



SUMMARY

- Reflections on the state monopoly on the legitimate use of force have tended to focus on the role of police and military while neglecting the role of intelligence.
- Independent civilian intelligence agencies can be integral to how the state provides for national and human security but they may also play a key role in securing authoritarian and autocratic rule.
- A system of democratic, civilian oversight and control offers the only means of reconciling the vital functions of intelligence with both state and human security. Such a robust system of democratic intelligence oversight and control ultimately provides a way to operationalise the legitimacy of the state's monopoly on the use of force.

The Place of Intelligence in the State's Monopoly on the Legitimate Use of Force

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Reflections on the state monopoly on the legitimate use of force have tended to focus on the role of police and military while neglecting the role of intelligence. Independent civilian intelligence agencies can be integral to how the state provides for national and human security but they may also play a key role in securing authoritarian and autocratic rule. In the context of the Global Reflection Group »Monopoly on the use of force 2.0?« this Think Piece asks: what is the role of intelligence agencies within the state monopoly on the legitimate use of force and how can a system of democratic, civilian oversight reconcile intelligence function with national and human security?

THE HISTORICAL EMERGENCE OF INTELLIGENCE WITHIN THE STATE'S MONOPOLY ON THE LEGITIMATE USE OF FORCE

The starting point for an analysis of the place of intelligence in the state's monopoly on the legitimate use of force is the definition of intelligence itself. As Bruneau and Dombrosky (2014, 8) point out, intelligence may be variously understood as a product, a process or an institution:

- As a product, intelligence is information that has been analysed to become relevant to political decision-making, especially concerning the security of the state, its political order and society.
- As a process, intelligence describes the collection and analysis of information as well as covert action and counter-espionage.
- As an institution, intelligence refers to state agencies responsible for collecting and analysing relevant information in a timely and accurate manner and for conducting covert action and counter-espionage in the interests of defending the state, its political order and society.

Each of these definitions offers a distinct perspective on the place and history of intelligence within the state's monopoly on the legitimate use of force. Adopting the simplest definition of intelligence as a

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product, it becomes clear that intelligence in the form of collecting information in the interests of political decision-making is as an activity as old as the practice of politics itself. Signs of early intelligence can thus be found in all ancient societies. Earliest examples date back about 5000 years, with ancient Egyptian hieroglyphs illustrating the use of intelligence practices like espionage and early forms of encryption (R.M. Sheldon 2003, 36; also see Leighton 1969). Ancient Greek, Persian and Chinese societies, although several centuries later, had also developed elaborate intelligence strategies (see e.g. Sun Tzu, *The Art of War*) to collect and disseminate information that would help protect their hold on power.² Insofar as the search for such information and the dedication of state resources to its collection were often preoccupied with matters of security, intelligence may be the oldest element of the state's attempt to monopolise the use of force.

Yet if intelligence as a product is very old, it was not until much later that intelligence developed into the process associated with modern political contexts whereby governments collect and analyse required information (data), whether by public, covert or clandestine means (Bruneau and Dombrosky 2014, 8). Intelligence gathering in its more recent historical manifestations was typically an informal and secret exercise of influence by those involved in political and diplomatic affairs, and was even the formal responsibility of diplomatic envoys (Herman 2001, 30). This began to change with the development of military technology in Europe, when intelligence became an increasingly formalised aspect of military planning increasingly institutionalized within special units (Herman 2001, 30ff). For example, France's first dedicated capacity for foreign intelligence was created by its war ministry in 1871 under Napoleon III as the *Deuxièmes Bureaux* (second sections) of the general staffs (Boyce 2005, 234).

During the nineteenth century, distinctions between military and police forces began to emerge and harden, and as a result police intelligence functions developed within the new European institutions for law enforcement. In line with the early origins of civilian policing in Europe, these organisations were often the result of a mandate to quash domestic political violence. Thus the Special Branch of Scotland Yard was founded to deal with political violence related to Irish activism in Britain in 1883 (Wilson and Adams 2015), whereas the *Preußische Geheimpolizei* was founded in 1848 by König Friedrich Wilhelm IV in reaction to the political violence of the revolutions of 1848-49 (Deflem 2002, 62f). The use of intelligence to preserve

domestic political order was also a feature of European campaigns of colonisation, since intelligence was an essential tool for effective domination of colonised societies (Boyce 2005; Thomas 2007). Thus modern intelligence agencies in both colonised and colonising countries trace their origins to the institutions of colonial-era control and repression: among the oldest independent agencies charged with intelligence gathering were the British services that grew out of the Special Duties section which operated during the Boer War (P. Davies 2004, 30), while India's Central Intelligence Bureau was an outgrowth of the Special Branch under British rule in India (Mahadevan 2011, 27-29).

