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INTELLIGENCE SERVICES AND DEMOCRACY

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Geneva Centre for Democratic Control of Armed Forces

Introduction

Intelligence is the collection, processing and dissemination of information according to the needs of a national government. Informed policymaking and decision making require adequate information and reliable analysis. Only if policymakers and decision makers are sufficiently informed about the state of the world and the likely developments, can they be expected to make sound judgments in the areas of internal and external security, national defense and foreign relations.

Strictly speaking, intelligence activities involve solely the collection and analysis of information and its transformation into intelligence. But other activities like counterintelligence and covert action have come to be considered examples of intelligence activity. Counterintelligence is the acquisition of information or activity designed to neutralize hostile intelligence services. These activities might involve espionage against those services, debriefing of defectors, and analysis of the methods of hostile operation. They might also involve penetration and disruption of hostile services and their activities.

In some states intelligence services (especially if they are military) are also involved in covert action. Covert action can be defined as any operation or activity (including use of violence) designed to influence foreign governments, persons, or events in support of the sponsoring government's foreign policy objectives while keeping the sponsoring government's support of the operation a secret. This paper does not consider this function further.

The requirements of national security and protection of the state are occasionally at odds with established concepts of privacy, civil liberties and civil rights that the same state accords to its citizens. Clearly, if the domestic intelligence service had no special powers, then it would find the protection of the state very difficult. Conversely, an intelligence service with unlimited powers might find the protection of the state

easy, but would cause unacceptable damage to the rights, civil liberties and privacy of citizens.

In a democratic state, a trade-off between these diverging interests has to be found in a politically and legally sound way. This implies a conscious decision about what is permitted and what is not. The government must therefore lay down general principles for what is acceptable, and ensure that these principles are adhered to by the intelligence services. The same considerations apply, in a different fashion, for operations abroad.

Transparency of the federal and state administration and activities of all agencies is important in a democracy, if the government wants to retain acceptance by and support of the public, the electorate and the taxpayer. However, for intelligence services to do their business effectively, there are some sensitive domains of activities that have to be and remain classified. Three generally agreed items should be mentioned:

1. All information pertaining to operations, sources, methods, procedures and means.
2. Anonymity of the service's operational staff and protection of its knowledge and information.
3. Origin and details of intelligence and information provided by other governments or foreign services in confidence.

All intelligence services require maintenance of secrecy on those issues. They must be able to guarantee protection of the identity of sources as well as protection of the information received in confidence. This must be not only for themselves and for the protection of their personnel, but also for the people in the outside world who work with the services.

Secrecy is needed, because it is the only way to assure (potential) sources of their own safety. No one will volunteer to work for an intelligence agency unable to prevent public disclosure of its sources.

The need for anonymity of the service's operational staff follows from the first item: operations, sources, methods, procedures and means cannot remain secret, if the personnel involved in operations are known to the public. All too often intelligence successes must remain secret in order to ensure continuous successful intelligence gathering. Knowledge and information of intelligence services need to be protected since disclosure could reveal the specific targets of the collection effort as well as the capabilities of collection systems – disclosures that could lead to effective countermeasures, precautions and denial of such information in the future.

If the government is interested in and seeks the cooperation of its intelligence service with the intelligence services of foreign countries, maintenance of secrecy of the origin of as well as of the intelligence and information provided is essential. All such intelligence remains the property of the providing nation and cannot be further disseminated without the originator's permission. Since own intelligence information has to be made available to those foreign services under arrangements for intelligence sharing, maintenance of secrecy is equally expected from those foreign services. Hence, it is necessary to establish guidelines for the classification and distribution of as well as access to intelligence information, with respect to both citizens and foreign governments.

Once the purpose of intelligence is clearly understood and the acceptable parameters have been agreed upon, decisions about the organizational structures and oversight follow naturally.

Organization

Intelligence agencies can be differentiated by function (technical, human, etc.), and by coverage (domestic and foreign). It is a good rule that each intelligence function should only be carried out by one agency. This avoids wasting effort and resources, and minimizes the risk of unhealthy and unnecessary competition between the various agencies developing. However, many intelligence tasks (notably countering transnational threats such as terrorism and organized crime), increasingly require information to be collected by various means on the same subject. Thus, there must

be coordination, access to the information of other services, and a process of joint assessment.

Separation Between Domestic and Foreign Intelligence

Democratic states generally separate domestic and foreign intelligence services. This is justified by the different missions and even more by the fact that different rules and laws apply to intelligence operations on national soil and abroad.

The mission of domestic intelligence generally is to obtain, correlate and evaluate intelligence relevant to internal security. Internal security aims for protection of the state, territory and society against acts of terrorism, espionage, sabotage, subversion, extremism, organized crime, narcotics production and trafficking, etc.

The mission of foreign intelligence generally is to obtain, correlate and evaluate intelligence relevant to external security and for warning purposes. Maintenance of external security requires knowledge of the threats, dangers, and risks as well as of the opportunities and likelihood of events and outcomes up to aggressions. Hence, information is needed about intentions, capabilities and activities of foreign powers, organizations, groups or persons and their agents that represent actual or potential threats to the state and its interests.

Information held by domestic intelligence agencies, as well as the techniques by which it is collected, should in principle be subject to national laws, including laws on data protection. Where exceptions to these laws are required for operational reasons, they should be the subject of separate laws or ordinances. All operations should be carried out with the approval of a member of the government, ideally of the minister (of interior) responsible for the domestic intelligence agency.

On the other hand, foreign intelligence services could scarcely do their work if they were to obey every law of the countries in which they operate, especially if those countries are not democracies. However, there should be strict rules, agreed at the political government level, about what foreign intelligence services can and cannot do in a particular country.

The separation of domestic and foreign intelligence services requires the coordination of intelligence collection with regard to modern transnational threats, dangers, and risks (e.g. terrorism, proliferation, organized crime, migration, narcotics production and trafficking). Information is collected by both services on the same subjects. Thus a regulated access to each other's information and the production of joint assessments should be ensured.

