Between 'sousveillance' and applied ethics: practical approaches to oversight[1]*

Michael Kowalski
Guest Editor
Chairman Netherlands Intelligence Studies Association (NISA)

Guest Researcher, Centre for Terrorism and Counterterrorism, Leiden University

m.kowalski@cdh.leidenuniv.nl

---

1   * The views expressed in the article do not represent the position of the NISA.

Abstract

The issue of the oversight of intelligence and security services is playing an increasing role in the debate on global security issues both among specialists and the broader public. Beyond theoretical debates on intelligence and surveillance ten practical approaches to advance oversight are being developed. Core ideas address the implications of the political supremacy of oversight, the need for revisiting the focus of oversight as well as the possibilities of the proliferation of best oversight practices. Furthermore, suggestions are made regarding the integration of ethics in security research and the creation of space for applied ethics for intelligence practitioners.

Introduction

The political oversight of the intelligence and security services is a hot subject. What has usually been of interest to lawyers and specialists has gained broader attention during the last decade. It is accurate to say that since 2013 we are even facing an outspoken and popular interest by the broader public in the effects of the activities of intelligence services on the lives of ordinary citizens. Subsequently the issue of oversight has become prominent due to the revelations and leaks by the American whistleblower Edward Snowden. Many of the details being discussed in public, however, do not really come as a surprise to specialists in the field of intelligence. Espionage and counter-intelligence are part and parcel of international relations. They are often even seen as supportive of international security since governments are seeking to make the best decisions based on an appropriate analysis of the situation. In that sense it should not be neglected that the activities of offensive foreign intelligence services can support together with the activities of defensive internal security services the maintaining of human rights. For example, by improving the quality of decision making by policy makers on global security issues, by preventing terrorist attacks or by minimizing the effects of weak or failing governance in specific areas. Of course, exactly the opposite can also turn out to be true which is often widely recorded and researched.

The most astonishing and, to many, disturbing dimension of the recent revelations concerns mainly the scale of intelligence activities aiming at hovering many bits and bytes of our global electronic communications. This article neither dives into a theoretical debate on this issue nor does it try to make an analysis of the perceived global surveillance practices at stake. Instead, ten practical approaches to oversight will be presented in order to put oversight in a broader practical perspective and to contribute to the implementation of oversight from different perspectives. In addition, questions or perspectives for future research will be raised.

1. Revisiting the focus of oversight: Especially in a situation in which the monopoly of the means of intelligence and security services has been weakened, it is necessary to revisit the focus of oversight. Especially in the European context a great deal of oversight mechanisms are already in place regarding intelligence and security services. However, regarding the police or other authorities that are in many cases entitled to apply similar or de facto even the same powers, no comparable oversight mechanisms have been put in place. This nurtures the question whether the focus of oversight is sharp enough. What are the effects of oversight regarding intelligence service A if governmental authority B uses fairly similar means, maybe even related to the same issue or operational case, and is not confronted with comparable oversight? When does such a practice lead to the point at which the burden placed on the intelligence services starts to become too heavy? Does the architecture of

oversight neglect to overlook substantial governmental action outside the intelligence community in certain cases? And how is governmental action distributed in different countries given the different regimes of oversight?

2. Putting the label right: Throughout the last decade the security architecture in the West has changed. Partly due to 9/11. But in a globalised world phenomena like serious organized crime and human trafficking are also changing and are in need of an adapted approach. From an oversight perspective it is important to oversee governmental action from the perspective of the intended purpose of the action at stake. If terrorism is at stake, counterterrorism is relevant. If organized crime is at stake, countering organized crime is relevant. It has proved to be important to be very specific in that respect.[2] Due to practical and perhaps also political reasons certain measures have been put in place with the claim that they are intended to counter terrorism. Very often, however, these measures might be predominantly suitable to counter, first and foremost, organized crime while having only an indirect potential spin-off regarding counterterrorism. If the label of a measure is wrong, oversight will discover it and public support for the intended measure could be undermined. At the end of the day an incorrect label could undermine the effectiveness of a measure since the lack of public support, for example for counterterrorism, could undermine the effectiveness of counterterrorism.

3. Do not blame the services: Of course, oversight is about scrutinizing the work of the intelligence and security services in the light of the legal frameworks at stake. This implies automatically that those services could be blamed in one case or another. However, it would not be appropriate to blame the services about the state of oversight. Building, implementing and reconstructing the architecture of oversight remains the monopoly of politics. Getting the discussion about the state of oversight right therefore implies blaming those to be blamed. Whom exactly is of course, given the complexity of politics, not easy to say and is constantly subject to change. It is also fair to consider that the interaction between politics and bureaucracies might imply an active role of the intelligence services in the entire field of oversight policies. Nevertheless, the conception, maintenance and renovation of the architecture of oversight remains first and foremost a political responsibility and not one to be overlooked.

4. Proliferating best practices: Although the practices of oversight are much less researched and documented than those of the intelligence and security services, there are well developed best oversight practices available like the toolkit of the Geneva Centre for the Democratic Control of Armed Forces on the parliamentary oversight of the intelligence services.[3] It remains important to proliferate those available best practices both within and beyond Europe. Many security issues are global and they involve global security authorities. Therefore it would only be appropriate if many of the countries involved in global security issues would have a functioning system of oversight at their disposal. In addition, it would be useful – when proliferating best oversight practices – to be also frank as to what does not work in order to avoid any duplication of failures and disappointments.