With the arrival of World War I and mechanised warfare on an unprecedented scale, the need to further institutionalise intelligence functions and increase capacity became paramount for a number of European countries. The UK's Secret Service Bureau, which eventually evolved into MI5 and MI6, was founded in 1909, making these two successor institutions the world's oldest continuously existing specialist intelligence agencies (Andrew 2012, Section A, Introduction). Much of their institutional capacity was lost in the course of the demobilisation of the interwar period, and remobilisation proved difficult when World War II arrived. This challenge together with the usefulness of the service convinced political decision makers to preserve the rebuilt wartime intelligence capacity after World War II had ended in the form of a peacetime civilian agency for intelligence gathering. Their original designations, »MI5« and »MI6« for »Military Intelligence« units five and six respectively were carried over unofficially to their post-war civilian status and serve as a reminder of the military origins of these services. The same logic led to the development of both the FBI and the CIA in the United States, as it did to the formalisation of the intelligence functions in the French *Service de Documentation Extérieure et de Contre-Espionnage* in 1946, which built on capacities of the *Deuxième Bureau de l'État-major general* (Boyce 2005, 234) (Faligot, Guisnel and Kauffer 2013, ch. 1). Similarly in China, the Ministry of Public Security was formed from the intelligence branch of the Chinese Communist Party – the Central Department of Social Affairs – following the end of the Chinese Civil War in 1949 (see further Chambers 2012). These decisions to preserve war-time intelligence capacity in anticipation of future mobilisation needs marked the emergence of the first independent civilian intelligence agencies. Tasked with providing intelligence in defence of the state and its people, the state's monopoly on the legitimate use of force thus gained a new type of institution to perform the old functions of intelligence activities.

² For an overview over the history of intelligence in ancient times, see R. M. Sheldon, »A Guide to Intelligence from Antiquity to Rome,« *Journal of U.S. Intelligence Studies* 18, no. 3 (2011): 49-51.

THE ROLE OF CONTEMPORARY INTELLIGENCE WITHIN THE STATE'S MONOPOLY ON THE LEGITIMATE USE OF FORCE

Since the post-World War II era, independent civilian agencies dedicated to intelligence have become an increasingly frequent addition to the state security apparatus (Africa and Kwajo 2009, 3). Such agencies are usually tasked with collecting domestic and foreign intelligence, either as separate institutions or as a single institution with dual responsibilities, although modalities vary greatly from case to case. Generally, their role is to supply »information relevant to a government's formulating and implementing policy to further its national security interests and to deal with threats to those interests from actual or potential adversaries« (M. Caparini 2007, 4). Within this overarching goal, intelligence serves various specific and sometimes overlapping purposes to which the institutions and mandates of intelligence agencies are tailored (see Born and Wills 2012). Intelligence can be active or passive, defensive or offensive, and the mandates of the organisations responsible for intelligence vary accordingly. Law enforcement and military institutions typically have dedicated intelligence functions focussed on criminal and military intelligence respectively, or intelligence units may operate as a branch of the executive providing politically relevant intelligence. Intelligence agencies may also be functionally defined; for example, signals intelligence focusses on communications technologies including radio, phone, Internet, cable and satellite based communication among others; technical intelligence specialises in infrared, imagery, acoustic, geospatial and seismic monitoring; while human intelligence relies on people to source information and includes social factors such as culture, politics, economics and psychology among others. Independent civilian intelligence agencies may specialise in any of these areas even as each of these functions may also be carried out within other state security institutions. As a result, the so-called intelligence community typically extends well beyond the independent civilian institutions concerned primarily with intelligence and instead involves a broad array of actors drawn from military, police, justice and economic government sectors.

Intelligence agencies in general seek to address both conflict and non-conflict related threats, running the gamut from crime and domestic instability to terrorism and threats of war. Intelligence can contribute to both state and human security within a democratic state by marshalling information that can help prevent acts of violence and crime by identifying and monitoring threats to national and public security, as well as quelling fears about such threats; it can also

enhance security by contributing to better informed policy-making and political decisions through timely, accurate and relevant information. In making these contributions intelligence should represent objective judgments that can provide a guide to the future. Thus intelligence ideally helps governments to avoid strategic surprises; it provides a long-term view based on specialist expertise; it supports a more nuanced and far-sighted policy process; and it does all this whilst also maintaining the secrecy of information, sources and methods (DCAF 2003).

Intelligence agencies generally have three basic functions: data collection, analysis and – intrinsic to the entire intelligence process – counterintelligence, which aims to discover and interdict hostile operations against the state and its people. Covert action, the more occasional fourth function for foreign intelligence agencies, aims to influence political, military or economic situations abroad while concealing the role of the state responsible in sponsoring such activities. Covert action provides states with an option that goes beyond diplomacy but stops short of military force. Such operations can prove valuable in targeting illicit activity related to organised crime, weapons proliferation or terrorism (Schreier 2008, 47-49); but the use of such measures has also been criticised as an inappropriate intelligence function in a modern democratic state (DCAF 2003, 13). In terms of the state's monopoly on the use of force, intelligence provides an alternative mode of use of force compared to other state security institutions such as the military or the police (although these institutions may also engage in covert activities depending on the context).