Ideally, coordination of intelligence collection is handled by an executive branch entity at the highest level – for example a National Security Council – that advises the president or the prime minister with respect to the integration of domestic, foreign, foreign economic and military policies relating to the national security. This entity provides review of, guidance for, and direction to the conduct of all domestic and foreign intelligence activities.

Production of joint assessments should ideally be undertaken by an independent body or national assessment staff, not necessarily attached to intelligence agencies which produce the intelligence and information. Unless all relevant information is marshaled when assessing intelligence on a subject, the quality of the final product might suffer. Hence, covertly obtained intelligence should not be assessed in isolation from overtly obtained intelligence. Secret intelligence is the continuation of open intelligence by other means. So long as governments conceal a part of their activities, other governments, if they wish to base their policy on full and correct information, must seek to penetrate the veil. This inevitably entails varying means and methods. But, however the means may vary, the end must still be the same. Secret intelligence must complement the results derived from the rational study of public or overtly available sources. This is, in essence, the job of the independent body or national assessment staff, which produces joint assessments.

Separation between Domestic Intelligence and Law Enforcement

Law enforcement and intelligence have fundamentally different purposes. While law enforcement's goal is to get a conviction in a specific criminal case, the task of intelligence is to collect as much information as possible on potential threats to the state and society. An intelligence service thus might prefer not to arrest an identified criminal if this would reduce its capacity to collect further information. An intelligence

service might also not want to divulge its information in an open judicial process for fear of betraying the source of its information.

The function of criminal intelligence, however (the collection of information on organized crime) does require skills that are similar to those used by intelligence agencies. In certain circumstances, targets of domestic intelligence services might be involved in organized crime as well, so the interests of two organizations would overlap. In addition, intelligence agencies usually have no authority to conduct criminal investigations, no power of arrest, and no power to search homes. When it is clear that a crime has been committed, the collection of evidence and execution of arrests may well be carried out by a specialist branch of the police force.

For domestic intelligence, the criterion for surveillance and investigation in a free society is the question of violence and suppression. Domestic intelligence is justified in targeting an organization if it, or its influence, has led to violence or there is a reasonable apprehension that it will. But the application of law and the exercise of executive power against violence is the field of law enforcement alone. Coordination and cooperation between these organizations has to be ensured at government level. Nevertheless, it must be clear, that Domestic intelligence should never be involved in any internal political activities.

Specialized Intelligence Services

In the foreign intelligence arena, different intelligence needs often lead to the creation of several services instead of one comprehensive organization. The defense ministry will often have an intelligence service of its own, concerned with more technical issues such as the assessment of the military potential of neighboring states, defense industries, military personalities, etc. In order to determine its own requirements in weapons, the defense ministry intelligence must know the nature of potential hostile forces as well as the characteristics of the target base. Size, capabilities, location and readiness of those forces must be continually monitored – either as a guide to planning requirements or as a means of warning against possible aggression. Much of this information is also important to negotiation and monitoring of arms limitation agreements. Hence, Defense or Military Intelligence can also be viewed as a third natural branch in addition to foreign and domestic intelligence.

Different collection methods, especially with sophisticated technical means, can also give rise to specialized intelligence organizations. These include imagery, signals and cryptology intelligence agencies.

Although this specialization supports the information needs of specific intelligence customers, it makes comprehensive national assessments more difficult. In addition, agencies are sometimes tempted to compete with each other, emphasizing things that they each believe to be important. Some kind of coordinating mechanism is therefore required to make sure that government is presented in a timely manner with the most complete and objective intelligence picture possible. This can range from the independent national assessment staff mentioned above to a more authoritative executive coordinating organization collecting and assessing intelligence from the various agencies. Often, it could be even useful to involve independent experts, such as diplomats or policemen, in the production of the final joint or national assessment, since they will have their own insights and experience to contribute. Outside experts brought into the process, however, must necessarily have the needed background, including intelligence training and experience. Bringing in distinguished outsiders, as well as experts, would not guarantee that differences with state policy would be brought to the fore, but it would facilitate the national assessment process, especially if coupled with competitive analysis of the intelligence agencies.

Civil or Military Lead

Intelligence is an intellectual exercise above all. Intelligence should become a tool to replace fear, ignorance and suspicion with knowledge and confidence. The best results of intelligence work are based on an all sources analysis. This can be achieved in several ways. Whatever the objective, the military has a useful role to play in this, but overall control must be a political one.

There is no doubt, however, that in a democratic state domestic intelligence is a civilian task.

Counterintelligence

Counterintelligence is the national effort to prevent foreign intelligence services and foreign-controlled political movements and groups, which are often supported by

intelligence services, from infiltrating the state's institutions and establishing the potential to engage in espionage, subversion and sabotage.

Counterintelligence differs from intelligence gathering, in that it exists to counter a threat, whether from hostile intelligence services or from non-state groups, and is thus to some degree reactive. With few exceptions, counterintelligence results are not produced in the short term

There is no need for an independent counterintelligence service itself, which might tend to become another agency to take over the intrinsic counterintelligence functions of each of the services. However, there is a need for a centralized counterintelligence program, the purpose of which is to better integrate, promote, improve and coordinate the counter-intelligence operations, investigations and research of each of the services.

Close cooperation of both foreign and domestic intelligence services is required, if the counterintelligence effort is to be effective. For example, a group of extremists carrying out armed attacks might be planning those attacks within the country, and seeking to develop operational intelligence to support this policy (domestic intelligence), but may be supported from a neighboring state where it does its training and planning (foreign intelligence). A centralized counterintelligence program establishing authoritative coordination and cooperation between the domestic and foreign intelligence service on counterintelligence matters, which inevitably cross borders, will preserve the legitimate jurisdictional demarcation between domestic and foreign counterintelligence responsibilities.

