

Closing the gap between debate and reality: Cooperation between intelligence oversight bodies^{1*}

B. de Jonge
Public prosecutor; Review Committee on Intelligence and Security Services
(CTIVD),
The Netherlands

info@ctivd.nl

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1 * The opinions reflected in this contribution do not necessarily reflect those of the CTIVD.

Abstract

Cooperation between intelligence oversight bodies has long been suggested as one of the means to keep the cross-border fight against terrorism in check. This article maps the incentives given to cooperation between oversight bodies, and evaluates the response to these appeals for cooperation by national legislators and the oversight community itself. This account shows that the level of cooperation between oversight bodies remains very limited. In practice several obstacles of a practical and legal nature exist that prevent further cooperation. Nevertheless, the article shows that even within the current legal framework there are several important fields in which the oversight community may still develop its cooperation. This will positively contribute to the quality and acceptance of oversight.

Keywords

intelligence; intelligence oversight; intelligence review; international intelligence cooperation; IIRAC; ENNIR; CTIVD; Comite I; LIBE Committee; DCAF

Introduction

Cooperation between intelligence oversight bodies has long been suggested as one of the means to keep the cross-border fight against terrorism in check. This article maps the incentives given to cooperation between oversight bodies, and evaluates the response to these appeals for cooperation by national legislators and the oversight community itself. This account will show that, notwithstanding the persistent appeal for closer ties, the level of cooperation between oversight bodies remains very limited. We will reflect on some of the limitations that prevent further cooperation, and suggest some areas in which the oversight community could already make progress.

Incentives for cooperation

Although oversight bodies² have been meeting for much longer, cooperation between overseers came on the agenda of politicians, academics and civil society in Europe after alarming revelations of various forms of intelligence cooperation. The Echelon program, the US extraordinary renditions and the mass communications surveillance gave rise to repeated debates on the involvement of European intelligence services and how to better control the international dimension of intelligence.

Academics and civil society dealing with international cooperation between intelligence agencies frequently call for stronger cooperation between intelligence oversight bodies. A form of networking accountability was proposed by Born, possibly to be further developed into joint oversight.³ Gill suggested that the overseers should form a genuine oversight community, in which information should be shared under minimal information restrictions.⁴ Aldrich went as far as to call for the establishment of an Inspector-General with the power to inspect the services of multiple countries.⁵ Hillebrand suggested that if a genuine international oversight body would not be feasible, ad hoc committees or oversight bodies related to the existing

2 The generic term oversight bodies is used here for the wide range of organs that exercise oversight over intelligence services, including the independent and parliamentary committees that exist in various countries.

3 H. Born, International Intelligence Cooperation: The Need for Networking accountability, speech at the NATO Parliamentary Assembly, 6 October 2007, available at www.dcaf.ch.

4 P. Gill, 'Democratic and Parliamentary Accountability of Intelligence Services after 9/11', in: H. Born and M. Capirini (eds.), *Democratic Control of Intelligence Services: Containing Rogue Elephants*, Ashgate, Hampshire, 2007, p. 213.

5 R.J. Aldrich, 'International intelligence cooperation in practice', in: H. Born, I. Leigh and A. Wills (eds.), *International Intelligence Cooperation and Accountability*, Routledge, Oxon, 2011, p. 37.

intelligence platforms should be created.⁶ Farcese put forward the idea of borderless review in relation to international cooperation, by which one oversight body would request its corresponding authority in the other state to check its end of the cooperation.⁷ Krieger supported a harmonization of the European oversight systems.⁸

Concerns expressed by the academic community and civil society were heard by and echoed in various international political bodies. The following overview illustrates the persistent hope in the international political arena for internationalizing intelligence oversight.

In response to the Echelon inquiry, the European Parliament adopted a resolution in 2001 which called upon the Member states to establish a platform which would scrutinize national legislation and to agree on a Code of Conduct.⁹ In 2003 and 2004 the Advisory Interparliamentary Benelux Council organized hearings on oversight over intelligence services. The council advised the three Benelux governments not only to endorse the establishment of independent external oversight in each of the EU Member States, but also demanded that further consideration be given to cooperation between the national oversight bodies.¹⁰

The 2005 Council of Europe inquiry into extraordinary rendition also looked into the lack of an effective oversight over international intelligence cooperation. The final report echoed the need for a Code of Ethics for the intelligence community, as well as a more permanent transnational facility with investigatory powers.¹¹ The extraordinary renditions also persuaded the European Parliament to discuss cross-border intelligence cooperation once again. In testimony before the inquiry committee of the European Parliament in 2006, Born repeated the suggestion for a Code of Ethics and the establishment of a network of experts.¹² The Parliament recommended that the European conference of oversight committees should be strengthened and the EU Parliament should be closely involved in its work.¹³

The OSCE Parliamentary Assembly remained aloof in its 2006 resolution by encouraging an exchange of experiences between legislators.¹⁴ But in 2007 two more political declarations were added to the call for closer cooperation. The Venice commission of the Council of Europe called for further networking by oversight bodies, in response to the international networking by security and intelligence services they are to review.¹⁵

6 C. Hillebrand, *The CIA's extraordinary rendition and secret detention programme*, Netherlands Institute of International Relations Clingendael, The Hague, 2009, p. 7.

