

**Waterboarding, rendition, secret flights and secret prisons:
degeneration or fruition of intelligence
in the fight against terrorism?**

– Paper presented within a EENET workshop* –

Bob de GRAAFF – University of Utrecht
e-mail: ani@sri.ro

Abstract:

This article examines the new developments in the field of intelligence with an impact on the ethical framework of intelligence activity, urging the re-questioning and rethinking of the role of ethics in this profession. Easing the tension between intelligence effectiveness and moral standards is a challenging task, albeit one which will trace the course for intelligence recognition or intelligence degradation in a democratic society.

Keywords: intelligence ethics, intelligence methods, intelligence profession.

To bridge the tension between on the one hand effectiveness, such as intelligence and security services or their political sponsors want, and on the other hand the moral standards that from a broader social context are set for these services, the criteria of proportionality and subsidiarity have been developed.¹

These criteria imply that a certain relationship must exist between the purpose of intelligence gathering and deployed intelligence resources (proportionality) and that no resources are to be used for intelligence gathering in cases where the information could be obtained with much less intrusive methods (subsidiarity).

I will now briefly discuss some of the intelligence methods used in the context of the so-called war on terror, in particular to try to answer the following questions:

1. Are there any new developments that are relevant to an ethical analysis?

¹ They make a comparison with the theory of just war possible and can also be found back in the Dutch Law on Intelligence and Security. Several writers on ethics and intelligence use the theory of just war as a starting point e.g. J.M. Olsen, *Fair Play. The Moral Dilemmas of Spying*, Washington D.C. 2006, pp. 20-22; D.L. Perry, *Partly Cloudy. Ethics in War, Espionage, Covert Action, and Interrogation*, Lanham, MD, etc 2009, p. 95; M. Phythian, "Intelligence theory and theories of international relations. Shared worlds or separate worlds?", P. Gill, S. Marrin and M. Phythian (eds.), *Intelligence Theory. Key questions and debates*, London/New York 2009, p. 64; P.H.J. Davies, "theory and intelligence reconsidered", *ibidem*, p. 200.

2. is the existing ethical framework sufficiently developed and does it proffer sufficiently clear criteria for intelligence staff in practical situations to make ethically justified decisions?

3. do the intelligence resources that are used live up to the criteria of proportionality and subsidiarity? and

4. are they effective?

1. What are new developments in the field of intelligence?

I would like to summarize the new developments that are relevant for this argument under the term “blurring of the lines”. I will briefly mention some of these developments, each time immediately followed by the consequences they have. The blurring of distinctions occurs in many fields, primarily in the US, but to a lesser degree also in other parts of the Western world. In the first place in the socio-political context in which intelligence and security services operate:

1. The difference between international and national threats diminishes. Result: the distinction between offensive intelligence gathering abroad and the protection of national security and the democratic order at home becomes obscured; the distinction between national citizenry and citizenry of the world falls away;² residents and citizens of one country may be subject to the legal system of another country or even be kidnapped or slain by a foreign power; furthermore, the system of “targeted killings” threatens to expand over ever wider categories;³

2. the distinction between personal and public life fades. Result: interference with privacy by the government can easily be explained away; in principle, the private sphere, therefore, has been eliminated;⁴

3. the distinction between public and private activities blurs in the field of security (this applies to both police and surveillance and military and intelligence functions). Result: there is a situation likely to arise in which what the government is not permitted is carried out by private services, which

² Th. Darnstädt, *Der globale Polizeistaat. Terrorangst, Sicherheitswahn und das Ende unserer Freiheiten*, Hamburg 2009; A. Mattelart, *The Globalization of Surveillance*, Cambridge / Malden, MA, 2010.

³ C. Whitlock, “Afghans Oppose U.S. Hit List of Drug Traffickers”, *Washington Post*, 24 October 2009.