To establish a centralized counterintelligence program, a special committee – ideally answerable to a National Security Council – should be appointed, that develops policy with respect to the conduct and coordination of counterintelligence activities with the tasks to:

- develop standards and doctrine for counterintelligence activities.
- establish guidelines and legal parameters with respect to the management, authorities and coordination of counterintelligence activities.

- outline national counterintelligence policy objectives and to insure that counterintelligence is handled on a functional not a geographic basis.
- resolve inter-service differences and assign responsibilities.
- provide guidance about the security of intelligence collection activities.
- develop and monitor guidelines consistent with the regulations for the maintenance of comprehensive central files and records of counterintelligence policy.
- approve counterintelligence activities which, under such standards as may be established by the government, require approval.
- review ongoing special activities and resolve conflicts of priority.
- submit to the government, the president or the prime minister an overall annual assessment of the relative threat to the interests of the state, including an assessment of the effectiveness of counterintelligence.

Intelligence in a Federal State

In general, federal states may replicate the federal structures in the field of domestic intelligence. But it has to be assured that all elements of the structure follow the same legal principles, which means that responsibilities, interrelationship, authority for guidance and control must be set.

Foreign intelligence and military intelligence, however, are limited to the federal level only. This being valid as long as the federation is responsible for a single foreign, security and defense policy.

Oversight

In democracies, executive, legislative and judicial branches exercise oversight of intelligence services and their activities. Every element plays its specific part in one entire package of oversight and accountability, the purpose of which is to provide assurance of legality, proportionality and propriety for activities that are necessarily conducted in a classified environment.

Within this oversight package, executive oversight plays a decisive role. The higher the echelon of executive oversight and the more seriously it executes its tasks; the lower is the likelihood of problems accruing to the government from legislative and judicial oversight. It is the executive, which is fully responsible for proper auditing and controlling of the intelligence services, thus creating the necessary base for transparency and parliamentary control.

Executive Oversight

Intelligence services are an arm of government, like the police or the fire service. They must therefore act according to the policies of the government of the day and in pursuit of objectives relevant to these policies. But the secrecy that surrounds the work of the intelligence services can produce temptations to act independently. Thus, there must be a clear tasking system, controlled not by the intelligence agencies themselves, but by the government departments on whose behalf they are collecting information. As a principle, no intelligence operations should be conducted, unless there is an agreed requirement. The misuse of intelligence services, with their extraordinary powers, by an elected government for its own political ends must be excluded. Hence, intelligence services should not be affiliated with any political party.

Generally, the more ministerial interest in and attention to the work of the service exists and develops, the more intimate the service will become with the conduct of the daily business of the government and the more the service will be subject to checks and balances. But this alone is not sufficient. The services must have assurance of the legality in things they do. Therefore the intelligence community requires – besides laws - executive orders and directives, and regulations that guide their activities, as well as a system of coordination and a number of statutory mechanisms for the accountability and control of their work.

Intelligence services need a statutory regime that arranges the authorization of the ways in which they collect intelligence to ensure that issues of necessity and proportionality are properly considered before action is taken. The most intrusive of these methods should require the signature of the minister responsible. In some countries that role of authorization falls to the judiciary. But the executive is bound to be in a better position to determine what should be the policy to adopt on internal and

external security and national defense than a tribunal, no matter how eminent. The statutory regime should have a bearing not only on how services collect and administer intelligence, but also on how they have to use it. Services should be accountable for the ways they use intelligence. It should define what information is sensitive; deal with classification levels and authority, downgrading and declassification, safeguarding classified information, etc.

One of the main tasks of executive oversight is to make sure that the intelligence services are functioning properly: i.e. that they ask the right questions, collect the right information and respond to the decision makers' needs. In particular, executive oversight has to identify intelligence failures and take action to prevent them in the future.

The source of executive supervision should ultimately be either the president, the prime minister or a National Security Council. There are practical reasons why these and the minister responsible might not be able to give full attention to all of the oversight tasks. Hence, governments in democracies appoint individuals or establish committees or boards mandated with supervision of intelligence activities. Individuals can be appointed as inspectors, controllers, efficiency advisors, etc., who report to the president, the prime minister or minister. Committees or boards can be established who ideally report to a National Security Council, alternatively to the president, the prime minister or the minister responsible. These can be constituted by members from outside the government, qualified on the basis of integrity, ability, knowledge, diversity of background and experience. However, no member should have any personal interest in or any relationship with any intelligence agency. Some countries have committees for intelligence oversight and for policy review to scrutinize performance and policy.

The mission of an executive intelligence oversight-board can be to:

- review periodically the internal guidelines of each service concerning the legality or propriety of intelligence activities.
- report periodically on its findings and any activities that raise serious questions of legality or propriety.

- forward to the Attorney General reports received concerning activities in which a question of legality has been raised.
- conduct such investigations of the intelligence activities of the services as it deems necessary to carry out its functions.

The mission of a policy review committee can be to:

- establish requirements and priorities for intelligence.
- review the intelligence program and budget proposals and report to the government, the minister or prime minister as to whether the resource allocations for intelligence respond to the intelligence requirements of the government.
- promote collaboration between the services and provide checks and balances within the system.
- conduct periodic reviews of intelligence products, evaluate the quality of the product, develop policy guidance to ensure quality intelligence and to meet changing intelligence requirements.
- submit an annual report.
- make recommendations on intelligence matters.

Audit is another important part of executive oversight. In democracies, an external audit of the accounts is normally done by a National Audit Agency or office.

Legislative Oversight

There are different models for legislative oversight and accountability of intelligence activities. Arrangements are needed which fit within the constitutional and legal parameters of one's own country, not those that look attractive from another.

The parliament's budget authority gives it control over of the intelligence organizations' budgets. In some states, parliament also has control over the appointment of agency heads. But parliament also has a role to play between the services and the public. The nature of intelligence limits the information that can be provided to the public. As representative of the public, a parliamentary oversight committee needs access to classified information. It should have the right to request

reports, hearings and conduct investigations to expose shortcomings or abuses. In order to be able to perform this task, those parliamentarians must have – besides their integrity - the trust of both the intelligence services and the public. In addition the right of the political opposition to participate in oversight should be laid down.