From the broader perspective of the state's monopoly on the use of force, intelligence agencies owe their existence to the fact that states and their populations may be threatened either by other states or by actors within the state (whether political or criminal) or by both (Phythian 2013, 37). From this perspective the role of intelligence is essential to identifying the origin and likelihood of threats against the state, its current political order and its population. This may include as Herman notes (2001, 7), the observation of actual or potential violence and of weapons and explosives their use or intended use, the capabilities they provide and the threats they constitute. Further concerns include studying foreign military forces and international arms supplies, the proliferation of weapons of mass destruction and terrorism, as well as to predicting instability, future attacks, the risks of violent change, and situations in which these figure. Intelligence may be directed externally towards foreign entities such as other states and non-state actors; but it also can be directed internally against perceived domestic

threats to the security of the state and society, which is traditionally known as security or security intelligence (M. Caparini 2007, 5). In a domestic security context, intelligence contributes to criminal justice processes, reveals financial crimes such as money laundering or terrorist financing and provides inputs into important decisions such as the application of targeted sanctions or decisions about security clearances or immigration permissions.

The range of security threats that intelligence agencies address is not only broad – it is also changing. Whereas intelligence functions during the Cold War centred on the threats that resulted from Great Power rivalries, the post-Cold War era has seen these threats change as increased contact and cooperation among states and societies has blurred traditional distinctions between external and internal threats, and between state and non-state actors. The resulting changes include, among other things, the development of international intelligence cooperation on a global scale, and accelerating privatization of some key functions of intelligence agencies (Aldrich 2009, 27f; see also Born, Leigh and Wills 2011).

These changes in the threat environment have required intelligence agencies and their political controllers to adapt. New technologies have given intelligence unprecedented access both to the lives of citizens living within their own jurisdiction as well as to the global population of people and organisations and businesses. At the same time, the new threat environment has prompted changes to legal frameworks granting intelligence agencies increased powers of access and scope for action, sometimes with more, sometimes with less oversight. As a result of this new threat environment, the mandates and operations of intelligence agencies, having historically been both vague and secret, hold new potential for confusion, and therewith abuse, in the context of increasingly globalised threats to national security and the further blurring of the boundary between internal and external security. Today the apparent contradiction in the roles and functions of intelligence agencies between national security and human security stems from the fact that intelligence agencies have become essential to addressing insecurity at a time when their relationship to civilian power and democratic norms are in flux.

The most visible symbol of the risks involved in these changes has been the abrogation of civil liberties and human rights under security legislation, most notably within liberal democracies where commitment to these norms had hitherto been strong. Among the most well-known examples of this tendency was the passing of the Patriot Act in 2001 (U.S. Department of Justice

2001) which expanded the powers of intelligence agencies in the United States and was subsequently criticised as violating rights to privacy, among others (see Whitehead and Aden 2001-2002). Various incidents of whistle-blowing, leaks and scandal have also revealed the extent to which new and more coercive tactics have been employed covertly in reaction to the new threat perception, including the revelations of extraordinary renditions, illegal detentions and secret prisons as well as the extent and illegality of cyber surveillance made public in the Edward Snowden revelations of 2013.³ Moreover, these revelations proved the extent to which there exists an international intelligence community, which through its international cooperation networks is able to escape both control and oversight, and thereby erodes the national supervision of intelligence.

Some state authorities and intelligence officials contend that extraordinary rendition, detention without due process, enhanced interrogation techniques and targeted killings are essential to containing the imminent threat of terrorism. Critics label these tactics state-sponsored kidnapping, illegal imprisonment, torture and murder. Violating both domestic and international law as well as human rights principles, such tactics are criticised as ineffective at best and dangerous at worst, because they exacerbate the threat of violent extremism by alienating people. These moral dilemmas and the scandals that brought them to light are only the latest in a long history of the entanglement of intelligence agencies in illegal activity. Such abuses raise serious questions about the legitimacy of the state's use of force when it comes to intelligence. Indeed, the history of state intelligence agencies suggests that most of them have skeletons in their closets, and the revelations of abuse have frequently provided motivation for reform. While revelations about the scale of the abuse of power by some intelligence agencies have been useful in addressing human rights abuses, there is no doubt that the cycles of scandal and revelation also inhibit the legitimate work of intelligence agencies (Johnson 2007). Ensuring that intelligence is both effective and accountable in an evolving threat environment is thus a major challenge facing contemporary intelligence governance.

Part of this challenge stems from the fact that intelligence agencies and their function within the state's monopoly on the use of force cannot be separated from the nature of the political regime of which they are a part. In weak states incapable of oversight, intelligence agencies may be at risk of

³ See Priest, Dana, and Joe Stephens, »Secret World of U.S. Interrogation« *The Washington Post*, for an account of U.S. practices in global detention; and »Timeline of Edward Snowden's revelations« *Aljazeera America*, for an overview over the Snowden revelations.

