# Spying in a Transparent World:
# Ethics and Intelligence
# in the 21st Century

Dr Siobhan Martin

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# Content

## Executive Summary

Is intelligence gathering ethical? Three years after the Snowden revelations on mass surveillance and ten years after the emergence of extraordinary rendition scandals, the debate on the role of ethics in intelligence gathering has never been as prominent, and is dominated by opposing perspectives. On the one hand is the view that the very nature of intelligence work is unethical, but such work needs to be done to protect national security. On the other is the view that it is precisely this unethical nature that undermines the legitimacy and security of democratic states, and is therefore unacceptable. The rise of this debate is due to two trends: the increasingly transparent environment in which secret intelligence activities occur, and policymakers' public assertions on the crucial role of intelligence in protecting national and international security.

The growing emphasis on intelligence has led to unprecedented concern with its practice in Western liberal democracies, particularly as a result of collection efforts in the combat against terrorism. The response from the public and civil society actors to scandals around extraordinary rendition and mass surveillance has been a resurgence of a fundamental debate on the extent to which democratic laws and values are being compromised to protect national security. This paper provides an analysis of current thinking on the relationship between ethics and intelligence in liberal democracies, the challenges posed by the increasingly complex 21st century security environment, the ethical dilemmas that emerge as a result and prospects for ethical intelligence gathering in the future.

# 1. Introduction

> "Without our ability to access telecommunications call data and intercept communications [we] cannot guarantee the level of safety assurance that people expect .... The fact is that in the last eight or nine years we have stopped four mass casualty terrorist attacks ... and nipped quite a number of others in the bud at the very early planning stage."
>
> David Irvine, Head, Australian Security Intelligence
> Organisation, 2009-2014[1]

The controversies of the last decade around extraordinary rendition, enhanced interrogation techniques and mass surveillance have created unprecedented ethical concerns about the role of intelligence in democratic states. The resulting public debate has never been as prominent, and is dominated by opposing perspectives. On the one hand is the view that the very nature of intelligence work is unethical, but this work needs to be done in order to protect national security. On the other is the view that it is precisely this unethical nature that undermines the legitimacy and security of democratic states, and is therefore unacceptable. This situation becomes more complex because of the increasingly transparent environment in which secret intelligence activities now occur, in addition to policymakers' public assertions on the crucial role of intelligence in protecting national and international security.

The reliance on intelligence is reflective of a pattern in which crises are followed by a resort to reactionary policies as governments 'return to the shadows' to protect national security. This approach can be traced back to the circumstances in which professional intelligence communities first emerged, and their evolution ever since. Intelligence communities began to professionalise quite late in many democracies, in the early Cold War era, which was a very specific environment overshadowed by the fear of nuclear annihilation. The Cold War effectively became a 'spy war' between US and Soviet intelligence agencies and those of their allies, leading to the use of extreme measures and covert action in defence of opposing political ideals. The result was an era of considerable freedom and power for intelligence agencies. As the Cold War progressed, concerns over intelligence agencies' conduct began to emerge, in particular controversies surrounding covert activities abroad and spying on citizens at home.[2] An era of enquiries then began that questioned whether and how intelligence services represent the values of the states they protect. Oversight mechanisms were also developed, albeit to a limited extent.

The emphasis on intelligence dissipated in the post-Cold War period as budgets were reduced and the focus was placed on the 'peace dividend'. It was shattered by the shock of the 9/11 attacks and the so-called global war on terror. Continuous and deadly terrorist attacks across Western liberal democracies led to extraordinary rendition and the use of enhanced interrogation techniques becoming an acceptable response – "We've got to spend time in the shadows in the intelligence world ... if we're going to be successful"[3] –

followed by revelations of mass surveillance, to such a degree that the British Government Communications Headquarters (GCHQ) is reported to collect 50 billion metadata records a day.[4] This is countered by reflections on past mistakes and the changing transparent environment in which a return to the shadows is no longer possible because it undermines civil liberties, national interests and democracy itself.[5] In this era of governments utilising intelligence as a tool to demonstrate that they are still in control, the discussion on the role of ethics and what constitutes acceptable intelligence gathering behaviour is critical.

Yet even in democracies, the practice of intelligence is characterised by "openness with some exceptions".[6] As government actors, intelligence agencies in liberal democracies are required to adhere to laws, norms and values, but they may also engage in "exceptional" activities to protect national security. Furthermore, ethics training is not a new concern for intelligence agencies,[7] despite clear shortcomings. Consequently, extreme perspectives that portray intelligence gathering as either not, or unable to be, ethical are limited in their ability to reflect the complexity of the international security environment. Intelligence work today must be ethical and effective, in a world in which both qualities are increasingly seen to be paramount. How this can be achieved in practice and the inherent challenges of ethical intelligence gathering will be addressed in this paper.

Initially an overview will be provided of classical and current thinking on intelligence gathering and ethics in order to understand the fundamental issues that emerge. The paper will then address the specific challenges confronted by intelligence agencies in the 21st century international security environment in order to explore the key ethical dilemmas that currently exist for agencies and governments. The paper will conclude by addressing future prospects for the practice of ethical intelligence gathering.