If a committee is established, its mission and tasks must be limited to intelligence only, otherwise work will be overloaded. However, the parliament's oversight committee must not have the authority to direct the intelligence services to initiate certain investigations or to pursue certain cases. Moreover, the committee is a political body and is subject to political expediency and subject to overreaction. The members of the committee should have a responsibility to avoid overreaction in moments of crisis, and the intelligence services should have a responsibility to retain their focus on their missions and not be pushed by the committee into following new objectives. Another critical issue of oversight is the balance between independence and criticism on the one hand and the maintenance of a working relationship between the committee and the intelligence agencies on the other hand. At the same time the committee must avoid becoming the protector or advocate for the intelligence services.

An intelligence oversight committee's authority is a constant reminder to the intelligence services to perform their task correctly and assures the public members of the committee that the services are not left to their own devices. As a general rule, intelligence services should:

- Keep the oversight committee informed concerning intelligence activities, including any significant anticipated activities.
- Provide the oversight committee upon request any information or document in the possession, custody or control of the service or person paid by the service.
- Report in a timely fashion to the oversight committee information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.

Legislative oversight has to be determinedly non-partisan and discreet. Experience shows, that if the members are trustworthy, services are willing to be honest and

frank with them. The oversight committee should be more inquisitorial than adversarial. Access to information will increase as confidence grows. The committee might have an investigator who has even wider access. Those mandated with the oversight have to make it clear that they can be trusted with sensitive information and can produce reports that are thorough, focused and rigorous, yet in no way compromising to the nation's security.

Examples of different national methods of parliamentary control are shown in Annex A.

Judicial Oversight

An intelligence service is not above the law – penalty must be provided by law. If there are no enforcement measures for accountability, there is no democracy. Under the rule of law, the activities and functions of intelligence services cannot extend beyond those that are necessary for protecting the democratic, constitutional order. The constitutional order includes the catalogue of fundamental freedoms and rights and effective measures to protect those rights against any violation. No intelligence service can arbitrarily threaten those rights and freedoms; if it does, it threatens the constitutional order instead of protecting it.

Law must regulate intelligence activities and establish procedures to guarantee proper execution, protection and transparency. Without a legal framework, legislative and executive oversight would have no reference point and their work would make no sense.

Intelligence is essential to informed decision making. But particular measures employed to acquire domestic intelligence, apart from being responsive to legitimate governmental needs, should be conducted in a manner that preserves and respects established concepts of privacy, civil liberties and civil rights. It is here where oversight is most required. Judicial oversight has to set limits intended to achieve the proper balance between protection of individual rights and acquisition of essential information. The highest judicial authority should normally approve collection procedures established: generally the Attorney General. Those procedures should protect constitutional rights and privacy, ensure that information is collected by the

least intrusive means possible, and limit use of such information to lawful governmental purposes.

For judicial oversight to be effective, the Attorney General should:

- Receive and consider reports from the services.
- Report to the minister responsible, the prime minister or the president in a timely fashion any intelligence activities that raise questions of legality.
- Report to the minister responsible, the prime minister or the president decisions made or actions taken in response to reports from the services.
- Inform the minister responsible, the prime minister or the president of legal judgement affecting the operations of intelligence services.
- Establish or approve procedures for the conduct of intelligence activities to ensure compliance with law, protect constitutional rights and privacy. The procedures should also ensure that the use, dissemination and storage of information about citizens acquired through intelligence activities is limited to that necessary to achieve governmental purposes.

The establishment of an office of ombudsman for the protection of civil rights may also be an effective tool for controlling the services. A different and minor form of judicial oversight can also be established by allowing staff of the intelligence agencies to go to employment tribunals.

Legal Framework

The intelligence community requires the enactment of a legal framework in which intelligence services operate. This framework must define the area of responsibility of the services, the limits of their competence, the mechanisms of oversight and accountability, as well as the legal means to deal with complaints in cases of violation of rights. Hence, the intelligence community needs a system of statutory regulation, coordination and control to guide its work. This system could be divided into laws, executive orders, directives and ministerial or agency regulations.

The role of intelligence should ideally be defined in a country's Constitution, representing the apex of the system. If not, national law should establish the basic missions, responsibilities, restrictions, structures and relations among the intelligence services associated in an intelligence community. The law has to set limitations which, in addition to data protection and other applicable laws, achieve the proper balance between protection of individual rights and acquisition of essential information. Ideally, the law should not be construed as authorizing any illegal activity and should not provide any exemption from any other law. Ministers in charge of intelligence services must have their responsibilities under the law. And each service has to have a statutorily defined relationship with their minister and a legally defined position in relation to him.

Executive orders – or ordinances – should define functions, organizational matters, list duties and responsibilities, establish procedures, coordination measures, assistance and cooperation, impose restrictions, etc. Implementation of executive orders and subjects like collection and analysis requirements, objectives and priorities, plans, programs and resource allocation, etc., require more detailed directives which can be established in two varieties – unclassified and classified.

Special attention should be given to the following issues:

- relationship between intelligence and other governmental bodies.
- cooperation with such ministries and authorities and, so far as is practicable, with such authorities of the Federation and of foreign countries as are capable of assisting the services in the performance of their functions.
- collection of intelligence.
- fighting of terrorism.
- data protection.

For examples of different national legal frameworks see Annex B.

Reform Process

It is understood that intelligence reform is a particularly difficult process. Intelligence organizations associated with former dictatorships are often discredited. Nevertheless, to protect the reputation of a new democracy, the reform of intelligence agencies has to be done properly and with full transparency. This cannot be achieved in isolation.

Especially in states undergoing political transformation, the political and ethical legacies of the past can be an impediment to reforms. They have to be dealt with in the services themselves, on the political level, and by society as a whole. On the other hand, intelligence reform can help to come to terms with the burden of the past.