claiming undue power through control of information, allowing them to develop into »a state within a state« (Phythian 2013, 38); in the context of stronger states, intelligence agencies may not be able to resist the politicisation of their work, so that they become tools of political repression. In non-democratic contexts, intelligence is typically used as such an instrument of political repression designed to maintain government control through intimidation, abuse and manipulative tactics directed against real and perceived enemies, both domestic and external (Matei and Bruneau 2010, 739). As a consequence of their role in regime maintenance, intelligence institutions frequently grow in size and power to gain high levels of political independence and control (see also M. Caparini 2007, 6). Deep penetration of social life as well as extensive and systematic abuse of human rights have often been the result, as, for example, in the cases of the Securitate in Romania (see Watts 2007, Ch. 3), the mukhabarat in Hosni Mubarak's Egypt (Sirrs 2013) or Saddam Hussein's Iraq (see further Makiya 1998), and the *Dirección de Inteligencia Nacional* of Pinochet's Chile (see further Hawkins 2002), among many others. The focus on regime security rather than on the security of the state or its population is what distinguishes intelligence functions in authoritarian states from those in democracies (see Bruneau and Dombrosky 2014). In democratic states, intelligence agencies belong to the public service and they exist to protect the security of the society of which they are a part. These differences in role and function are reflected in different perceptions of the legitimacy of intelligence agencies and the role they play in assuring the state's monopoly on the legitimate use of force. This is in part because of the way that democratic norms for intelligence control and oversight have emerged out of the particular history of intelligence. As these new norms for democratic oversight have emerged, the place of intelligence agencies among the security institutions and the societies they aspire to protect has changed.

NEW NORMS OF DEMOCRATIC OVERSIGHT IN THE POST-COLD WAR ERA

If the emergence of independent civilian intelligence agencies is a relatively new addition to the state's monopoly on the use of force, the idea that their work should be rendered democratically legitimate through democratic civilian control, oversight and accountability is even newer. Accountability and oversight have been hampered by the idea that the secrecy of intelligence work precludes the transparency required by democratic norms. The vehemence of this conviction is aptly illustrated by the fact that the very existence of intelligence agencies has often been kept secret; and

they have often operated without a sound legislative basis even in liberal democracies that were otherwise premised on the principles of rule of law. This secret extra-legal or at best questionably legitimate legal status placed intelligence agencies beyond the reach of democratic supervision even when they were formally subject to direct control by democratically elected or appointed officials. Thus, for the major part of their history, independent civilian intelligence agencies have operated in secret under executive legal authority and the exclusive control of political authorities, largely unbeknownst to the wider government, let alone the public. In the United Kingdom, for example, despite having operated under the aegis of national security for eighty-two years, the very existence of MI5 was not acknowledged officially until 1992, while MI6 and GCHQ were not officially acknowledged until they were referred to in legislation for the first time when the 1994 Intelligence Services Act was passed into law. Both MI5 and MI6 had previously operated under the legal authority of Crown prerogative (Rosamund 2016, 127) and later the Maxwell-Fyfe directive (Aldrich 1998, 126). A legislative basis for intelligence was not established by parliament until 1989 in the case of MI5 (amended in 1996) and until 1994 in the case of MI6 and GCHQ (Government of United Kingdom 2010). The existence of independent civilian intelligence agencies was similarly secret and of questionable legal status in many other western countries and continues to be shrouded in secrecy, especially in non-democratic contexts.

Some scholars date the emergence of democratic supervision of intelligence to the congressional commissions launched in the United States in the 1970s to investigate the involvement of the intelligence agencies in the Watergate scandal (Rosenbach and Peritz 2009, 18). The Senate Committee and House Committees (known respectively as the Church and Pike Committees) marked the first time since its founding that the CIA had faced hostile investigation of its activities from the legislature (Born, Johnson and Leigh 2005, 4). The Pike Committee used its power to investigate the use of public funds in order to reveal the existence of black budgets within the CIA and the findings of the committee provided the impetus for a new era of active congressional oversight of intelligence activities. A similar cycle of scandals followed by ad hoc improvements in control and monitoring marked developments in intelligence oversight in other liberal democracies, including the McDonald Commission of 1977-80 in Canada (Commission of Enquiry Concerning Certain Activities of the Royal Canadian Mounted Police 1981), Justice Hope's Royal Commissions in Australia in 1973-77 (Hope 1976-1977) and 1984 (Hope 1984-1985), and an independent commission

led by Supreme Court Justice Lund in 1996 in Norway (Government of Norway s.d.).

Thus although legislation governing the activities of intelligence agencies existed before the 1970s in countries such as the Netherlands, Germany and the United States (Born, Johnson and Leigh 2005, 4; Williams and Deletant 2001, 12), legal frameworks did not begin to place meaningful limits on the powers of intelligence agencies until the 1980s. Moreover, the legislative basis permitting intelligence agencies to interfere with the rights of citizens within the framework of their legal mandate frequently depended on executive decrees and directives that failed to meet the basic conditions for democratic governance and the rule of law because they were neither subject to parliamentary approval nor publicly known.

These inadequate legal bases brought intelligence agencies into conflict with constitutional norms and, in the European context, the European Convention on Human Rights.⁴ For states in Eastern Europe the transition to democracy in the post-Cold War era became a driver of reform. This context also spurred new intelligence legislation in a number of developed democracies: Italy in 1977 (Spotts and Wieser 1986, 112), Australia in 1979 (Government of Australia 2015), Canada in 1984 (Government of Canada 1985), Denmark in 1988 (Danish Security and Intelligence Service n.d.), Austria in 1993 (Federal Chancellery 2016), Romania in 1993 (Government of Romania 1992), Greece in 1994 (Government of Greece n.d.), and Norway in 1996 (Government of Norway n.d.). In other parts of the world the move towards intelligence transparency and accountability has been slower and less ambitious, with political transitions providing the most frequent catalyst for reform, for example, in Argentina in the 1980s, and in Brazil from 1990, South Africa from 1993-94 and Indonesia from 2011 onwards (see further Davies et Gustafson 2013).