## 2. The context of intelligence: an ethical exception?

Before examining the application of ethics to intelligence gathering, it is essential to have a clear understanding of what intelligence actually is. Defining intelligence is somewhat difficult, because its meaning varies across states and agencies, and has evolved with the changing security environment. Traditional definitions include a focus on information or (fore)knowledge within a secret and 'foreign' political context,[8] which is seen to manifest as a product, process or activity. While quite broad, the context today is as much about the domestic as the foreign sphere. Furthermore, while the emphasis on national security remains the priority, the focus is becoming increasingly international in the interlinked, interdependent world of the 21st century. The role of intelligence nonetheless remains focused on reducing uncertainty, providing early warning and informing policy decisions. As a result, intelligence can be defined as secret information, or activities conducted to produce or procure it, in order to maintain or improve national and international security. This definition introduces the need to understand the questions of who conducts what intelligence gathering activities, which are key in understanding the ethical dilemmas that arise.

Intelligence work is conducted by government agencies on behalf of the state. The traditional focus of civilian agencies is on the foreign (e.g. CIA, MI6), domestic (e.g. FBI, MI5) and technical (e.g. NSA, GCHQ) spheres. A country's executive branch of government is the primary consumer of intelligence, determines the intelligence agenda, and is, by extension, also involved in the decision to engage in ethical or unethical behaviour when it approves intelligence gathering activities. An intricate relationship, the executive has to balance the level of freedom accorded to agencies to effectively prevent threats with the risk of granting too great a zone of discretion that may lead to compromised laws and values. The situation becomes even more complicated if 'plausible deniability' is applied, as the executive may purposely remove the need for direct consent while nonetheless understanding the potential ethical risks involved in a particular activity. This increases the level of autonomy given to intelligence agencies in the 'special' context of intelligence, but also creates ethical and legal concerns.

This paper will focus on intelligence agencies, but it should also be noted that the interconnected nature of current threats requires the involvement of more and more non-security related agencies. Customs departments, finance departments and other branches of government do not just supply information, but also conduct 'operations' such as tracing funds and building legal cases against terrorist suspects. Non-traditional ministries and departments also require a rapid intelligence capacity when dealing with disasters and other crisis situations involving citizens, but do not have the level of access of traditional intelligence actors. In fact, the current context has expanded so broadly that there is a "new intelligence ecology"[9] in which we are all intelligence actors – from intelligence officers to the general public reporting suspicious behaviour to local police. The expansion of actors engaging in intelligence work makes the discussion on ethics – and what our societies agree is acceptable behaviour – even more significant.

The context in which intelligence activities take place is based on secrecy, which is "an intrinsic and necessary feature … of [an agency's] mandate and functions".[10] Secrecy clearly impacts on agencies' ability to engage in unethical behaviour, but the level of secrecy required for an intelligence service to function effectively is now being questioned. For example, intelligence analysis today relies much more on open sources (reportedly up to 80 per cent),[11] but this information becomes 'secret' once it enters the intelligence process. Yet the need for secrecy does not just apply to the information itself, but to the methods used to obtain it or the sources it comes from, the secrecy of which must crucially be maintained. Therefore, although intelligence is not only based on classified materials, secrecy is still a prerequisite to ensuring the level of knowledge necessary to prevent and forewarn against hostile threats. This need has to be taken into account for any discussion of the relationship between ethics and intelligence.

The forms of intelligence gathering activities have evolved over recent decades and reflect not only the type of threat being faced, but also political and public perception. The Cold War was an era of spies, of human intelligence ('humint'), and of moles and double agents. As technology advanced in the 1950s and 1960s, emphasis shifted to signals intelligence ('sigint'), i.e. the process of intercepting communications, because technology was seen to be more reliable than the human factor. This was also related to the negative perception that arose as a consequence of the numerous covert action scandals during the Cold War. For a time the focus on technology was less controversial. However, the shock of the 9/11 attacks demonstrated the lack of understanding of the new threat posed by terrorist groups and the need to refocus on 'humint' in response to overwhelming public pressure to prevent further attacks. In parallel, the increased technical capabilities available to intelligence agencies led to signals collection expanding to an unprecedented level, constituting the major part of intelligence gathering efforts.[12] Both are a source of concern for the public today.

Finally, failure on the part of intelligence agencies will lead to grave consequences for national and international security. This context amplifies the sense of urgency and the absolute necessity for effectiveness. Consequently, our understanding of what is ethically acceptable does not apply as easily to the domain of intelligence. In considering the debate and the ability of agencies to respond to the needs of the current era, it is important to understand how the 'specialness' of intelligence is taken into account – if at all – within ethical discourse, the changes to intelligence gathering practices that have emerged in the increasingly globalised environment, and the ethical challenges they pose for intelligence agencies today.

# 3. Classical and current thinking on ethics

"Tough interrogation of Al Qaeda ... thwarted more than 20 plots ... against U.S. infrastructure targets, including communications nodes, nuclear power plants, dams, bridges, and tunnels. A 'future airborne attack on America's West Coast' was likely foiled only because the CIA didn't have ... to treat Khalid Sheikh Mohammed like a white collar criminal."

George Tenet, Director, Central Intelligence Agency, 1996-2004[13]

The use of enhanced interrogation techniques is one of many issues that have resulted in a fundamental questioning of intelligence and its role in democratic societies over the past decade. Yet the case Tenet refers to is also an example of one of multiple intelligence successes leading to the protection of many innocent lives. Deciding what constitutes ethical behaviour can be extremely complex in such scenarios and lies at the heart of this debate.