The following factors are deemed essential for every reform project:

- Create a clear legal basis and framework
- Fix a definite goal
- Appoint the right person to head the project
- Do not create intelligence services before you haven't established their mission
- Identify responsibilities
- Involve parliament at all stages, beginning with the definition of tasks and powers of the services
- Initiate public debate; every citizen should have the opportunity to become acquainted with the competencies of the intelligence services
- Keep the public informed
- Select key personnel and experts as good professionals, never on political application
- Obtain further outside assistance – but assure your national security needs are respected
- Deal with past legacies in a way that does not to compromise the success of the project.

Reform Recommendations - Principles For Intelligence in a Federal Democratic State

1. Intelligence is the collection and analysis of information for the executive authorities – primarily the government to include the ministries, which use the reports for policy and decision-making.

Intelligence collects and analyzes information to provide reports and assessments to the executive power.

2. There is a need for general principles indicating what is allowed and what is not in intelligence work. Political and legal decisions are necessary in this field. A code of ethics should be considered.

Fundamental rules should provide guidance as to what is allowed in intelligence work.

3. A specific law (or even the constitution) describes creation, mission, responsibility and control of intelligence services; additional corresponding laws are needed for a complete legal frame. Re-view of principle laws might be necessary.

The law creates, defines the responsibilities and describes the mission and responsibilities of Intelligence.

4. Foreign and domestic intelligence should be executed by definition in different organizations that report to the president, the prime minister and the responsible ministers.

Foreign and Domestic Intelligence should be separated.

5. Domestic intelligence and law enforcement have different purposes, and the use of their final products differs.

Domestic Intelligence and Law Enforcement should be separated.

6. Integrated intelligence can ensure the most effective all source collection system. The exchange of information guarantees an overall analysis and

national assessment, which benefits all ministries. Even the military has an important role to play in intelligence, but overall control must be a political one.

Military Intelligence may be integrated into Foreign Intelligence.

7. Counterintelligence is to some degree reactive. However, coordination with foreign and domestic intelligence is needed. A centralized counterintelligence program for authoritative coordination and cooperation between the intelligence services should be established.

Counterintelligence functions are intrinsic to each of the Intelligence Agencies.

8. Law enforcement and counterintelligence need coordination through the different services; different specialized bureaus may be built, but the coordination authority has to be placed at the necessary high level.

Law Enforcement and Counterintelligence need coordination.

9. Given the sensitive nature of intelligence services, oversight must be exercised by the executive, legislative and judicial authorities. It is the executive that is fully responsible for proper auditing and control of the intelligence services, thereby creating the necessary base for transparency and parliamentary control.

All three democratic branches execute oversight over Intelligence Services.

10. Foreign and military intelligence are federal responsibilities only, while domestic intelligence, law enforcement and counterintelligence involve republican authorities. Basic decisions are needed within the legal frame, to start in the parliament.

Federal and Republican intelligence responsibilities are to be identified.

Annex A 1

Parliamentary Control of Intelligence Services in Sweden

A Short Summary

After the Second World War the military Secret Intelligence Service, at the time called

C-byrån (C Bureau), was transformed during 1946-1947 into what became known as *T-kontoret* (T Department). In 1957, within Defence Staff Command Section 2, a unit was formed, *B-byrån* (B Bureau), tasked with gathering security intelligence information and to work parallel with the intelligence operations of T Department. The unit was tasked to identify “subversive elements within society” and “fifth columnists” in the employ of the Soviet Union.

At the time espionage was prevalent and it was thought expedient that Military Intelligence and the Security Service should work more closely together. In accordance with Proposition 1965:66 the special unit, B Bureau, and T Department were to combine. The new organisation was named IB.

The disclosure of this organisation and its operations in 1973, developed into the scandal in the mass media known as the “IB affair”. It became known that the military Secret Intelligence Service had been conducting operations directed against Swedish citizens. The hunt for “subversive elements” probably involved the unwarranted registering of political views. As a direct result two investigations were commissioned, UU 1974 1974 års underrättelseutredning (Stockholm 1974), (UU1974 Intelligence operations investigation) and SOU 1976:19 *Den militära underrättelsetjänsten* (Stockholm 1976), (Military intelligence operations). The proceedings were placed under the control of the Government with Parliament strongly represented on *Försvarets underrättelsenämnd* (FUN), the Defence Intelligence Operations Committee.

In 1996 it was decided that a fresh review of the intelligence services would be carried out. This decision resulted in SOU 1999:37, *The intelligence services – a review* (Stockholm 1999).

The Defence Intelligence Operations Committee was established on 1 July 1976 as a result of a parliamentary resolution that same year. The Committee was to be made up of six members who for the most part would be Members of Parliament from different political parties. The Secretary to the Committee is currently a civil servant from the Defence Ministry. The Committee, which is given free access, monitors and advises the Intelligence organisation. An investigation into the registering of political views that occurred in earlier years is planned for the future and the Committee has already carried out some preliminary work. *Redovisning av vissa uppgifter om den militära underrättelse- och säkerhetstjänsten* (Presentation of Information concerning the Military Intelligence and Security Services) was released on 26 November 1998, from which it appears that the public debate on the "IB affair" festers on.

It has also been decreed by law, Law (2000:131) §5, that, as previously proposed by the Government, a special committee will monitor the activities of the Defence Intelligence organisation.

Parliamentary Control of Intelligence Services in the Czech Republic

General

The parliamentary control concerns three intelligence services:

- B.I.S. – *Bezpečnostní informační služba* (Security Information Service) – established in 1994 as an independent counterintelligence.
- Military Intelligence consists of Military Intelligence Service and Military Defence Intelligence. It is subordinated to the Ministry of Defence of the Czech Republic.
- *Úřad pro zahraniční styky a informace* (Bureau for International Contacts and Information) of the Ministry of the Interior

Control

The Parliament of the Czech Republic consists of two chambers – the Chamber of Deputies and the Senate. The Chamber of Deputies has 200 members; their tenure is four years. In 1998 extraordinary election to this lawmaking body was held. The Senate consists of 81 senators. The tenure is 6 years, one third of the senators being re-elected every two years.