7 C. Forcese, 'The collateral casualties of collaboration', in: H. Born, I. Leigh and A. Wills (eds.), n. 4, p. 91.

8 W. Krieger, 'Oversight of Intelligence: A Comparative Approach', in: G.F. Treverton and W. Agrell, *National Intelligence Systems*, Cambridge University Press, New York, 2009, p. 233.

9 European Parliament, Resolution [on the ECHELON interception system] (2001/2098(INI)), OJ C 72 E, 21.3.2002, p. 221.

10 Advisory Interparliamentary Benelux Council, Recommendation 719/3, adopted 4 December 2004, available at: http://www.lachambre.be/kvvcr/pdf_sections/pri/benelux/726-001.pdf.

11 Council of Europe Parliamentary Assembly, Recommendation 1713 (2005), adopted 23 June 2005.

12 Report on the meeting of the Temporary Committee [on extraordinary renditions by the CIA], held in Strasbourg on 25 September 2006 (13289/06).

13 European Parliament, Resolution [on extraordinary renditions by the CIA] (2006/2200(INI)), adopted 14 February 2007.

14 OSCE Parliamentary Assembly, Resolution on strengthening effective parliamentary oversight of security and intelligence agencies, adopted 3-7 July 2006, Brussels.

15 Venice Commission, Report on the democratic oversight of the security services, adopted 1-2 June 2007, (CDL-AD(2007)016), p. 40 and p. 56.

National oversight bodies should exchange information on international cooperation, as well as best practices and trends. Moreover, the WEU Parliamentary Assembly invited national parliaments to explore forms of cooperation between oversight committees as regards cross-border intelligence activities.¹⁶

The UN Human Rights Council tasked UN Special Rapporteur Scheinin to assess the respect for human rights in the fight against terrorism.¹⁷ He concluded in 2009 that there was a serious lack of accountability in international cooperation. The rapporteur adopted the suggestion by the Belgian Standing Committee I to establish a knowledge centre, which the rapporteur thought could be extended to “joint oversight” over time.

And, again, at the time of writing this article, the European Parliament is on the verge of reiterating the need for cooperation in oversight. Its June 2013 resolution stresses the need to set up a European equivalent of ‘the mixed parliamentary-judicial control and inquiry committees’.¹⁸ The LIBE committee, instructed to investigate the matter in more depth, organized a hearing on the national oversight systems. But, perhaps unsurprisingly, in order to fulfil its mandate it resorts to national oversight bodies for specific information.

In short, over the last decade there has been hardly any international political body that has not addressed or discussed closer cooperation between national oversight bodies. Some of the more daring propositions cannot be achieved unless national legislation permits this and states enter into the necessary agreements. The many legal obstacles standing in the way of moving towards operational cooperation mean that the repeated appeals should be understood as being directed towards national lawmakers in the first place. Nevertheless, we will show that room exists even now for national oversight bodies to work in the spirit of a genuine international oversight community.

Follow-up on the national level

Despite the numerous appeals for closer cooperation and the fact that the various international political bodies are connected to the national parliaments, no legislative activity to overcome the current legal obstacles to cooperation has followed.¹⁹ At the national level, it seems that the case for more permitting legislation has not found a willing ear.

In fact, at the national level, resistance rather than reluctance exists in relation to internationalizing oversight. In 2007, the Dutch parliamentary commission for the intelligence and security services concluded that in Europe consensus existed that a joint normative framework was not (yet) feasible.²⁰ In a 2012 evaluation of the Dutch oversight system, Fijnaut asked a number of high-level stakeholders in intelligence oversight if they deemed the internationalization of oversight to be desirable. A unanimous ‘no’ was recorded.²¹

16 Assembly of the Western European Union, Interparliamentary European Security and Defence Assembly, Resolution 1332 on the intelligence services and parliamentary scrutiny – reply to the annual report of the Council, 5 December 2007 (Document A/1983).

