

Forum: Legal Committee (GA6)

Issue: Establishing an international legal framework for intelligence agencies

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INTRODUCTION

The significance of intelligence agencies is unequivocal. Intelligence agencies have undertaken the important role of gathering, examining and evaluating information in order to identify any menaces to national security. The information gathered is taken into consideration by policymakers, who take measures to stave off such threats. Ergo, it can be argued that intelligence agencies play a crucial role in maintaining and safeguarding national security.

Especially over the last years, intelligence agencies have contributed significantly to the combating of terrorist threats, which is suggestive of their importance for national security. However, there have been reported a number of cases pertaining to malpractices of intelligence agencies such as but not limited to the use of torture and the violation of the right to privacy. These violations of human rights have been intensified after the 9/11 attacks, when intelligence agencies in the purse of information regarding terrorist attacks used many questionable methods. Therefore, in order to eliminate these malpractices the creation of an international legal framework for the operation of intelligence agencies is imperative.

DEFINITION OF KEY-TERMS

Intelligence Agencies

Intelligence agencies are governmental organizations that have the responsibility to gather, analyze and evaluate information in order to maintain and protect the rule of law and national security.

Torture

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹

Personal Data

Personal data is any information that relates to an identified or identifiable living individual. Different pieces of information, which collected together can lead to the identification of a particular person, also constitute personal data.²

National Security

The term 'national security' refers to the defense and protection of a state's citizens.

Surveillance

The term 'surveillance' can be described as the acquisition of information for the sake of the government through the utilization of human sources.

Intelligence and Information

'Intelligence' and 'information' differ as terms. 'Information' refers to facts pertaining to a situation, while the term 'intelligence' describes the process of the analysis of these facts.

Espionage

Espionage refers to the act of spying with the aim of acquiring non-disclosed information the authorization of its holder.

BACKGROUND INFORMATION

Historical Retrospection

The 19th century saw an unprecedented expansion of intelligence agencies and use of methods such as espionage. One state where the intelligence agencies played a very important role was the United States and especially during the years of the Civil War, namely 1861-1865. Many soldiers in the armies of both sides were undercover agents gathering military intelligence. This expansion of intelligence agencies also continued during the 20th century and especially after the onset of the 1st World War. More specifically, intelligence agencies of Great Britain and

¹"OHCHR | Convention Against Torture." www.ohchr.org/en/professionalinterest/pages/cat.aspx.

²"What is Personal Data?" *European Commission - European Commission*, 11 2019, ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en

France hired refugees as agents, who were then sent to gather military intelligence from the Central Powers.

Pursuant to the end of the 1st World War, a country where intelligence agencies played a very important role was Russia. After the Russian Revolution in 1917 and the establishment of the Leninist regime, the so-called Cheka – the Russia secret police- played a crucial role in finding the opponents of the Communist regime and eliminating them. Bearing in mind that the political developments were volatile and the Revolution was not legitimized by the whole population, the secret police had undertaken the difficult task of eliminating any political opponents of the Communist Party.



PHOTO OF A CHEKA BADGE

Furthermore, the expansion of intelligence agencies was also the case in Nazi Germany. Gestapo – the Nazi secret police- gathered information regarding all those who could potentially undermined the regime and it also proved to be very important during the outbreak of the 2nd World War, as Gestapo members were sent to the occupied territories to suppress any potential act of resistance.

Source: "The Cheka." *Russian Revolution*, 12 Mar. 2020, alphahistory.com/russianrevolution/cheka/

Lastly, the years of the Cold War were also an era when intelligence agencies contributed significantly to the protection of national security. Both the United States of America and the Soviet Union used the Central Intelligence Agency (CIA) and the Komitet Gosudarstvennoy Bezopasnosti (KGB), respectively, in order to gather information for their opponents. However, after the end of the Cold War and the fall of the Soviet Union the role of the intelligence agencies was limited and it was not until the 9/11 attacks that the role of intelligence agencies expanded in order to combat terrorist threats and safeguard national security.