The Parliament controls intelligence services by means of parliamentary bodies:

- Committees
- Special committees
- Subcommittees

The **Senate** has one body, whose duties and responsibilities include the oversight of the intelligence service:

- Committee on Foreign Affairs, Defence and Security

The Senate approves the laws submitted by the Lower Chamber of the Parliament.

The **Chamber of Deputies** plays the decisive role in the intelligence services oversight. It controls the intelligence services by means of:

- Committee on Defence and Security
- Three special commissions
- A subcommittee for intelligence service.

Committee on Defence and Security of the Parliament of the Czech Republic

This committee is fully responsible for the activities of the intelligence services. The Committee controls the intelligence services budgets. The budgets can be a special part of ministerial budgets (so called budget chapters of Ministry of Defence and Ministry of the Interior), or as in the case of the Security Information Service it can form a separate part of state budget.

The Committee has right to invite the intelligence services directors for dealings of any problems concerning their activities (general issues, concrete affairs, matters raised by media, etc.). The Committee also deals with some tasks of *Národní bezpečnostní úřad* (National Security Bureau), especially with those concerning background checks for security clearances of the state departments personnel who works with secret documents and materials.

Both amendment proposals were conceived in light of insufficient number of authorized persons for the handling of concealed information. The ruling cabinet's proposal dismisses the suitable health condition clause for persons screened for all levels of security clearance and also dismisses the personal suitability clause for the first degree of security clearance. For security clearance of the second degree, the bill proposes only a honorable declaration about personal suitability. For the screening of persons for the third degree of security clearance, national security authorities will investigate only persons who present a security risk. Part of the bill that delegates part of the second-degree security clearance procedures for Ministry of Defense and Ministry of Foreign Affairs to National Security Office (NKU) is controversial. The version proposed by the ruling cabinet significantly differs from the version offered by the Chamber of Deputies that allows second-degree security

checks only for the Ministry of Defense and that with an agreement from the National Security Office.

The Committee has a special subcommittee directly oriented to intelligence service – *Podvýbor pro zpravodajské služby* (The Subcommittee for Intelligence Services). The decision to establish this subcommittee is made by the Committee after every general election. Since 1993, when the Czech Republic was founded as a successor of the former Czechoslovak Federation, every Committee for Defense and Security established this subcommittee, the fact which stresses the importance of intelligence services issues in the eyes of Czech politicians. The members of this subcommittee have the same rights as members of the Committee. The subcommittee consists not only of the members of the Committee on Defense and Security, but also of other parliamentarians who are interested into the issues concerning intelligence services. The main task of this subcommittee is to gather people with similar interest and expertise, to deal with these issues in details and to prepare documents and materials for the Committee.

Special commissions

There are three special commissions controlling the activity of intelligence services:

- Permanent Commission for Oversight of Security Information Service Activities
- Permanent Commission for Oversight of Military Defence Intelligence Service
- Permanent Commission for oversight of the employment of operational technique of the Police of Czech Republic (eavesdropping, monitoring, espial, etc.).

Members of these commissions are parliamentarians, mostly members of the Committee on Defence and Security. Establishment of these commissions is ruled by the laws governing the intelligence services. The chairman is responsible to summon a meeting of the commission at least once a year to work out a report on the commission activities for the Chamber of Deputies of the Parliament. Any member of the commission have a right to ask the chairman to summon its meeting. The

commissions are oriented to concrete, detailed or topical issues concerning the intelligence service.

Annex A 2

Parliamentary Control of Intelligence Services in the Federal Republic of Germany

General

For the parliamentary control of the three intelligence services a specific law¹ was established.

The intelligence services are:

- *Bundesnachrichtendienst* for foreign intelligence
- *Bundesamt für Verfassungsschutz* for domestic intelligence²
- *Militärischer Abschirmdienst* for military counter-intelligence

Control

The German government is controlled concerning all activities of the intelligence services. This control is executed by the Parliamentary Control Committee (*Parlamentarisches Kontrollgremium*).

The government has to inform the Committee about the activities of all three services generally and in particular of specific operations of importance. Additional information must be provided on request of the committee. For this purpose the government has to arrange interviews with members of the services, the availability of documentation and visits at the HQs.

The government can decline, if there are reasons of security (protection of human sources, classification etc.), but has to justify.

If necessary, the Committee can (with 2/3 of its members and after consultation of the government) task an expert to execute their control function investigating a specific case. Then the expert gives his report about results to the Committee.

¹ *Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes Vom 11. April 1978.*

² There are also *Landesämter für Verfassungsschutz* under responsibility of the *Länder*; they have to follow guidance of the *Bundesamt für Verfassungsschutz*.

After completion of half of the legislative period and at its end the committee provides reports to the parliament about the control activities.

Control of Budget

Since budgets for intelligence services are classified, the Parliamentary Control Committee is involved discussing and deciding budget questions during closed sessions in the Budget Committee (Vertrauensgremium) of the parliament.

Establishing of the Control Committee

At the beginning of a legislative period the German parliament (Bundestag) selects with majority vote the members of the Control Committee out of the parliamentarians and decides about the total number.

If a member of the Committee leaves the parliament or becomes a representative of the government, he loses his seat in the Committee and a new parliamentarian will be nominated.

The Committee has a session once (minimum) every three months and decides about the standing orders. Each member is authorized to require a session or ask for a specific information.

The sessions of the Committee are classified and the members have to follow those procedures also after their formal time in the Committee.