5. Integrating ethics in security research: The research agenda on security issues has been intensified

---

2   Dutch National Coordinator for Counterterrorism, Counterterrorism Measures in the Netherlands in the First Decade of the 21st Century, The Hague, 2011.

3   H. Born and A. Wills, Overseeing Intelligence Services: A Toolkit, Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2012.

during the last decade as reflected by, for example, the considerable funding devoted to those issues by national governments and the European Union. Often only after the initial launching of those programmes do ethical issues arise and are intended to be integrated within these programmes. This attention devoted to the ethical dimensions of security research has, for example, been institutionalized by explicitly researching ethics or integrating a compulsory paragraph on ethics into those programmes.[4] In spite of those efforts it seems that there is still room to further strengthen the integration of ethics in security research. In practical terms the challenge is twofold. First, this ethical element would have to integrated into all relevant security research agendas, both on national levels as well as at the European level. Second, it should be closely monitored to what extent this ethical dimension is really given 'life' in these programmes and is not limited to checking a box added by a few obligatory but non-binding sentences on ethics.

6. Making oversight an 'insider': Security issues are often international and often involve the intelligence and security services from many countries. Given the fact that intelligence is and is very likely to remain a national competence, this issue cannot be tackled by international oversight. What can be done, however, is to make oversight an 'insider' in arrangements where international cooperation is institutionalized. In the European Union, for example, cooperation is institutionalized. And although it is unrealistic and maybe even not desirable to have European oversight, it would be feasible to enrich the debate about oversight. This could be attained by strengthening international expertise on oversight that would lead to institutionalized attention being devoted to issues of oversight within international platforms of cooperation. This could be done without divulging any state secrets or claiming formal responsibilities in the field of oversight.

7. Oversight education: It is obvious that security is an important issue, both on the national as well as on the international level. Security has also become a market. A market for products and a labour market. This has also led to a broad range of educational programmes teaching security in one way or another. Looking at oversight, however, only little if any educational programmes are available to teach those who become involved in oversight or those studying oversight. This underrepresentation of oversight within educational institutions also negatively influences the state of research in this field. Any boost to the education on oversight would gain depth if the focus would go beyond legal issues given the interdisciplinary character of oversight.

8. Allowing 'sousveillance' to grow: The shortcomings of oversight have often been indicated by actors from below. Especially in the current information age it seems that the individual is increasingly empowered to become involved in intelligence in his or her normal daily life. From personal intelligence collection and analysis to the detection and countering of intelligence. As far as the objectives of oversight are concerned this power from below could be used to serve the same purposes.[5] This 'sousveillance' ('undersight') could be used by official oversight bodies to feed their own work. In addition, civil society as such could also be strengthened by this kind of involvement. As far as the potential leaking of state secrets that could imply serious risks for state security is concerned

---

4   An example is the former research programme of the Eurpoean Union entitled Detection Technology, Terrorism, Ethics and Human Rights (DETECTER), www.detecter.eu.

5   E. Zuckerman, Die Antwort auf Überwachung heißt Unterwachung, in Die Zeit, 10 July 2013.

emerging arrangements responding to potential whistleblowers could be put in place.[6]

9. Giving space to applied ethics: In many aspects of society applied ethics have explicitly gained space during the last few decades. This holds especially true for fields like health and care for the elderly where the potential dilemmas are directly present and are experienced by many more persons than the individual in a specific case. Different institutional arrangements like moral case deliberation among professionals, ethical advisory boards and "vaccinating" leadership with ethical immunity have been implemented. In the field of the security and intelligence communities, however, dilemmas are predominantly approached from a judicial perspective. Given the rich expertise of applied ethics in the field of health care but also public order policing and military operations, further work could be done to explore the potential of applied ethics in the field of oversight. The study commissioned by the Dutch government and carried out by RAND Europe on the options and instruments of applied ethics in the field of counterterrorism could inspire further research. In addition, the findings on concrete and practical mechanisms and means to apply ethics within the daily work of terrorism fighters could also inform the debate on oversight in a more general sense.[7]

10. Overseeing oversight: Oversight ought to be as independent, competent and well equipped as possible. But who checks whether this is in fact the case? And if not: what should be done to get the balance right? Given the political supremacy of oversight this is a difficult question. And it could become very complex to find an answer to such questions. It could, but there are also easy alternatives. Without leading to parliamentary inquiries or sensitive committees it could be researched how the architecture of oversight is furnished and how this is related to the tasks at stake and the way in which the different services are furnished.

---

6   WODC, Klokkenluiders, in Justitiële verkenningen, 2013, No. 7.

7   RAND Europe, Handling ethical problems in counterterrorism. An inventory of methods to support ethical decision-making, Brussels/Cambridge, 2013.

This article was first published with Brill | Nijhoff publishers, and was featured on the Security and Human Rights Monitor (SHRM) website.

Security and Human Rights (formerly Helsinki Monitor) is a journal devoted to issues inspired by the work and principles of the Organization for Security and Cooperation in Europe (OSCE). It looks at the challenge of building security through cooperation across the northern hemisphere, from Vancouver to Vladivostok, as well as how this experience can be applied to other parts of the world. It aims to stimulate thinking on the question of protecting and promoting human rights in a world faced with serious threats to security.

www.nhc.nl