The development of intelligence oversight in established democracies reflected the realisation that intelligence agencies could threaten as well as protect democracy. The threats that began to figure more prominently in public concerns about the activities of intelligence agencies included (Leigh 2005, 5ff):

- Violations of privacy through information gathering and surveillance;
- Political manipulation of intelligence processes (and vice versa);
- The use of violence, including assassinations and regime change, in foreign countries;

- Influence on domestic political processes through the control of information or the infiltration of political movements (such as pressure groups or trade unions).

The power that intelligence agencies wield stems from the secrecy that is necessary to their work. Thus, although intelligence agencies may hold less coercive power than law enforcement agencies, the fact that their work is conducted beyond public, or even broader government, scrutiny invites both fear and abuse. Containing both the threat of abuse of power as well as fear of such abuse is the primary motivation for innovations in intelligence oversight. The changing threat environment of the last fifteen years has tested the limits of legislative frameworks whose development has been staggered over the past thirty years. Reconciling the need for secrecy with the requirements of functioning democracy in the context of a changing threat environment is the objective of a system of democratic oversight and control.

HOW DEMOCRATIC OVERSIGHT CAN RECONCILE INTELLIGENCE WITH STATE AND HUMAN SECURITY

A major challenge in ensuring that intelligence is both accountable and effective within a framework of civilian democratic control, respect for the rule of law, and human rights, consists in striking a balance between the requirements of political control and effective intelligence gathering. Intelligence agencies always work hand in glove with political authorities; but both excessive and insufficient executive control of intelligence are sources of danger. On the one hand, intelligence should be tailored to the concerns of policymakers and provide useful and actionable intelligence; on the other hand, intelligence agencies should maintain an independent position vis-à-vis policy-makers (M. Caparini 2007, 7f).

The rationale for tailoring intelligence to political decisions is to ensure intelligence responds to the policymakers' priorities, concerns and existing policies. Critics of this view argue that if intelligence agencies are too responsive to political processes, they run the risk of adapting their analysis to fit pre-conceived policy preferences. Those who support a more independent position for intelligence argue instead for policy-neutral intelligence that provides policymakers with what they need to know, rather than what they would prefer to hear. As a result, it is important to ensure the intelligence agency is sufficiently independent and isolated from the policymaking process that it avoids producing »intelligence to please«. Critics of

⁴ In 1987, the ECHR ruled that »citizens must enjoy some right of redress against the security intelligence services«, cited in: Williams and Deletant 2001, 16. See further Leigh 2007, 75.

this approach, however, contend that an independent intelligence agency risks developing its own biases in analysis or threat perception, which may in turn bias political decisions against democratically derived preferences. Thus, while too much control risks politicizing intelligence, too little risks creating rogue institutions (M. Caparini 2007, 7f).

The goal of a functional system of democratic oversight is, accordingly, to provide enough oversight to ensure that intelligence is firmly under executive control, while at the same time isolating intelligence from abuse by political authorities or from within the institution itself. Beyond the necessary internal controls that should ensure procedures exist and are followed, placing legal limits on intelligence activities is essential to ensuring that intelligence work serves the public interest within the rule of law (Gill 1994, 253-258).

Ensuring that intelligence work has a firm footing in democratically legitimate legislation is an essential attribute of a system of democratic oversight for intelligence. A sound legal basis for intelligence activities confers democratic legitimacy while limiting the use of power by intelligence agencies and upholding the rule of law (Born and Wills 2012, 17f). The power and the responsibility to create a legal basis for intelligence lie with democratically elected representatives. Judicial authorities are responsible in turn for assuring that all such legislation abides by the rule of law. On this basis legislatures can delegate powers of control and the responsibility for oversight to executive authorities. Such a system confines the use of powers for intelligence within a legal framework while also providing for a system of democratic oversight that verifies respect for this framework (Leigh 2007, 80).

Once a sound legislative basis for intelligence exists, democratic oversight of intelligence is further necessary to ensure that the limits it lays down are respected. Systems for achieving this objective vary as much as the political contexts of which they are a feature. Whether democratic governance is premised on a separation or a fusion of powers, intelligence oversight always involves a mixture of legislative, executive and judicial authorities to subject the use of power to a system of checks and balances. There is also usually a mixture of functional and institution-specific oversight mechanisms to ensure that all areas may be covered in the requisite detail. Independent specialised intelligence oversight agencies operated by the judiciary and the legislature, as well as direct legislative and judicial scrutiny of the activities of intelligence institutions, are all endemic features of democratic intelligence oversight.