The concept of ethics is generally based on an understanding of what is acceptable and moral, as determined by the rules and values of a given society; it is "a set of behavioural guidelines based on certain beliefs … regarding the role of intelligence in society".[14] These guidelines include national laws, which limit behaviour, in addition to norms relating to human rights and societal values. In considering intelligence gathering specifically (the main source of recent controversy), the discussion is quite nuanced: "Intelligence is information and information gathering, not doing things to people; no one gets hurt by it, at least not directly."[15] This is an oversimplification however, because if the information leads to a suspect being arrested and flown to an oversees location to be interrogated in a way that is contrary to human rights law, direct harm will result. In fact, ethics is closely linked with law. While the two concepts are clearly distinct, they are often intertwined in the domain of intelligence in determining what constitutes harm, but also because illegal acts are "immoral" in that they breach the rules of society.

For example, espionage in a foreign state might not directly harm an individual, but its very existence begins from an illegal – i.e. unethical – starting point. On this latter point, the most complex questions around intelligence gathering are often based on the interrelationship between ethics and law – what is morally questionable yet legal, or morally justifiable but illegal. For example, the use of enhanced interrogation techniques to prevent a terrorist attack is argued to be morally justifiable, even if illegal, because of the lives it saves. The same argument can be made regarding the collection of foreign intelligence through illegal espionage and mass surveillance. On the other hand, intelligence activities can be legal, but ethically questionable. In the so-called global war on terror, both US vice president Richard Cheney and defense secretary Donald Rumsfeld argued that members of Al Qaeda and the Taliban were not entitled to prisoner-of-war status, so international law was not applicable, allowing for 'non-white collar' treatment.[16] In another case that was technically legal but clearly unethical, the legal definition of torture was limited to such a degree that it was very

difficult to prove, thus facilitating the use of enhanced interrogation techniques.[17] Intelligence gathering will not always be ethical, but neither will it always be legal. Better guidelines for ethical intelligence need to integrate ethics, the concept of harm and law.

An opportunity to do so is provided by considering that the application of ethics to intelligence is not static. The emphasis on societal values allows for ethics to evolve in conjunction with what is seen as acceptable, or legal, and therefore an understanding of ethical intelligence can change over time. The focus on guidelines is useful when considering what concrete measures can be taken to achieve the ethical practice of intelligence. Although intelligence work often takes place within a climate of extreme risk and urgency, as indicated by the case above, this is not the only reality. A distinction is needed between decisions taken and actions carried out in extreme circumstances, and day-to-day activities.

There are two classic perspectives on the application of ethics to espionage in statecraft that are also advocated by intelligence practitioners. Idealists such as Immanuel Kant believed that the use of spies was inherently wrong, that employing the "infamy of others can never be entirely eradicated", and that it will persist after war and undo any peace that exists.[18] In order words, the use of immoral means will lead to an immoral state and therefore weaken security, and so should be forbidden. This perspective is upheld by intelligence practitioners, who see that "no area of human activity, can claim 'an a priori entitlement to require the moralist to be silent', and intelligence should be no exception".[19] While admirable, the nature of intelligence gathering involves illegal and immoral acts, such as foreign espionage. Therefore, applying the idealist perspective (at least in the Kantian sense) essentially means conducting statecraft without an intelligence gathering capacity. This is not possible when dealing with national security, and even less so in the complex threat environment that currently exists.

While idealists focus on the means, realist philosophers interpret the use of espionage and ethics through the results obtained. Classical Machiavellian thinking acknowledged that "although the act condemns the doer, the end may justify him",[20] and so immoral methods are sometimes necessary to protect the state. Other views from intelligence practitioners range from the view that "if there is to be discomfort and terror inflicted on a few, is it not preferred to [its] being inflicted on perhaps a million people?"[21] to "the whole business of espionage is unethical .... It's not an issue. It never was and never will be, not if you want a real spy service."[22] The implications are clear. In order to maintain the civilised world and to protect democratic liberties, there is a need for those who are willing to use whatever means are necessary to protect the state.

Nonetheless, the view that ethics has no place whatsoever in intelligence work is unconvincing, because it implies that the only way to protect a state is to undermine the values that constitute it. However, the less extreme perspective in which the security of the majority – the state – takes priority over that of the individual is significant in demonstrating

that realists do not simply dismiss ethics; rather, they interpret its basis differently, because not engaging in intelligence work would leave the state vulnerable to threats and attacks, which is itself ethically unacceptable.

The ideas behind these classical philosophies are just as prevalent today. Societal norms do not just focus on the majority, but on the civil rights of the individual and human security. This is juxtaposed with the recent return to realist thinking, demonstrated by extraordinary actions taken in relation to rendition and mass surveillance. Nonetheless, caution must be exercised because both the idealist and realist approaches – at least in the classical sense – do not take into account the complexity of current threats. Furthermore, they do not provide concrete guidance to intelligence agencies on exceptional action.

Recent discourse allows for a more nuanced analysis in this regard, drawing on the logic of consequences. One prominent approach is the idea of an "ethical balance sheet"[23] in which the potential harm should be weighed against the potential benefits obtained through intelligence activities. This is similar to the idea of allowing for exceptions in extreme circumstances by prioritising the majority over the individual. However, this approach is seen as too restrictive, since the concept of 'potential harm' can be vague and not easy to understand in practice. It is difficult to assess the level of harm or potential benefits in advance of an act, while the balance can radically change after it has occurred. If a suspected terrorist is tortured due to fear of an imminent attack and is actually innocent, the 'potential' benefits would be unjustifiable in comparison to the harm done in accordance with the ethical balance sheet.