⁴ Cf. P. Schaar, *Das Ende der Privatsphäre. Der Weg in die Überwachungsgesellschaft*, München 2007.

are subject to less stringent standards; furthermore, the public-private mix may lead to incestuous relationships and breaches of integrity;

4. partly due to the great pressure of time in which authorities believe they are due to the threat of terrorism, especially in the case of possible use by terrorists of weapons of mass destruction, rational decision-making is more and more replaced by instinctive and improvisational acting. Result: possible consequences of action are getting less thought out, there is an unbridled desire for action, without much intelligence, both in the sense of brainpower and in the sense of prior information-gathering.

Intelligence itself also changes character:

5. the succession of distinct intelligence activities as parts of a continuous intelligence cycle makes way for parallel core intelligence activities. Result: intelligence officers get less guidance and (re)direction from either outside or above; their work is increasingly based on trial and error;

6. as a result of the information revolution, intelligence and security services use open sources more and more frequently. Result: the distinction between information and intelligence fades, as reflected in the frequent use of data mining, profiling and pattern recognition by intelligence and security services, contributing to a situation where, in principle, every citizen swims into the dragnets of a secret service, a situation in which every citizen is suspect, unless...;⁵ the outcry that Western states have become surveillance states, that gather more and more data about their citizens and make the standard deviation an increasingly important criterion for their citizenries, is becoming louder and louder;⁶

7. the gap between policy formulation or decision making on the one hand and intelligence on the other gets filled: the distinction between strategic and tactical operations, including strategic and tactical intelligence, is also likely to disappear.⁷ Result: decision-makers become their own

⁵ Cf. B. de Koning, *Alles onder controle. De overheid houdt u in de gaten*, Amsterdam 2008, p. 18.

⁶ E.g. S. Harris, *The Watchers. The Rise of America's Surveillance State*, New York 2010; M. den Boer and J. van Buuren (eds.), *Door het oog van de staat. Publieke controle op de burger*, Amsterdam 2010.

⁷ Vgl. UK Ministry of Defence, *Joint Doctrine Note 1/10. Intelligence and Understanding*, Shrivenham 2010, pp. 1-6.

intelligence analysts or try to micromanage intelligence operations.⁸ This politicization of the intelligence process either leads to demoralisation in the intelligence community because the lack of recognition of its professionalism or to the delivery of “intelligence to please”;⁹ the politicization of intelligence also implies a concentration on today's problems with too little attention to the problems of tomorrow;

8. secret services have increasingly become part of the public domain and debate. The result: political pressure on intelligence and security services, partly again due to a public pressure; the increased transparency of intelligence and security services since the end of the Cold War has not been accompanied by an effective management of public expectations; on the contrary, politicians have been selectively peddling intelligence to the public that was based on dubious sources and thus ultimately became the victims of their own “information policy”; in order to prevent image damage of politicians intelligence and security services had to suffer loss of prestige;

9. the distinction between military and civilian intelligence fades. Result: in the US, according to insiders, the CIA and the Pentagon increasingly resemble each other;¹⁰

10. the distinction between intelligence analysis and intelligence operations is weakening. Result: this may not only cause amateurism that

⁸ The former was the case with the Dutch prime minister on the eve of the Iraq war, the latter with President Bush, who during daily briefings so interfered with operational details that presidential pressure on the staff of intelligence and security services led to professionally and ethically irresponsible performance. One can also think of the actions of Vice President Dick Cheney, who in the run up to the Iraq war visited the CIA as many as eight times, and not to be informed, Th. Powers, “The CIA and WMDs: The Damning Evidence”, *The New York Times Review of Books*, 19 August 2010. Or think of the Abu Ghraib affair (Cf. Perry, *Partly Cloudy*, p. 86) or of the so-called proof of a relation between Saddam Hussein and Osama bin Laden, known on the eve of the American invasion of Iraq as “the Big Lie”, J. Kiriakou, *The Reluctant Spy. My Secret Life in CIA's War on Terror*, New York 2009, p. 152.

⁹ E.g. Kiriakou, *Spy*, pp. 156-157 en 162. Cf. the remark by an employee of the National Intelligence Council Fulton Armstrong about the “pressure” by Cheney and other members of the Bush administration and “the power of an administration's flattery”, Armstrong, “The CIA and WMDs”.