For intelligence oversight bodies to be effective and efficient, special courts, committees and review institutions with dedicated specialist staff must be equipped with technical expertise, resources and autonomy to the same extent as the intelligence agencies they are expected to oversee. An adequate legal framework must provide them with the necessary powers of investigation and access to classified information in order to assure that intelligence activities are constrained to respect human rights and the rule of law. Even more, the financial independence of these oversight bodies is essential to their credibility and effectiveness as apolitical instruments for ensuring accountability (Born and Johnson 2005, 235-238). Oversight must be equipped to span the entire intelligence cycle – from collection to analysis and dissemination of information, covert operations, espionage and counter-espionage, both domestically and abroad. Moreover, oversight can take place before, during and after each of these activities as the case may demand, as Born and Wills describe (2012, 14-16):

- Ex ante oversight includes »the creation of comprehensive legal frameworks for the intelligence services and the bodies that oversee them; the creation and approval of budgets for the intelligence services; and the authorization of intelligence operations that exceed a certain threshold of sensitivity.«
- Ongoing oversight encompasses »investigations, on-site inspections, periodic hearings, and regular reporting on the activities of the intelligence services and of the oversight bodies themselves. In addition, in some states, judges periodically review ongoing information collection operations, such as wiretaps, to determine whether continuation of the operation is justified.«
- Ex post oversight usually involves »thematic reviews, case reviews, expenditure reviews, and annual reviews. In certain situations, however, such as when alleged wrongdoing is revealed, ex post oversight can take the form of an ad hoc inquiry. Such inquiries are normally established to investigate and make recommendations concerning specific events.«

The secrecy of intelligence makes it both potent and dangerous, yet it is essential to intelligence in order to facilitate the collection of information, to safeguard methods and sources and to protect the safety of those involved in gathering or supplying information (Nathan 2012, 51). In democracies, the secrecy of at least three aspects of intelligence is generally agreed to need protection (DCAF 2003):

- All information pertaining to sources, operations, methods, procedures and means of collection.
- The identity of the operational staff and its knowledge and information.
- The origin and details of intelligence provided by foreign services in confidence.

Yet secrecy conflicts with democratic values of openness and transparency, and not all aspects of intelligence are equally sensitive. For these reasons, democratic oversight of intelligence is best premised on the principle that »secrecy should be regarded as an exception that in every case demands a convincing justification« (Born and Wills 2012, 52). This principle should be embodied in a well-developed system of classification as well as freedom-of-information laws. On this basis a closed system of checks and balances can provide a viable alternative to full public scrutiny by extending transparency widely enough among vetted public representatives to prevent abuse while guaranteeing the protection of national secrets (Born and Wills 2012, 17f).

Whistle-blowing, while it has sparked many reforms in intelligence oversight, can compromise national security through the uncontrolled release of sensitive information. Whistle-blowing signals a failure of democratic oversight as much as it does a failure of intelligence agencies insofar as it demonstrates that the system failed to provide a safe and reliable way for insiders to denounce abuse. Providing protections for whistle-blowers in the context of an independent complaints mechanism can prevent such a system failure by creating a way to denounce abuse without jeopardising national security.

Democratic oversight of intelligence is essential to human rights protection. In practice, protecting human rights in the field of intelligence means applying appropriately graduated policies for the use of special powers so that national security concerns cannot become *carte blanche* for rights violations. Proportionality is thus a key principle that in the context of intelligence requires that the intrusiveness or severity of an action be weighed against the gravity of the threat it is directed at. In the context of Canada's McDonald Commission, for example, this principle has been interpreted to mean that a proposed action of an intelligence agency must be weighed against the potential damage that might be done to civil liberties and democracy by such an act: wherever possible the least intrusive actions are to be preferred (Leigh 2005, 6). A functional system of democratic oversight can build such principles into layers of discretionary decision-making such that the greater the intrusion that a particular technique entails, the higher the

authority required to authorise it.

No system of democratic intelligence governance can entirely eliminate the risk of abuse or prevent such risks from materialising as intelligence and threat environments change. Yet intelligence remains an essential part of the state monopoly on the legitimate use of force and vital to the public interest even if, uncontrolled, it can also endanger democracy, society and the state itself. The goal of democratic oversight is to mitigate these risks while assuring that intelligence agencies can fulfil their legitimate mandate. Democratic oversight and control offers the only means of reconciling the vital functions of intelligence with both state and human security. Even though, as Gill points out, only a minority of nation states have actually started taking practical steps towards democratic intelligence oversight and control (Gill 2012, 217), this relatively new idea has quickly gained increasing international acceptance. Situating intelligence within a system of democratic, civilian oversight and control can serve both national and human security in the context of the state's legitimate use of force. Such a robust system of democratic intelligence oversight and control ultimately provides a way to operationalise the legitimacy of the state's monopoly on the use of force.