Another 'harm-focused' approach that has gained much traction in recent years is an adaption of the 'just war' theory and the argument of proportionality. It is based on the concept of 'do no harm', in which an assessment should be made of how intelligence activities can impact on an individual's 'vital interests' concretely defined as physical integrity, mental integrity, autonomy, liberty, human dignity and privacy.[24] By their nature, intelligence gathering activities will usually involve some degree of violation, but the idea is that such an assessment will allow intelligence practitioners to differentiate between "the forbidden [torture] and the essential [interrogation]"[25] by applying the following six principles:

> A just cause should be evident and the threat being faced should be sufficient to justify the potential harm caused by intelligence collection; the authority to do what is required must be legitimate and represent the political community; the intention should be clear and the intelligence gathered should not be used for secondary objectives; proportionality should be applied, with potential harm weighed against perceived gains; a last resort approach should be taken in which less harmful activities should be conducted first; and there should be discrimination between legitimate and illegitimate targets.[26]

As a result, efforts will always be made to limit harm, and action will take place within a justified framework. Yet critics of the just intelligence approach point out that it is limited to legal activities, and refer to the obvious incompatibility of applying just war perspective to activities that are illegal and criminal.[27] Nevertheless, it can be equally argued that just war theory is suitable, given the intricate interrelationship between ethics and law in the domain of intelligence and the types of activities used to secure the state. However, there is a need to recognise that the context of intelligence requires some adaptation and flexibility.

The brief review above outlined the main theoretical approaches to the complex dialectic between intelligence work and ethics. However, a number of new trends have emerged in the practice of intelligence in the 21st century that pose challenges not only for ethics, but for intelligence work itself. An understanding of the impact of globalisation on intelligence, therefore, is key to comprehending the core dilemmas that impact on the ethical practice of intelligence gathering today.

# 4. 21st century intelligence: new challenges for ethics

Although intelligence has always been a central part of maintaining state security, the era of globalisation has transformed the environment in which intelligence services operate. There has been an increase in the number and complexity of the threats that intelligence agencies are struggling to respond to, while intelligence work increasingly occurs in the public sphere, with policymakers highlighting more and more the crucial role of intelligence in justifying policy decisions. The discussion that follows is not exhaustive, but outlines some of the main trends that have emerged and the challenges they pose for ethical intelligence gathering.

## 4.1 The changing nature of threats

The threats that top national security agendas in democracies today are interconnected, borderless, state-based and vast in number. State-based threats are perhaps seen as more traditional and therefore more manageable, but the speed and unpredictability of the Arab Spring, for example, was unforeseen by intelligence agencies, while the situation in Syria is continually volatile. At the same time, the majority of security challenges are borderless, conducted by non-state actors or isolated cells that are more difficult to track, as well as by lone-wolf perpetrators loosely associated with terrorist organisations such as Al Qaeda and the Islamic State, which are extremely difficult to identify. In addition to hard security threats, intelligence agencies have seen a widening of their responsibilities: issues ranging from potential pandemics to the effects of climate change are all becoming part of the intelligence agenda. Agencies are struggling to be effective, and their ability to do so, while increasing the focus on ethics, is one of the core difficulties they currently confront. It is for this reason that the dialogue on what constitutes ethical intelligence must progress.

## 4.2 Technology

Technology has transformed the strategic environment in which intelligence agencies operate. It has enabled agencies to have a far wider reach and has given them access to more information than ever before. Yet it has exacerbated the threats that agencies are facing by significantly increasing the interaction among state entities and non-state entities threatening state security. It has also led to incredible pressure on agencies, as executive decision-makers now expect immediate, real-time intelligence, and intelligence producers have to compete with the wide variety of online, unverified information available to their consumers. While some see opportunities in the high-tech capacity of intelligence collaboration,[28] which has become a necessity to protect the state, the reaction of civil rights groups raises fundamental questions about the appropriateness of technical means of intelligence gathering and their regulation. The Edward Snowden revelations brought this to the fore in illustrating the wide disconnect in public opinion on surveillance. While advances in technology should be seen as providing opportunities to intelligence agencies, how they should adapt while maintaining civil liberties remains unknown.

### 4.3 Outsourcing

In response to the pressures of current threats and the demand for real-time reporting, a significant response by agencies has been to outsource intelligence responsibilities. Edward Snowden's access as a private contractor and his leaking of up to 200,000 secret files raised key questions about the degree to which private sector companies should be used to perform state functions. Agencies have also outsourced operations and interrogation activities to private military companies who are not subject to the same regulations as state agencies, making it more difficult to monitor abuses and prosecute crimes.[29] These examples are representative of a wider trend that the overwhelming pressure to respond and the opportunities afforded by technology have led to a dramatic increase in the outsourcing of intelligence work to private sector entities. States will continue to depend on private sector support and expertise to respond to the challenges and technological environment that they face. Improved oversight and regulation are a necessity.