¹⁰ S. Shane, M. Mazzetti and R.F. Worth, “Secret Assault on Terrorism Widens on Two Continents”, *New York Times*, 14 August 2010; Kiriakou, *Spy*, p. 104.

affects the “victims” of intelligence or the quality of intelligence analysis, it can also be dangerous for intelligence personnel, as showed in late 2009 in Afghanistan when seven employees of the CIA working at the intersection of both disciplines were blown to pieces in a suicide attack by an informant;

11. the distinction between intelligence and covert operations is reduced. Result: the American practice, in which the two have been brought together long ago, shows that historically ninety percent of all criticism and moral indignation about the CIA is not about intelligence in the strict sense, but concerns the covert operations; a mixture of both therefore threatens to affect intelligence in an ethical sense;

12. intelligence gathering and law enforcement seem to merge. Risk: police threaten to develop into secret police and to the intelligence and security services executive powers are made available that had so far been denied to them in some western countries on the basis of experiences during the Third Reich.

The combined threat of terrorists and weapons of mass destruction has also contributed to the blurring of distinctions.

13. the distinction between war, terrorism, guerrilla and insurgency is fuzzy. Consequence: it is nowadays easy to view any form of conflict as part of a global conflict, a global war on terror or a global counterinsurgency, also thereby threatening the transplantation of methods that a government considers acceptable as part of a counterinsurgency to the national territory;

14. terrorism moves at the interface between crime, warfare, a social problem and a threat to national security and the democratic order. Result: precisely because the phenomenon of terrorism crosses different domains of government, a government that pursues a comprehensive approach or a grand strategy against this phenomenon may become seduced to refurbish a political structure that is the more or less balanced result of decades or even centuries of building, or may even be seduced to partially demolish it;

15. self-defense and pre-emptive actions seem to be synonymous, i.e., defense and aggression begin to resemble each other;¹¹ this is also due to the fact that the boundary between (political-military) power and powerlessness is fading. Result: in their fight against terrorists governments begin to appear much the same as their opponents (by using such tactics

¹¹ Cf. M. Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror*, Toronto etc., 2004, p. 164.

as unexpected attacks, kidnapping, humiliation and assassination as well as showing an unwillingness to negotiate) and are consequently losing the moral high ground;

16. the difference between war and peace has become rather unclear. One result: in particular the status of prisoners in the fight against terrorism is unclear: is he a prisoner, a POW, the subject of protective custody, known as *Schutzhaft* at the time of the Nazis, or is he withheld from the public eye as a *Nacht und Nebel* detainee?;

17. more than during the Cold War the war on terror has created a dependence on non-Western intelligence and security services that use other legal and ethical standards than their Western partners use(d) to maintain.¹² Result: Western governments are at risk of becoming guilty of torture and murder by proxy; a lack of clear ethical guidelines in respect of foreign liaison already leads sometimes to qualms among employees of intelligence and security services;¹³

18. authorities, including law enforcement, act, both nationally and internationally, increasingly on the basis of assumptions rather than on the basis of evidence. Result: not only does the blurring between evidence and suspicion arise in national legal systems, partially as the result of a more general prevention optimism, but this blurring also manifests itself in the international arena; this blurring was perhaps the most clearly summarized in the so-called “one-percent” or Cheney doctrine, which states that if there is a one percent chance of a nuclear threat by a terrorist group the U.S. government will have to treat it “as a certainty in terms of our response”.¹⁴

19. governments assess people increasingly on the basis of their ideas and intentions rather than according to their actual deeds. Result: the attention of governments, especially in the radicalization discourse, for what they deem dangerous thoughts and intentions of citizens has been an essential contribution to the beginning of the creation of a thought police and has much contributed to mutual distrust among their citizens;

¹² E.g. Kiriakou, *Spy*, pp. xv-xvi, 99-100, 106, 122-123, 142; K. Silverstein, “Official Pariah Sudan Valuable to America’s War on Terrorism: Despite Once Harboring Bin Laden, Khartoum Regime Has Supplied Key Intelligence, Official Says”, *Los Angeles Times*, 29 April 2005.

¹³ For an example from the practice of the CIA see Perry, *Partly Cloudy*, p. 99.