REFERENCES

- Africa, Sandy, and Johnny Kwajo (eds). *Changing intelligence dynamics in Africa*. Birmingham, UK: Global Facilitation Network for Security Sector Reform GFN-SSR and African Security Sector Network ASSN, 2009.
- Aldrich, Richard J. *Espionage, Security, and Intelligence in Britain, 1945-1970*. Manchester University Press, 1998.
- Aldrich, Richard J. »Global Intelligence Cooperation Versus Accountability: New Facets to an Old Problem.« *Intelligence and National Security* (Routledge) 24, no. 1 (February 2009): 26-56.
- Andrew, Christopher. *The Defence of the Real: The Authorized History of MI5*. Penguin UK, 2012.
- Born, Hans, and Aidan Wills (eds). *Overseeing Intelligence Services: A Toolkit*. DCAF, 2012.
- Born, Hans, and Loch K. Johnson. »Balancing Operational Efficiency and Democratic Legitimacy.« In *Who's Watching the Spies*, edited by Hans Born, Loch K. Johnson and Ian Leigh, 225-240. Potomac Inc., 2005.
- Born, Hans, Ian Leigh, and Aidan (eds.) *Wills. International Intelligence Cooperation and Accountability*. Routledge, 2011.
- Born, Hans, Loch K. Johnson, and Ian Leigh (eds). *Who's Watching the Spies? Establishing Intelligence Service Accountability*. Potomac Books, 2005.
- Boyce, Robert. *French Foreign and Defence Policy, 1918-1940: The Decline and Fall of a Great Power*. Routledge, 2005.
- Bruneau, Thomas C., and Kenneth R. Dombrosky. »Reforming Intelligence: The Challenge of Control in New Democracy.« In *Who Guards the Guardians and How: Democratic Civil-Military Relations*, edited by Thomas C Bruneau and Scott D. Tollefson, 145-177. Austin: University of Texas Press, 2014.
- Caparini, Marina. »Controlling and Overseeing Intelligence Services in Democratic States.« In *Democratic Control of Intelligence Services: Containing Rogue Elephants*, edited by Marina Caparini and Hans Born, 3-24. Ashgate, 2007.
- Chambers, Dr. David Ian. »Edging in from the Cold: The Past and Present State of Chinese Intelligence Historiography.« *Studies in Intelligence* 56, no. 3 (September 2012): 31-46.
- Commission of Enquiry Concerning Certain Activities of the Royal Canadian Mounted Police. *First Report: Security and Information (1979), Second Report: Freedom and Security under the Law (1981), and Third Report: Certain RCMP Activities and the Question of Governmental Knowledge (1981)*. Commission Report, Ottawa: Minister of Supply and Services, 1981.
- Danish Security and Intelligence Service. »Danish Security and Intelligence Service.« *Supervision of the Danish Security and Intelligence Service*. n.d. Accessed August 03, 2016, <https://www.pet.dk/English/Legal%20matters/Supervision%20of%20the%20Danish%20Security%20and%20Intelligence%20Service.aspx>.
- Davies, Philip. *MI6 and the Machinery of Spying: Structure and Process in Britain's Secret Intelligence*. Routledge, 2004.
- Davies, Philip, and Kristian C. Gustafson. *Intelligence Elsewhere: Spies and Espionage outside the Anglosphere*. Georgetown University Press, 2013.
- DCAF. »Intelligence Practice and Democratic Oversight - A Practitioner's View.« *DCAF Occasional Papers* (3). Geneva: DCAF, 2003.
- Deflem, Mathieu. *Policing World Society: Historical Foundations of International Police Cooperation*. Oxford University Press, 2002.
- Faligot, Roger, Jean Guisnel, and Rémi Kauffer. *Histoire politique des services secrets français: De la Seconde Guerre mondiale à nos jours*. Paris: Editions La Découverte, 2013.
- Federal Chancellery of Austria. »Federal Chancellery RIS Law Information System.« *Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Sicherheitspolizeigesetz*. 2016. Accessed August 03, 2016, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005792>
- Gill, Peter. »Intelligence, Threat, Risk and the Challenge of Oversight.« *Intelligence and National Security* (Routledge) 27, no. 2 (April 2012): 206-222.
- . *Policing Politics: Security intelligence and the Liberal Democratic State*. London: Frank Cass, 1994.
- Government of Australia. »Federal Register of