17 UN Human Rights Council, Tenth Session, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/HRC/10/3), p. 17.

18 European Parliament, Resolution [on the US National Security Agency surveillance programme], 4 July 2013, (2013/2682(RSP)).

19 The international political bodies themselves possess no legislative competence in matters of national security. E.g. the EU Member States have retained their autonomy in this field: articles 4(2) TEU and 72 TFEU.

20 Dutch Parliament, Lower House, session 2007-08, 31462, 2, p. 2.

21 C. Fijnaut, *Het toezicht op de inlichtingen- en veiligheidsdiensten: de noodzaak van krachtiger samenspel*, The Hague, CTIVD, 2012, p. 91 (available at: www.ctivd.nl, only in Dutch).

Notwithstanding the absence of a more permitting legal basis for enhanced cooperation, the oversight communities themselves have been drawing slowly together over the last decade. Contacts are usually organized at the initiative of one institution, or at the external initiative of an international organization. Besides, the biannual international and annual European conferences seem to be turning into a more permanent tradition.

The first international meetings between reviewers were organized long before academics and politicians gained an interest in the topic. The most prominent international gathering of intelligence reviewers was initiated over fifteen years ago when the Australian Inspector-General McLeod took the initiative for a conference in 1997. This initiative developed into the current biannual International Intelligence Review Agencies Conference (IIRAC) in which many of the oversight bodies participate. The number of participating bodies has been slowly increasing. In 2001, for instance, several oversight bodies from the younger European democracies joined and their systems were presented and discussed.

In Europe, the European Parliament noted in 2004 that little progress had been made with regard to its earlier call to establish a platform on intelligence oversight.²² That same year the Italian Parliament took the lead and organized a conference for parliamentary bodies overseeing the intelligence services. This has developed into an annual meeting of European overseers, offering a forum to guarantee the accountability of the intelligence services.²³ Alas, at its last convocation no agreement was reached as to where the next session is to be held, and currently no new session is planned.

Most independent oversight bodies that publish annual reports also report on their international contacts. The practice of the Dutch Review Committee on the Intelligence and Security Services (CTIVD) is not substantially different from the other bodies and may serve here as an example.²⁴ The CTIVD receives a few delegations from abroad each year, which offer the opportunity to familiarize oneself with the oversight system in another country and to learn from the experiences of colleagues. From the very beginning the Dutch CTIVD recognized the potential to learn from the experiences of its foreign counterparts. These exchanges strengthen trust in partners, inspire one's work and sometimes make one realize that the national oversight situation is 'not so bad' in comparison with the system of the visiting country. In particular, the contacts with countries with a recently installed system of oversight aim to inform and inspire those colleagues.

When oversight bodies share similar characteristics, more detailed discussions as to working methodologies may take place. However, only very few of these exchanges have so far taken place in the case of the Netherlands. Best practices are regularly exchanged at the conferences for overseers, often dedicated to specific topics. For instance, the conferences hosted by the Norwegian EOS Committee in 2003 led to a handbook on overseeing international cooperation.²⁵ A number of oversight bodies contributed to the 2011

22 European Parliament, Resolution on ECHELON (P5_TA(2002)0530), OJ C 16 E88, 22.1.2004, p. 89.

23 Meeting of the representatives of the Parliamentary Committees within the European Union for the oversight of intelligence and security services, Bucharest Declaration, 17-19 October 2006. Available at: www.cfsirp.pt. The subsequent meetings were held in Bucharest (2006), Lisbon (2008), Tallinn (2009), Brussels (2010) and Berlin (2011).

24 The CTIVD is one of the main pillars of the Dutch oversight system, the other being the parliamentary committee. The Annual Reports and a number of Investigative Reports of the CTIVD are available in English at: www.ctivd.nl.

25 H. Born and I. Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, DCAF/OES/University of Warwick, Oslo, 2005.

study for the European Parliament on national intelligence oversight.²⁶ Particularly useful comparative studies on fusion centres and the use of intelligence products in criminal proceedings were initiated by the Belgian Standing Committee I.²⁷

The Belgian committee has been playing a particularly stimulating role in cooperation in general. The committee has long intended to come to a network of overseers with the aim of raising the quality of review.²⁸ The Belgian delegation formally launched the idea of a knowledge centre to exchange best practices at the 2009 Tallinn conference. At the 2011 Berlin conference a founding document was adopted for a European network, equipped with a website where reports can be posted. This European Network of National Intelligence Reviewers (ENNIR) is to give the cooperation between European reviewers a more permanent nature. Lamentably, there are no easy gains, and much work remains to be done. Too little information has been put on the website to date and too few countries contribute reports.²⁹ It is also quite elaborate to retrieve relevant parts on a specific subject-matter from the available reports. In combination with the current deadlock in the organization of the European conferences, one may conclude that cooperation is fragmented and is progressing slowly.