¹⁴ R. Susskind, *The One Percent Doctrine. Deep Inside America’s Pursuit of Its Enemies Since 9/11*, London 2007, p. 62.

20. the difference between traditionally democratic states and dictatorships has become less obvious. Result: it can not be excluded that individual officials of Western countries are now at risk of prosecution for war crimes, and e.g. the United Kingdom has on inter alia the length of detention without charge been ranged by some human rights watchdogs in the category of countries such as China and Russia.

2. The ethical framework

It is already difficult enough to develop a professional ethics for intelligence officials. A basic problem for intelligence and security services in democracies is the question: for whom do they and their employees work, to put it differently: what is the good cause they serve in operations that under other circumstances would be characterized as unethical? There is a reluctance to say that intelligence personnel works for the (incumbent) government and in the run up to the Iraq war it became once again apparent that there are risks involved in serving the immediate policy objectives of the incumbent government; therefore it is said that intelligence and security services work not for the government, but for the state, for the people, in the national interest, for a just cause or in the spirit of the constitution. But in practice, these services and their employees have to decide themselves in individual cases as to what the state or the people want and what the national interest, the good cause or the spirit of the constitution implies.

Another important ethical issue for intelligence and security services is the balance between freedom and stability. In the ethical framework that dominated during the Cold War freedom was a value of paramount importance. After the wars in Afghanistan and Iraq, which by the way already lasted longer than World War II, one may wonder whether the value of stability should not be upgraded in comparison with the value of freedom.

It is difficult to see how the blurring of lines outlined before will not lead to a blurring of the professional standards and would in any case make it difficult to establish a well-defined ethical framework.

3. Proportionality and subsidiarity

In recent years terrorism has so much been depicted as the “absolute evil” that the issue of proportionality had of course to suffer from it. Indeed, the only remedy against absolute evil are absolute means. President Bush’s

statement, “We have no higher responsibility than stopping terrorists”, made any ethical consideration superfluous.¹⁵

In several respects Western intelligence and security services have in recent years exceeded the limits of subsidiarity and proportionality, albeit often encouraged by politicians. Central to this is stretching the limits of interrogation methods by U.S. intelligence and security services, known as “enhanced interrogation techniques” that are contrary to both the Convention against Torture, signed by the U.S., and U.S. law.¹⁶

But not only at the level of acts has proportionality been lost from sight. All over the world there has been a tremendous growth of intelligence and security services. The U.S. now has the appalling number of about 845,000 people working in the sphere of intelligence and security, i.e. 0.7 percent of the total workforce. I wonder if there is a quantitative standard to indicate the concept of 'police' or 'intelligence state' and the numerical ratio in respect of the workforce that can be considered to be the threshold for such a qualification.

4. Effectiveness

Thus we come to the question of effectiveness, because the question is whether with such cumbersome organizations and bureaucratic relationships real-time intelligence has not become an illusion to begin with. In any case, the American approach of connecting the dots seems to have suffered from it.

Furthermore, western intelligence and security services have advanced little further by stretching boundaries and standards. The use of interrogation techniques that involve torture, is, as long known,¹⁷ not as effective as claimed, said a CIA man with experience in Pakistan in 2002, John Kiriakou: people are prepared to say anything to stop the torturing:

¹⁵ Bush said this in March 2008, when he vetoed a bill of the Amerikaanse Congres, which would have resulted in bringing the CIA's interrogation techniques back within acceptable limits, Perry, *Partly Cloudy*, p. 225.

¹⁶ Title 18, section 2340A of the American Penal Code See also Perry, *Partly Cloudy*, p. 207. For an overview of those techniques see e.g. Kiriakou, *Spy*, pp. 135-139. For their consequences see: Ph. Sands, *Torture Team. Deception, Cruelty and the Compromise of Law*, London etc., 2008.

¹⁷ Vgl. Perry, *Partly Cloudy*, p. 202; H. Katchadourian, “Counter-terrorism: torture and assassination”, G. Meggle (ed.), *Ethics of Terrorism & Counter-terrorism*, Frankfurt etc., 2005, p. 191.