### 4.4 Cooperation

A global response is needed to global challenges, and the 21st century has seen a veritable explosion of intelligence sharing, which is now less the "supporting arm of defence and diplomacy, instead becoming … the cutting edge of foreign policy".[30] In fact, according to the CIA deputy director of operations, between 2001 and 2005 "virtually every capture or killing" of suspected terrorist was the result of international cooperation.[31] While such cooperation is logical due to the benefits of burden sharing and increasing access to equipment, expertise and technology, it lies at the crux of the tension that exists between ethics and intelligence. While many international partners have similar rules and values, others "make strange international bedfellows, with profound implications for foreign policy, civil society and human rights".[32] Furthermore, agencies have also been accused of deliberately subcontracting intelligence activities to allied agencies, thereby technically adhering to national ethical and legal obligations, but in the knowledge that partner agencies may not or do not do so. Even if sought, agencies often have little (if any) control over how partners acquire information, and whether it is done according to the same standards and ethics as their own. Finally, agencies also provide information to partners that may or may not be used in ways that are contrary to national law and democratic values. Overall, since the majority of intelligence relationships fall under non-treaty arrangements in international law, they are flexible and not legally binding,[33] making it much easier to work under the radar and avoid regulation. Moreover, public enquiries into extraordinary rendition and surveillance have demonstrated that agencies have knowingly and deliberately circumvented national laws and ethical values with the knowledge of their executive. While cooperation is necessary to respond to current threats, therefore, it has also created an ethical vacuum that allows intelligence agencies to avoid oversight and accountability.

### 4.5 Norms and values

The 21st century has seen increased numbers and types of threats in a technologically complex world, and a resulting increase in new forms of intelligence production. The lack of clarity in deciding on what is ethically acceptable and under what circumstances is both a reality and a responsibility. The earlier discussion on ethics indicated that norms and values can be expected to change over time. Covert activities were justified by decision-makers during the Cold War, but there was strong public criticism and the reputation of intelligence agencies suffered. Currently the normative dimension of democracy is arguably stronger because of increased transparency and the multitude of stakeholders involved in governance. As a result, the return to a similarly controversial situation in which intelligence services continue to obtain information through ethically questionable or illegal methods poses serious challenges for democracies. Yet the reaction of the public to the more recent scandals has been quite nuanced. While there has been clear outrage among civil society groups and certain segments of the public, the perceived terrorist threat seems to have also led to a surprisingly muted reaction. Polls indicate that members of the public in several countries support mass surveillance as an acceptable method of intelligence collection.[34] Additional surveys even indicate acceptance of enhanced interrogation techniques.[35] There is a sense that societal norms are in flux, and it is very difficult to require intelligence agencies to adhere to an ethical basis that is unclear. How this situation unfolds in the future will determine the limits of what is ethically acceptable and the context in which intelligence agencies will operate.

# 5. Three dilemmas: ethical intelligence in practice

The overview of intelligence and globalisation has highlighted a number of emerging trends. These reflect a critical debate around three specific intelligence dilemmas that may have existed as long as intelligence has been a tool of statecraft, but which are particularly complex today.

### 5.1 Ethics in practice: public vs primary goods?

At the core of the debate on ethics and intelligence is the dilemma between public goods (national security) and primary goods (individual security). This dilemma is ever present, because primary and public needs are intertwined and neither can be completely fulfilled at the same time. For example, privacy is an individual, primary good, but when information on an individual is part of an intelligence dossier, that individual's privacy becomes part of national security, which is a public good. Moral questions surrounding mass surveillance or interrogation methods become far more complex when one considers their use not as unethical as such, but as a prioritisation of national security – the security of the majority – over the security of an individual. A crucial question is whether all intelligence activities potentially involve the violation of primary goods, and whether it is possible for any intelligence activities to occur without violations. Since multiple forms of gathering exist, one must consider how different forms of intelligence impact on different vital interests and the proportionality of their use.

Proponents of open source intelligence would emphasise that its use can be justified, since the collection of information in the public domain does not involve violating privacy and intelligence actors are not responsible for placing it there, thus collecting it is not a breach of ethics. While it can be added to a secret dossier with the potential to cause either physical or mental harm, the act of using open source information alone does not do so. Because signals intelligence is based on intercepting communications, it does not cause direct physical or mental harm, but, excluding open sources, it can impact on an individual citizen's liberty, dignity and privacy to a potentially very invasive degree. It is governed by national law, in which security actors must present sufficient evidence in order to obtain a surveillance warrant. However, in recent years it is the sheer quantity of surveillance that takes place without the public's knowledge that is ethically questionable. In fact, individual cases have been declared illegal in the UK and by the European Court of Human Rights.[36] Yet one could also argue that metadata does not focus on the content of communication, but on sender-to-recipient details, therefore in the collection phase it is of limited harm. Furthermore, critical questions also emerge on how realistic privacy even is in today's online world[37] (constituting a discussion that is beyond the scope of this paper), because it can be argued that such techniques are simply a reflection of available means, and not to do so would leave intelligence agencies at a considerable disadvantage – and public security by extension.