Not to be missed in an account of the establishment of an international oversight community is the Geneva Centre for the Democratic Control of Armed Forces (DCAF). Based on contributions from and discussions with national oversight bodies, DCAF has produced a number of publications, amongst others the comprehensive 2012 Toolkit for intelligence oversight.³⁰ Currently, a policy guide on international intelligence cooperation is in preparation. As have a number of other oversight bodies, the CTIVD has contributed to the work of DCAF by participating in its working groups and taking part in editorial or advisory boards. The work of DCAF is clearly well rooted in the practice of a number of European countries, however heterogeneous that practice may be.

Undeniably, the cooperation has rendered several results for the oversight community over the last decade. These results may be summarized as (1) exchanges of best practices and working methods, (2) a number of thematic and comparative studies, (3) support to countries with recently established oversight systems, and (4) steps towards common standards as well as (contributions to) handbooks on oversight. In the relatively young community of oversight bodies, these exchanges of ideas and the opportunity to critically compare systems are highly useful. However, all these achievements remain far away from even the most modest form of cooperation on matters of substance or the coordination of independent inquiries.

Moving forward

Many authors have rightly pointed out the many legal limitations that prevent national oversight bodies from

26 A. Wills and M. Vermeulen, Parliamentary oversight of security and intelligence agencies in the European Union, European Parliament, Brussels, 2011.

27 Belgian Standing Committee I (ed.), Fusion Centres throughout Europe All Source Threat Assessments in the Fight against Terrorism, Antwerp, Intersentia, 2010. And: D. van Daele, and B. Vangeebergen, Inlichtingendiensten en strafprocedure in Nederland, Duitsland en Frankrijk, Antwerp, Intersentia, 2006.

28 E.g. Vast Comité van Toezicht op de inlichtingen en veiligheidsdiensten, Activiteitenverslag 2007, Antwerp, Intersentia, 2008, p. 69. The idea was already put forward in 2008 by the Belgian delegation at a conference in Norway: G. Vanderwalle, Paper presented at the international congress on accountability of international intelligence cooperation, 17-18 October 2008 (available at: www.comiteri.be).

29 www.ennir.be.

30 H. Born and A. Wills (eds.) Overseeing Intelligence Services – A Toolkit, DCAF, Geneva, 2012.

extending cooperation to operational work.³¹ Amongst the most frequently mentioned arguments are the third party rule, a limited formal mandate, rules on secrecy, limitations due to sovereignty and limited jurisdiction. Still, even the forms of cooperation which can be sought within the existing legal boundaries have not yet been fully explored, so it seems. It may not be only legal obstacles that put a break on the enthusiasm on the side of oversight bodies.

The humble size of the oversight bodies severely limits the possibilities to take up additional initiatives outside the direct scope of responsibility. A very simple, but real barrier is also formed by the different languages in which the overseers report. Counterparts in other countries may only incidentally learn about the conclusions at the international conferences or when reports are translated into English. Literature that integrates the views from different oversight bodies on a specific topic is scarce, and so it becomes difficult to refer to or even to take note of the opinion of a foreign oversight body on a specific subject-matter. Finally, no genuine incentives exist on a national level to work with counterparts across the border. National oversight bodies inform national parliaments which have an inherently national focus. Cross-border collaboration may thus not always receive the appreciation and priority it deserves.

Since the scope and depth of cooperation has remained very limited until now, one might easily believe that cooperation between overseers may be of little use to national oversight bodies. Here we try to develop some arguments that cooperation should nevertheless remain on the agendas of national oversight bodies. Pursuing closer cooperation may be very beneficial to the core missions of the oversight bodies. Even within the strict boundaries of sovereignty, independence, national jurisdiction and secrecy, the oversight community may profit from further developing their cooperation.

Let us first look at the nature of oversight bodies. Several of them function to a larger or lesser extent as judges of the work of intelligence agencies. Nevertheless, their 'jurisprudence' remains largely secret and there is no 'judicial discourse'. In their own isolated remit an oversight body is a rather secluded institution interpreting the statutes and international law under which the agencies operate. This lack of dialogue with similar institutions will not contribute to the quality of its case law. Also, as it stands, it is likely that the very same ECHR case law on, for instance, observation is interpreted differently in different jurisdictions across Europe. At the same time the Strasbourg case law has only a limited harmonizing effect in this area, since its case law on intelligence develops extremely slowly. A form of judicial discourse between oversight bodies will add to the uniformity in the application of the convention, to intelligence, and to quality and authority of the findings of the national oversight bodies. In this spirit, the 2009 Tallinn Declaration recognized a need for harmonizing principles of secret surveillance.³² The ENNIR network offers a tremendous opportunity to benchmark one's own interpretation of a specific topic with the work of foreign oversight agencies, provided that the national bodies loyally make use of ENNIR. The translation of reports and comparative studies would also greatly assist in making the reports accessible.