Annex A 3

Parliamentary Control of Intelligence Services in the Swiss Federation

General

Two organizations of two ministries are considered *national intelligence organizations*:

- The **Strategic Intelligence Service** (*Strategischer Nachrichtendienst*), responsible for *foreign intelligence*, of the “Ministry of Defense, Population Protection and Sports”, and
- The **Service for Analysis and Prevention** (*Dienst für Analyse und Prävention*), responsible for *domestic intelligence*, in the Federal Agency for Police of the “Ministry of Justice and Police”.

In addition to the national intelligence organizations there are four other agencies within the “Ministry of Defense, Population Protection and Sports”, their primary function being to satisfy intelligence requirements of the Minister of Defense and components of the ministry and the Armed Forces:

- The **Military Intelligence Service** (*Militärischer Nachrichtendienst*) in the General Staff.
- The **Signals Intelligence Service** (of the Electronic Warfare Division of the General Staff, Abteilung EKF), which works mainly for the Strategic Intelligence Service and partially for the Military Intelligence Service.
- The **Air Force Intelligence Service** (*Luftwaffennachrichtendienst*), which is a technical-tactical intelligence unit of the Air Force.
- The **Military Security Service** (*Militärische Sicherheit*) in the General Staff, responsible for security matters within the Armed Forces and the Ministry of Defense.

Control

Parliamentary oversight of the *domestic, foreign* and the *other intelligence services* is assured by a special *Delegation (Geschäftsprüfungsdelegation – GPDeI)* of the *Supervisory Commission for government business and practices (Geschäftsprüfungskommission – GPK)* of both Chambers of Parliament (House of Representatives = *Nationalrat*, and the Senate = *Ständerat*).

This *Delegation* consists of 6 Members, 3 of each Chamber of Parliament. Art. 47quinquies of the *Federal Law regulating the Position and Powers of Parliament (Bundesgesetz über den Geschäfts-verkehr der Bundesversammlung sowie über die Form, die Bekanntmachung und das Inkraft-treten ihrer Erlasse (Geschäftsverkehrsgesetz)*. SR 171.11. AS 1962 773. March 23rd, 1962, amended January 23rd, 2001) gives the *Delegation* wide powers and extended rights of inquiry. After having received the minister's opinion, the *Delegation* has the right to request documents from and conduct hearings with all Federal and Cantonal authorities, agencies and citizens, the oath taken on official secret acts and military secret notwithstanding. It can conduct inquiries of civil servants and private persons as witnesses and receive information, evidence, deposition and testimony. (See: Annex 6 for Art. 47quinquies of the Law and Annex 7 for a copy of the web-page, describing the mission of the *Delegation* for the general public).

Annex B 1

Legal Framework for Intelligence Services in Sweden

Swedish intelligence operations are governed under *Lag (2000:130) om försvarsunderrättelseverksamhet*, (Law on Defence Intelligence Operations). The nearest example of this can be found in an equivalent Norwegian law, *loven om Etterretningstjensten*, (Law on intelligence operations). Corresponding laws in several other countries have also been studied. Intelligence has in the past, as is generally the case with other Government administered activities, been governed by a set of regulations.

More detailed direction for the running of the organisation can be found in *Förordning(2000:131) om försvarsunderrättelseverksamhet* (Regulations for defence intelligence operations).

The overriding principles for the conduct of intelligence operations are presented in the opening words of Chapter 5, SOU 1999:39 :

“The Intelligence Services shall, in the same way as any other organisation in the public service, be run according to the principles of democracy. The organisation will be controlled by law and basic civil rights and freedoms will be respected...”

In hindsight, it was the constitutional and legal ambiguities existing at the time of the IB organisation that resulted in the investigations UU 1974 and SOU 1976:19. Since then, as discussed, official decisions and regulations have been made into law.

The introduction to Chapter 6 of SOU 1999:37 lays down the four basic principles for operation of the Intelligence Services :

1. Firstly, the organisation shall be run in line with the Government’s foreign, defence and security policies. *The organisation shall be guided by our own needs and priorities only.* However, due attention should be given to the increasing need for international co-operation in connection with peacekeeping and humanitarian operations.

2. Secondly, the organisation should be concerned only with the nation's external security. “ *It should not become involved in the Police intelligence required for the prevention of and fight against crime.*” Note: This is a direct result of the “IB affair”.
3. Thirdly, the organisation shall be directed according to the national interest. “...and may therefore not be run in the interest of another state nor must other states' interests be allowed to take priority over our own”. Note: This has occasionally been questioned but has remained a firm principle since the Second World War.
4. Fourthly, the exchange of information with foreign intelligence and security organisations may only occur if it serves the national interest and will not harm the Swedish state.

After SOU 1999:37 was presented, the *Samordningssekretariat för säkerhetspolitiska underrättelsefrågor (SUND)*, (Secretariat for the co-ordination of political security intelligence matters), was established mainly to conduct general strategic analysis. The purpose of SUND is also to avoid duplicating work and to ensure that important intelligence is not overlooked.

Comments

The Committee had already considered that a wider formulation of the four principles might be necessary in the future.

This has now come into question after the events of 11 September 2001. There is perhaps a need to improve the way the various departments of the intelligence and security organisations work together and to put in place laws and regulations to reflect these improvements, without the effects being counterproductive.

Legal Framework for Intelligence Services In the Czech Republic

The laws creating a framework for governing the intelligence community:

- Act No. 154/1994 Coll., On Security Information Service (two amendments)
- Act No. 53/1994 Coll., On Intelligence Services (one amendment)
- Act No. 67/1992 Coll., On Military Defence Intelligence (three amendments)
- Act No. 148 /1998 Coll., On the Protection of Confidential Facts
- Act of the Czechoslovak National Council No. 283/1991 Coll., on Police of the Czech Republic (18 amendments)

A new legislation on intelligence defence of the Czech republic is in preparation in the Parliament. There will be also a new law ruling activities of the Special Police Section using operational technical equipments. The political consensus about the necessity to pass these two laws has been already reached, but the proposals will not be discussed and approved before the general election in June 2002.