Human intelligence, on the other hand, has the potential to cause considerable harm during its collection. National agencies may recruit foreign agents, and if their operatives are based in a foreign country under unofficial cover, this involves deception and manipulation, since espionage is illegal. From an ethical point of view, this has implications both for the intelligence operative and the individual supplying information by creating a situation that could lead to considerable mental harm, puts informants at risk of physical harm, and has obvious implications for liberty. The controversial use of enhanced interrogation techniques indicates the prioritisation of public goods over primary goods, because terrorist attacks have facilitated a context of mutated norms in which torture came to be seen as necessary for combating terrorism.[38] So while legally unacceptable, it was seen as a compromise worth making, a "vital counterterrorism tool"[39] for the protection of the state and its citizens. Yet the effectiveness of torture has been increasingly called into question,[40] while there is also evidence that it was not used as an "exceptional" last resort.[41] The use of torture was facilitated not only by limiting how it was defined, as mentioned earlier, but the apparent encouragement of psychologists in the creation of "permissive ethical guidelines" to "continue to participate in harsh and abusive interrogation techniques being used … after the September 11 attacks on the United States".[42] Such excessive and sustained efforts to permit unethical and illegal behaviour are blatantly unacceptable in the eyes of the public – and even the intelligence agencies themselves.[43]

Although trade-offs between primary and public interests will be necessary in order for agencies to work with urgency and effectiveness, such circumstances must remain extraordinary. Even though support from society for extreme measures may exist, it is dependent on such measures being justified and necessary. The public enquiries and the increasing involvement of civil society demonstrate that more actors are now involved in the discussion on how intelligence agencies should balance primary and public interests. This will require considerable change to the static organisational culture of agencies, many of which have existed since the mid-20th century.

### 5.2 Ethics in practice: wartime vs. peace?

Different rules apply in war and peace. The classical debates on ethics and intelligence are based on this distinction. The challenge for the modern world is that such a distinction is no longer evident. With the ever-growing danger from asymmetrical threats, we are in a new era of instability, of conflictual peace, in which threats are heightened and pressure on intelligence agencies is increasing. The challenge is in knowing when to apply wartime exceptions in societies living according to peacetime norms.

At the heart of this dilemma is the normative debate on intelligence. Intelligence is not a case of black or white, but operates at the heart of what can be considered an ethically grey

area. Our understanding of it has also evolved over time. We have moved from an era in which "no one respects the character of a spy" to perceiving intelligence as a "distasteful but vital necessity". In today's world, the nuclear risk that "justified" Cold War covert activities is distant, but the ever-present threat of terrorism has led to the "willingness to tolerate extraordinary measures to counter a threat to our survival".[44] At the same time, how wars are fought matters considerably more today. The concept of "moral injury" has emerged:

> While perceptions of justice … have always mattered in human conflict, they matter more in the "information age" than they ever have. These perceptions help determine the psychological aftermath of war as well as inspire and maintain the will to fight that ultimately "wins" wars.[45]

The recognition today of the need to 'win hearts and minds' applies as much to intelligence as military action. In a world in which perception has a major influence and is used so effectively by enemies of the state, governments and their agencies may need tools such as mass surveillance, but they have to be used in a way that is supported by the public. The US Patriot Act, a "vital" weapon against terrorism,[46] was created in an opaque way that did much to damage the reputation and legitimacy of US intelligence efforts among the public. In the future, one way to rebuild trust in intelligence agencies is to consider the just intelligence approach, which would be very suited to this increasingly normative context. It could provide intelligence agencies and executive decision-makers with useful guidelines on what is acceptable or not in the era of conflictual peace, thus allowing for the justification of necessary extreme measures.

### 5.3 Ethics in practice: the ethics-effectiveness trade-off?

The need for intelligence agencies to operate at the highest levels of efficiency is crucial, considering the potentially fatal consequences for national security if they do not do so. The emphasis on ethics is often understood as placing a constraint on intelligence gathering activities, resulting in reduced effectiveness in some form of ticking time-bomb scenario, as mentioned earlier. Indeed, the unfortunate reality is that intelligence officers are – and will continue to be – faced with impossible situations in which they have to weigh the rights of the individual against those of the public to ensure the effective protection of national security. It is to be hoped that extreme cases remain rare, but there is a need for a better understanding of what guides the decisions that are taken in this context.

The majority of intelligence work takes place in less heightened circumstances, but the application of ethical considerations is seen to impede the autonomy (and thus the effectiveness) of intelligence agencies. Such a focus is incorrect. Firstly, intelligence agencies will never be fully autonomous. They are part of the government bureaucracy, and "the very nature of democracy is that it not only does, but should, fight with one hand tied behind its

back".[47] As a result, agencies currently exist and will continue to exist in a context of rules and procedures. Therefore, the juxtaposition of ethics and effectiveness is redundant. Rather, the discussion needs to focus more deeply on how to develop a more efficient balance between the two.

Secondly, the resulting implication is that unethical intelligence will be more effective. This argument is flawed. Putting open source intelligence collection aside as the least intrusive form of intelligence gathering, signals intelligence is a necessity in the modern world, and the argument is that by focusing on it, agencies are simply utilising the tools available. However, criticism has been levelled against the enormous amount of data that has to be analysed, the expensive technology required to collect it, and the continued inability of big data to explain how individuals think. Because it constitutes the most risks to vital interests, one would assume that the effectiveness of human intelligence must outweigh the ethical compromises made to assure national security. Yet reports on the quality of the information obtained through enhanced interrogation techniques have indicated the production of false and unreliable intelligence not only without any guarantee of effectiveness, as indicated earlier, but, in fact, with the potential to reduce it.[48] Furthermore, the current blurring between intelligence and police work – in prosecuting terrorist suspects, for example – means that these forms of intelligence collection are problematic, because illegally obtained information is not admissible in court. This does not mean that surveillance is without value, but an overreliance on such methods is not necessarily the most effective approach – and is certainly not the most ethical.