Secondly, someone following the annual reporting by various overseers will know that each of them is confronted with an increasing use of technology. As borders become relative, intelligence agencies have to adjust to that reality and international cooperation is highly required. New technology also brings about new

31 For instance, A. Wills and H. Born, 'International intelligence cooperation and accountability: formidable challenges and imperfect solutions', in: H. Born, I. Leigh and A. Wills (eds.), *supra*, n. 4, pp. 290-299. See also: A. Wills and M. Vermeulen, *supra* n. 25, p. 109-111.

32 Fifth Conference of Parliamentary Committees for the Oversight of Intelligence and Security Services of the European Union Member States, Declaration of Tallinn, 25-26 May 2009 (available at: see *supra* n. 22).

questions of the interpretation of human rights standards in the modern age. At the same time, the oversight bodies are not typically well equipped to understand or investigate highly technical arrangements and activities. In fact, following the example of the Norwegian EOS, the Dutch CTIVD considered hiring external technical expertise.³³ For instance, in the case of Sigint, intelligence services work closely together while multiple oversight bodies may struggle to understand the same technology and face the same questions of interpretation under international human rights standards. Other examples of new challenges in terms of understanding and assessing are bio-forensic techniques, the social media or drones. Closer cooperation between oversight bodies might contribute to the legal debate and joint technical training could be organized, in particular in fields where intense intelligence cooperation exists.

A third contemporary challenge for overseers concerns the oversight over relations with ‘non-traditional’ foreign intelligence services. It has been recommended that reports of human rights organizations are included in the decision whether or not to liaise with a foreign service.³⁴ Overseers may likewise feel the need for independent information on a specific country when they assess the propriety of cooperation with that country. Similarly, the ECHR consistently refers to the reports of human rights organizations when applying convention rights to international cooperation. For small oversight bodies it is not so easy to collect and filter the relevant information on the human rights situation in a particular country. Here again, without infringing on sovereignty, secrecy or independence, it would be valuable to exchange human rights reports on specific countries and, where possible, opinions on the legitimacy of cooperation with those countries. This will only add to the authority of the opinions of the national oversight bodies.

Finally, it has been pointed out that it is often journalists, civil society and academics who play a role in uncovering and investigating violations of human rights in the transnational dimension of intelligence.³⁵ The European conference for oversight bodies could be a platform where selected journalists or civil society institutions present their concerns to national oversight bodies. They may subsequently decide independently whether or not they should act upon the presented information, in accordance with their mandate and capacities. In this way, a joint starting point for entirely independent inquiries could be created.

Conclusion

A wide gap exists between the international and academic debate on intelligence oversight and the national reality when it comes to cooperation in the international oversight community. The often indicated void in the accountability of international intelligence cooperation has not set in motion a movement to equip the oversight bodies with the necessary legal tools, despite many international resolutions and recommendations. Nonetheless, an international oversight community does exist. It faces practical challenges and enthusiasm is limited, but important steps have already been taken. Even though there is still plenty of room for new initiatives within the existing legal boundaries. It would be useful if incentives on a national level are given to the oversight community to stimulate participation in networks like ENNIR. Even though a more permitting legal basis is absent, cooperation between oversight bodies will strengthen them in the performance of their missions and should therefore continue to be developed.

33 Norwegian Parliamentary Intelligence Oversight Committee (EOS), *Abbreviated Annual Report for 2011*, Oslo, 2012, p. 14 (available at: www.eos-utvalget.no). And: CTIVD, *Investigative report no. 28 The use of Sigint by the DISS*, The Hague, 2011, p. 2 (available at: www.ctivd.nl).

34 For instance: DCAF, *Toolkit – Legislating for the Security Sector, Compilation of Good Practices for Intelligence Agencies and their Oversight*, DCAF, Geneva, 2011, pp. 28-29.

35 R.J. Aldrich, *supra* n. 4, p. 36. W. Krieger, *supra* n. 7, p. 215.



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Netherlands Helsinki Committee
Het Nutshuis
Riviermarkt 4
2513 AM The Hague
The Netherlands

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