“In practice, more empathetic psychological means, whimpy as that may sound, can yield much better results.”¹⁸ Using the practice of targeted killing may also make one shoot in his own foot. It carries the risks that it will be reciprocated, may lead to dependency upon the support of dubious regimes, to severe image damage in international opinion, the danger of misjudgements and the risk that it will increase the number of potential adversaries rather than reduce it.¹⁹ The use of ethically dubious methods has also led to demoralization of intelligence personnel and the appearance of whistleblowers.²⁰

Conclusion

In conclusion, I note that an ethical framework for intelligence personnel is of limited value if not also an ethical code applies to the heads of state and ministers responsible for the intelligence and security services.

Secondly, I note that the field of intelligence and security is very much in a state of flux and everything seems to be connected with everything, an inherent feature of the (post) modern, globalized world. Some may be inclined to consider the extent to which the intelligence business is integrated into society as an element of recognition or fruition of the intelligence business, the ultimate emancipation of a “dirty profession”. However, from the perspective of an ethical operation of intelligence and security services in countries with a constitutional and democratic character I am inclined to speak of a degeneration. Consequently, I would plead that the intelligence and security services should emphasize their autonomous and specific disciplinary nature much stronger than they do now. Restoring branche specificity will improve standards and facilitate their enforcement. Thus ethics will prove to be a part of professionalism and as outlined above, the application of professional ethics will not at all thwart goal attainment by the intelligence community.

¹⁸ Kiriakou, *Spy*, p. 130. See also *ibidem*, p. 132.

¹⁹ E. Patterson and T. Casale, “Targeting Terror: The Ethical and Practical Implications of Targeted Killing”, *International Journal of Intelligence and Counterintelligence*, vol. 18, issue 4 (2005), pp. 647-649. Zie ook G. Blum and Ph. Heymann, “Law and Policy of Targeted Killings”, *Harvard National Security Law*, vol. 1 (27 June 2010), pp. 145-170; S. Shane, M. Mazzetti and R.F. Worth, “Secret Assault on Terrorism Widens on Two Continents”, *New York Times*, 14 August 2010.

²⁰ E.g. Kiriakou, *Spy*, pp. xxi, 140-142, 145.

Precisely because so much is in flux, the individual information officer's personality has to be tested for his integrity prior to appointment,²¹ he has to be provided with a rudimentary ethics code,²² he will then need to be trained in independently weighing up ethical considerations and finally, within the intelligence community, a structural platform should be offered for the presentation of ethical issues. At any rate, the solving of ethical dilemmas should not be left to the individual intelligence officer as this has proved to be a recipe for "confusion, abuse, and cover-up".²³

* **Editor's note EENeT** (European Expert Network on Terrorist Issues) is an informal network established in 2007, between the EU Member States, bringing together experts on terrorism, officials of Law Enforcement and National Security Agencies, EUROPOL officials, as well as scholars from the academic field dedicated to the study of the terrorist phenomenon and related issues.

A Romanian representative, on behalf of the Romanian Intelligence Service is taking part in the activities organized by this informal structure.

The relations between the Romanian Intelligence Service and the European experts on counter-terrorism from the academic field have been considerably strengthened in the context of the EENeT Annual Meeting (held on the 19th-21st of September 2010, in Brussels) Consequently, the Romanian Intelligence Service is continuously benefiting of their past experience materialized in studies on terrorism. These papers have been made available to us in order to be published by the Romanian Journal of Intelligence Studies.

This is also the case of Bob de Graaff's presentation held at the aforementioned meeting. Bob de Graaff is a historian, Phd. Professor at Utrecht University (former Professor at Hague – Leiden University, Terrorism and Counter-terrorism Department), specialized in the field of Intelligence and Security.

²¹ As an anonymous CIA-employee once said: "This is such a dishonest business that only honest people can be in it." Quote in Perry, *Partly Cloudy*, p. 133.

²² Vgl. Olsen, *Fair Play*, p. 226; Perry, *Partly Cloudy*, pp. 102-104.

²³ Olsen, *Fair Play*, p. ix. See also *ibidem*, p. 225.