Consequently, it is important to understand why intelligence agency officers have used unethical methods to such an extent. It is perhaps explained by the post-9/11 environment, in which:

> It felt like a 'ticking time bomb' every single day. In this atmosphere, time was of the essence. We had a deep responsibility to do everything within the law to stop another attack. We clearly understood that, even with legal and policy approvals, our decisions would be questioned years later. But we also understood that we would be morally culpable for the deaths of fellow citizens if we failed to gain information that could stop the next attacks.[49]

According to the CIA in response to the US Senate Select Committee report on rendition, legal and ethical concerns were absolutely present, but with an exclusive focus on national security. Moreover, executive involvement in approving these activities is significant. Their involvement is often reactionary – a response to public pressure – leading to the approval of methods that might not be the most ethical or effective, and can undermine a state's reputation.

Intelligence agencies are being confronted by more deadly and less traceable threats than ever before. The public and human rights groups have accepted the exceptional status of intelligence as a result.[50]  If there is greater communication on the ethical framework guiding intelligence work, and if there is an unambiguous structure that balances harm and proportionality, then intelligence work can become more ethically acceptable without impacting on effectiveness. After all, intelligence will never be perfect, but the "overall test … is whether those approving [intelligence operations] feel they could defend their activities before the public if the actions became public".[51] The 'just intelligence' approach has much to contribute in this regard.

## 6. Prospects for a 'just future'

Intelligence agencies are currently confronting complex threats that go beyond borders and span all domains. In order to respond to this environment, agencies need to cooperate with allies, share the burden and work with specialised private sector companies, and harness the assets available to them through technology, all while operating within the transparent, normative requirements of democratic society. The result is an awkward coexistence of ethical needs and effective intelligence, while balancing primary and public goods, in an era of conflictual peace.

Although the need for exceptional behaviour is accepted, the sustained extent to which norms were violated in recent scandals, not just by agencies, but with executive collusion, seems more a case of a dismissal of values rather than a trade-off, and is clearly unacceptable. It is time to dismiss the belief in both the 'inherently unethical' nature of intelligence and the 'absolute' need to be ethical without compromise. The reality is that intelligence work is already ethical, but with serious shortcomings. A just approach demonstrating proportionality, necessity, and the weighing of harm and benefits will be more effective. The debate needs to focus on how to institute such an approach as normal intelligence practice, and for this to happen more effective regulation is needed.

Consequently, one approach in moving forward should be the evolution of oversight structures that emerged as a result of numerous scandals during the Cold War and are seen as mainly reactive – "fire fighters" – within a national focus.[52] Oversight structures are naturally limited because different rules and procedures exist and the ability of oversight committees to access information is limited because of the potential consequences for security. This is even more problematic in the case of intelligence cooperation – one of the main current trends – because it is not possible to compel a foreign agency to participate in oversight procedures.

The extraordinary rendition scandals in the post-9/11 era exposed this, together with the lack of government control over how intelligence cooperation was taking place. During the enquiries that followed the rendition scandals, the executive and agencies actively impeded the accountability process, using "all legal measures" to prevent information on their activities from being revealed,[53] and in particular using the fear of being cut off from valuable intelligence-sharing relationships. In 2013 the mass surveillance revelations demonstrated the dual nature of cooperation when German outrage over the tapping of Chancellor Angela Merkel's phone was followed by disclosures of the extent to which German intelligence worked closely with the US National Security Agency to produce metadata on European companies and governments.[54]

Both cases demonstrated collusion on the part of governments and set them against the public. Furthermore, the June 2016 Chilcot Report on Britain's involvement in the 2003 war in Iraq placed particular emphasis on the flawed nature of the intelligence used to justify

joining the war (obtained through cooperation with the US and Germany), and on the finding that the mishandling of this intelligence "may now have permanently damaged the public's trust in [Britain's] spy agencies".[55] Intelligence cooperation is essential, but the more agencies and governments use it to circumvent national regulation and oversight, the greater the impact on their credibility and legitimacy, and on the effectiveness of the intelligence they obtain as a result.

One response to this has been the idea of creating "fair trade intelligence", in which responsibility is placed on the individual analyst to ensure that intelligence is obtained in an ethical and reliable way.[56] However, the present author acknowledges that while this may work in some cases, the reality is that agencies often do not have a choice in who provides the intelligence and we thus return to the question of prioritising the primary needs of an individual (who will already have been harmed by the time the intelligence is made available to the analyst) or the public need for security in obtaining the intelligence needed to prevent an attack.

Nonetheless, frustration with state-based oversight has led to innovative and creative alternatives. Civil society actors are following intelligence agency work more closely, and there has been an increase in detailed reporting on intelligence activities by groups such as Privacy International,[57] along with a closer examination of current oversight weaknesses. This has not only taken place at the national level,[58] and the level of regional and international efforts to improve oversight capabilities has also increased.[59] There is now more interaction among actors in combining national and international efforts. The National Parliaments-EU Parliament conference on oversight, as part of the 2014-2019 agenda, is an example of this.[60]

With regard to intelligence produced from surveillance, the fundamental issue of what privacy means in the digital age and how individual rights are balanced against security is now being addressed. David Omand, the former director of GCHQ, has proposed a "just intelligence" approach to the use of surveillance, which would then be endorsed by national parliamentary oversight committees.[61] The United Nations (UN) has also supported such an approach, as have international civil society experts, outlining the need for the necessity and proportionality of surveillance.[62] Such proposals combine the need for an ethical framework with the need to inform and reassure the public, and indicate the adoption of the "just intelligence" approach. At the international level, regulation measures exist, for example, the UN General Assembly Resolution 69/166 on "The Right to Privacy in the Digital Age".[63] Digital rights groups have also emerged and are interacting with other forms of oversight, for example, in organising training sessions with members of the European Parliament.[64]