- Legislation.« *Australian Security Intelligence Organisation Act 1979*. 25 March 2015. Accessed August 03, 2016, <https://www.legislation.gov.au/Details/C2015C00105>.
- Government of Canada. »Justice Laws Website.« *Canadian Security Intelligence Service Act*. 1985. Accessed August 03, 2016, <http://laws.justice.gc.ca/eng/acts/C-23/page-1.html>.
- Government of Greece. *National Intelligence Service*. n.d. Accessed August 03, 2016, <http://www.nis.gr/portal/page/portal/NIS/LegalFrame>.
- Government of Norway. *Norwegian Parliamentary Oversight Committee on Intelligence and Security Services*. n.d. Accessed August 03, 2016, https://eos-utvalget.no/english_1/services/about_the_eos_committee_1/history/.
- Government of Romania. *Law on the Organization and the Operation of the Romanian Intelligence Service*. 03 March 1992.
- Government of United Kingdom. »National Intelligence Machinery.« November 2010.
- Hawkins, Darren G. *International Human Rights and Authoritarian Rule in Chile*. University of Nebraska Press, 2002.
- Herman, Michael. *Intelligence services in the Information Age*. London: Frank Cass, 2001.
- Hope, Justice R.M. *Royal Commission on Australia's Security and Intelligence Agencies*. Commission Report, Canberra: Commonwealth Government Printer, 1984-1985.
- . *Royal Commission on Intelligence and Security. Commission Report*, Canberra: Australian Government Printing Service, 1976-1977.
- Johnson, Loch K. »A shock theory of congressional accountability for intelligence.« In *Handbook of Intelligence Studies*, edited by Loch K. Johnson, 334-360. Routledge, 2007.
- Leigh, Ian. »The Accountability of Security and Intelligence Agencies.« In *Handbook of Intelligence Studies*, edited by Loch K. Johnson, 67-81. New York: Routledge, 2007.
- . »More Closely Watching the Spies: Three Decades of Experiences.« In *Who's Watching the Spies*, edited by Hans Born, Loch K. Johnson and Ian Leigh, 3-11. Potomac Inc., 2005.
- Leighton, Albert C. »Secret Communication among the Greeks and Romans.« *Technology and Culture* 10, no. 2 (April 1969): 139-154.
- Mahadevan, Prem. *The Politics of Counterterrorism in India: Strategic Intelligence and National Security in South Asia*. I.B. Tauris, 2011.
- Makiya, Kanan. *Republic of Fear: The Politics of Modern Iraq*. University of California Press, 1998.
- Martin, Thomas. *Empires of Intelligence: Security Services and Colonial Disorder after 1914*. University of California Press, 2007.
- Matei, Florina Cristiana, and Thomas C. Bruneau. »Intelligence in the Developing Democracies: The Quest for Transparency and Effectiveness.« In *The Oxford Handbook of National Security Intelligence*, edited by Loch K. Johnson, 757-773. Oxford: Oxford University Press, 2010.
- Nathan, Laurie. »Intelligence Transparency, Secrecy, and Oversight in a Democracy.« In *Overseeing Intelligence Services: A Toolkit*, edited by Hans Born and Aidan Wills, 49-68. Geneva: DCAF, 2012.
- Priest, Dana, and Joe Stephens. »Secret World of U.S. Interrogation.« *The Washington Post*. May 11, 2004, accessed August 03, 2016, <http://www.washingtonpost.com/wp-dyn/articles/A15981-2004May10.html>.
- Phythian, Mark. »Cultures of National Intelligence.« In *Routledge Companion to Intelligence Studies*, edited by Dover, Robert, Michael S. Goodman and Claudia Hillebrand, 33-41. Routledge, 2013.
- Rosamund, Thomas. *Espionage and Secrecy (Routledge Revivals): The Official Secrets Acts 1911-1989 of the United Kingdom*. Routledge, 2016.
- Rosenbach, Eric, and Aki J. Peritz. »Confrontation or Collaboration? Congress and the Intelligence Community.« *The Intelligence and Policy Project*. Harvard University, 2009.
- Schreier, Fred. »Fighting the Pre-eminent Threat with Intelligence-led Operations.« *DCAF Occasional Papers* (16). Geneva: DCAF, 2008.
- Sheldon, Rose Mary. »A Guide to Intelligence from Antiquity to Rome.« *Journal of U.S. Intelligence Studies* (Association of Former Intelligence Officers) 18, no. 3

(2011): 49-51.

– . *Espionage in the Ancient World. An Annotated Bibliography of Books and Articles in Western Languages*. Jefferson: Mc Farland, 2003.

Sirrs, Owen L. »Reforming Egyptian Intelligence: Precedents and Prospects.« *Intelligence and National Security* 28, no. 2 (2013): 230-251.

Spotts, Frederic, and Theodor Wieser. *Italy: A Difficult Democracy: A Survey of Italian Politics*. Cambridge University Press, 1986.

Sun, Tzu. *The Art of War*. Chiron Academic Press, 2015.

United States Department of Justice. »USA Patriot Act 2001.« Accessed August 02, 2016. <https://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf>

Watts, Larry L. »Control and Oversight of Security Intelligence in Romania.« In *Democratic Control of Intelligence Services: Containing Rogue Elephants*, edited by Hans Born and Marina Caparini, 47-64. Ashgate, 2007.

Whitehead, John W., and Steven H. Aden. »Forfeiting Enduring Freedom for Homeland Security: A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives.« *American University Law Review* 51.6, 2001-2002: 1081-1134.

Williams, Kieran, and Dennis Deletant. *Security Intelligence Services in New Democracies*. New York: Palgrave, 2001.

Wilson, Ray, and Ian Adams. *Special Branch: A History: 1883-2006*. Biteback Publishing, 2015.

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The Reflection Group »Monopoly on the use of force 2.0?« is a global dialogue initiative to raise awareness and discuss policy options for the concept of the monopoly for the use of force. Far from being a merely academic concern, this concept, at least theoretically and legally remains at the heart of the current international security order. However it is faced with a variety of grave challenges and hardly seems to reflect realities on the ground in various regions around the globe anymore. For more information about the work of the reflection group and its members please visit: <http://www.fes.de/de/reflection-group-monopoly-on-the-use-of-force-20/>

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