Updated and quality information about bills under discussion in the Czech Parliament, about preparation of laws and their status in the approval process can be found on the Internet (www.epz.cz). The Protection of Classified Information Act and Amendments to relevant legislation approved by the Chamber of Deputies of the Parliament as of May 20, 1998 can be found on www.nbu.cz/ang/law.html. The Act on Police in later amendments (in English) is on www.mvcr.cz/odbor/bezpe_pol/english/dokument/z_polic.html. The Act 153/1994 Coll., On Intelligence Services of the Czech Republic is available on www.bis.cz/ascii/l_zakony.html (in Czech). The Czech versions of some laws are also available on www.onlinedata.cz/zakony.

Annex B 2

Legal Framework for Intelligence Services in the Federal Republic of Germany

The laws concerning **German secret intelligence services** have their basis in Article 87 (Subjects of direct Federal Administration) of the Basic Law (*Grundgesetz*), which is the Constitution 1). In that article the government is authorized to establish Federal Offices to fulfil tasks on behalf of state security – which the Federal Constitutional Court authorized.

The **Foreign Intelligence Service** (*Bundesnachrichtendienst - BND*) is based on a specific law 2), which was passed by the Federal Parliament (*Bundestag*). Since no Military Service was established, the BND has also the responsibility for military intelligence.

The **Domestic Intelligence Service** (*Verfassungsschutz*) is established on federal and “*Länder*” – level. Also this was authorized by law 3), passed by the Federal Parliament. It is also clarified, that the federal service can give guidance to the “*Länder*”- service.

The **Counter-Intelligence** is in principle the responsibility of the “*Verfassungsschutz*”. Only for the Armed Forces a specific service (*Militärischer Abschirm-Dienst*) was established by law 4), passed by the Federal Parliament.

The **Parliamentarian Control** of intelligence services was also laid down in a law 5), passed by the Federal Parliament.

There are other laws which influence intelligence work. **Data protection** 6) must be followed also in gathering, analyzing and storing of information. In intelligence operations there is taping and **monitoring of voice and mail** required; a law 7) was established for this sensitive purpose.

1. **Grundgesetz für die Bundesrepublik Deutschland**
Vom 23. Mai 1949, BGBl. III 100-1
Letzte Änderung 16. Juli 1998, BGBl. I 1822

2. **Gesetz über den Bundesnachrichtendienst**
Vom 20. Dezember 1990, BGBl. I 2979

3. **Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das bundesamt für Verfassungsschutz**
Vom 20. Dezember 1990, BGBl. I 1990, 2954, 2970
Letzte Änderung 26. Juni 2001 | 1254, 2298

4. **Gesetz über den Militärischen Abschirmdienst**
Vom 20. Dezember 1990, BGBl. I 2977

5. **Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes**
Vom 11. April 1978, BGBl. I 1978, 453
Letzte Änderung 26. Juni 2001 | 1254

6. **Bundesdatenschutzgesetz**
Vom 20. Dezember 1990, BGBl. I 1990, 2954, 2955
Letzte Änderung 26. Juni 2001 | 1254

7. **Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses**
(Artikel 10-Gesetz – G 10) – remark: government's intention to redraft in 2001.
Vom 13. August 1968, BGBl. I 949
Letzte Änderung 1990, BGBl. I 1354, 1386

Annex B 3

Legal Framework for Intelligence Services in the Swiss Federation

There are yet no legal provisions encompassing the Intelligence Community as a whole. However, a legal framework exists for all intelligence agencies and their operations, comprising *laws*, *ordinances* and *directives*.

The *Law* and *Ordinances* that govern the domestic intelligence service and its activities are:

- *Federal law about the measures for the preservation of internal security (Bundesgesetz über Massnahmen zur Wahrung der inneren Sicherheit (BWIS), SR 120. AS 1998 1546. March 21st, 1997, amended June 30th, 1998. See: Annex 1).*
- *Ordinance about the measures for the preservation of internal security (Verordnung über Massnahmen zur Wahrung der innern Sicherheit (VWIS), SR 120.2. AS 2001 1829. June 27th, 2001, amended August 14th, 2001. See: Annex 2).*
- *Ordinance about the Stateprotection-Information-System (Verordnung über das Staatsschutz-Information-System (ISIS-Verordnung), SR 120.3. AS 1999 3461. December 1st, 1999, amended August 15th, 2000. See: Annex 3).*

The *Law* and *Ordinances* that govern the foreign intelligence service as well as other intelligence agencies of the Ministry of Defense are:

- *Federal law about the Army and the Military Administration, Art. 99 and Art. 100 (Bundesgesetz über die Armee und die Militärverwaltung, Art. 99 and Art. 100 (Militärgesetz, MG). SR 510.10. February 3rd, 1995. See: Annex 4). A new law for the Army XXI is in preparation.*
- *Ordinance about the Intelligence Service in the Ministry of Defense, Population Protection and Sports (Verordnung über den Nachrichtendienst im Eidgenössischen Departement für Verteidigung, Bevölkerungsschutz und*

Sport (Nachrichtendienstverordnung, VND), SR 510.291. December 4th, 2000. See: Annex 5).

- *Ordinance about the Military Security (Verordnung über die Militärische Sicherheit)*. The old Ordinance is totally outdated, the new one, also containing wide ranging measures pertaining to information assurance, is in preparation.

In addition, *directives* exist for the intelligence services in both ministries (ministerial as well as agency directives), for the implementation of the laws and ordinances, pertaining to collection and analysis requirements, objectives and priorities, plans, programs and resource allocation, etc.



Established in 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes international cooperation within this field, initially targeting the Euro-Atlantic regions.

The Centre collects information, undertakes research and engages in networking activities in order to identify problems, to establish lessons learned and to propose the best practices in the field of democratic control of armed forces and civil-military relations. The Centre provides its expertise and support to all interested parties, in particular governments, parliaments, military authorities, international organisations, non-governmental organisations, academic circles.

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