While these proposals can improve the oversight and regulation of ethical intelligence work, the outsourcing of intelligence activities cannot be regulated in the same way. Private military

companies and other non-state partners are not subject to the same legal frameworks and obligations as state agencies. One method would be to hold the approving government agency to account if abuses occur. However, proving an abuse is quite difficult, and even when cases of abuse are legally proven, information on approval processes is often vague[65] and so it is very difficult to hold individuals responsible. With specialised agencies, such as Booz Allen Hamilton, the risks include the vulnerabilities created by giving non-government actors access to extremely sensitive information and how to ensure that sufficient security protocols are applied. In the case of the Snowden leaks, Booz Allen was cleared of wrongdoing.[66] In the future, because governments will continue to rely on and probably increase their dependence on private actors, to do so credibly will require transparent protocols for regulation. A set of 'just intelligence' guidelines that could involve and apply to both private sector and state agencies involved in intelligence work, would facilitate the oversight process.

However, these efforts cannot be successful without the better involvement of intelligence agencies themselves. Overall, there needs to be a better understanding on the part of political leadership and the public of what intelligence agencies can and cannot do. One of the recent challenges has been the level of extreme pressure and executive collusion, creating an environment of politicisation. Organisational structures and processes are a means of controlling intelligence agencies, but also a means of instituting norms and standards. Intelligence agencies benefit and receive protection from politicisation through the standardisation of procedures and transparency regarding decision-making. It is therefore in their interests to submit to such procedures. For this to occur effectively and for regulation efforts to improve, there needs to be more equal involvement among agencies, the executive and actors involved in oversight, so that the necessary changes can be introduced in a way that does not put sources and methods at risk.

It should be noted that intelligence agencies and governments have been making greater efforts to respond to the situation. In 2014, the US Directorate for National Intelligence released the "Principles of Professional Ethics" as a permanent set of guidelines for the intelligence community.[67] In the same year the Dutch Ministry of Security and Justice commissioned a report entitled "Handling Ethical Problems in Counterterrorism", which contained an inventory of methods to support ethical decision-making.[68] In 2015, the UK Intelligence and Security Committee of Parliament released a report on privacy and security, with extensive recommendations for change.[69] In 2016, the head of the BND (Germany's foreign intelligence service) was "unexpectedly" sent into retirement following criticism levied against the agency for its cooperation with the NSA on European targets, with multiple changes expected as a result of ethical concerns.[70] On the other hand, France has recently come under scrutiny for a possible "French-style Patriot Act",[71] as has Australia for passing legislation to facilitate mass surveillance.[72] Yet media attention immediately focused on

the opaque approach taken by these governments and the implications of the proposed legislation for civil liberties. Therefore, while agencies alone, or on the orders of their governments, may try to return "to the shadows", the opportunity to do so is becoming more limited.

# 7. Conclusions

This paper set out to analyse current thinking on the role of ethics in intelligence, the challenges posed to its practice and future prospects in this regard. Doing so required asking the question as to whether intelligence agencies can protect national security without stepping back into the shadows of secrecy and controversial behaviour that has led to decades of scandals. The response is that they must. The level of secrecy and autonomy accorded to intelligence agencies in past decades no longer exists. The main challenge for such agencies is to bridge the 20th century organisational structures and procedures with the 21st century security environment. Just as members of the public need to adapt to a new era of less privacy, so do intelligence agencies. The need for secrecy will continue to be essential, but better efforts need to be made to balance agency independence and effectiveness with individual security, democratic values and law, and how these concerns converge in intelligence gathering activities.

Three interlinked ethical dilemmas emerged as particularly complex within this context. The first centred on the prioritisation of primary (individual) security or public security. The second involved how to adapt ethical thinking that was created on the basis of a distinction between war and peace to the demands of the modern era of conflictual peace. The third focused on the assumed juxtaposition of ethics and effectiveness in intelligence work. Of the multiple theoretical perspectives considered, the 'just intelligence' approach emerged as the most suitable in response to all three dilemmas. It allows for a balancing of the need for exceptional action with ethical guidelines reflective of current societal norms. It sets out the conditions for proportionality and the consideration of potential benefits and harm resulting from activities that impact on primary and public security. As a result, it demonstrates that ethics and effectiveness are not mutually exclusive, although balancing the two is not easy. Further efforts are required for the systematic development and inclusion of the just intelligence approach as part of day-to-day intelligence practice.

The increasingly transparent environment in which intelligence gathering takes place has only led to challenges but has also created opportunities. It has enabled the opening up of the intelligence 'black box' and the potential to change ideas, cultures, conduct and the frameworks within which intelligence agencies operate. Furthermore, the debate on the ethical practice of intelligence gathering has been strengthened by the involvement of multiple actors on the national, regional, and international levels. Although difficult ethical decisions will continue, a more inclusive approach involving all relevance stakeholders would facilitate the creation of 'just' guidelines to allow intelligence agencies and policymakers to rebuild trust and operate more effectively in today's public environment. Finally, many proposals and policies are new and unproven but they nonetheless demonstrate the opening of more channels than ever before to achieve a better balance between individual rights and national security, between ethics and effectiveness in democratic societies.

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