Intelligence agencies and international law

The absence of specific international law principles that obliges intelligence agencies to operate in such a way that the human rights are not violated is a reality that the international community must confront. The absence of international law documents related to intelligence agencies has led some countries to adopt the so-called 'Lotus approach'. On the 2nd of August,

1926 the French vessel 'Lotus' collided with a Turkish vessel in a location north of the island of Mytilene. The collision resulted in the death of eight Turks and Turkey initiated criminal proceedings against the lieutenant of the French vessel. However, France brought the case before the Permanent Court of International Justice claiming that since the accident took place in the high seas, the country of the vessel's flag had the right to try the individual, namely France and not Turkey. Nevertheless, the Court found that France did not meet the burden of proof and that Turkey had the right to try the French lieutenant. After this case, the so-called 'lotus approach' was created according to which if there is not an explicit forbiddance, a country has the right to act as it wishes. This principle applies in the context of intelligence agencies, as the absence of an international legal framework has let many countries act as they wish without abiding by rules that ensure the protection of human rights.

On the other hand, there are states that perceive the existing international legal framework as prohibitive, albeit limited. Those states argue that existing legislation such as the International Covenant on Civil and Political Rights establish the right to privacy, which shall not be violated by any arbitrary action of any state's intelligence agency. With regards to the gathering of information from other states with means such as but not limited to espionage, this school of thought suggests that the sovereign rights of the other state are violated. This is because there is interference with the state's internal affairs, which is not regarded as an act of respect towards other states' sovereignty.

Intelligence agencies and malpractices

Albeit significant for national security, intelligence agencies have been engaged in malpractices pertaining to violations of human rights. First and foremost, intelligence agencies use torture as a method of interrogation and gathering information. One characteristic example is the Central Intelligence Agency (CIA), which has repeatedly been accused of using torture as a method of interrogation and gathering information. More specifically, in November, 2005 Washington Post³ presented reports regarding human rights violations conducted by the CIA. One year later, the accusations made George Bush – a former United States President- admit the existence of secret prisons, where the detainees were subject to torture. Adding to that, intelligence agencies have also been accused of violating personal data. It goes without saying that the collection of personal data is an integral part of an intelligence agency's work.

However, the gathering of such information cannot be arbitrary and unjustified. In order for someone to be investigated, there should be proof that he might be a threat and not a sheer suspicion. In the past, intelligence agencies had gathered information of citizens without the

³ *The Washington Post*, 18 Nov. 2005, www.washingtonpost.com/archive/politics/2005/11/18/foreign-network-at-front-of-cias-terror-fight/b15b27dd-8de2-441e-9eb5-8509770a1d53/.

citizens knowing that they were being investigated and without the existence of any reason that could justify such investigations. This arbitrary collection of data can jeopardize the democratic structures, as they can lead to government abuse of power and thus it must be limited.

Social Media and Intelligence Agencies

The expansion of social media and communication technologies, nowadays, play a crucial role in the gathering of information. Cyberspace constitutes a source of information, which is used more often than not by intelligence agencies in order to gather information, identify threats and ultimately eliminate them. Nevertheless, the use of social media as a source of information is a tricky procedure, as what is uploaded to social media usually has no impact beyond the world of social media and it is difficult to assess whether someone or something is menacing for the national security. Any policy, which leads to the prosecution of anyone that uploads something suspicious, borders with the violation of the freedom of expression. Hence, any action taken by intelligence agencies in order to eliminate any danger identified via the use of social media should be done carefully.

However, it is important to mention that many terrorists groups use social media as means of radicalizing individuals and then recruiting, as well as, for the purpose of fundraising. Therefore, intelligence agencies must find a balance between identifying and eliminating threats to national security such as terrorism through the use of social media, while not infringing the freedom of expression.

MAJOR COUNTRIES AND ORGANIZATIONS INVOLVED

United States of America (USA)



THE EMBLEM OF THE CIA

Source: "CIA." *Wikipedia*, 13 Oct. 2005,
el.wikipedia.org/wiki/CIA

As mentioned above, the USA has hardened the methods used by intelligence agencies for the gathering of information relating to terrorist attacks after the 9/11 attacks. The CIA has repeatedly been accused of severe human rights violation and the acceptance of these accusations by President Bush shows the need for reforms.

Russian Federation

Russia's intelligence agencies have also used questionable methods in the past. One main problem that permeates the Russian intelligence agencies is corruption. The Federal Security Service (FSB) has been accused of promoting Vladimir Putin's policies, instead of gathering information for the sake of national security.

China

In 2017, China passed the 'China's National Intelligence Law'⁴, which gives a number of powers to intelligence agencies, as well as, legal grounds to violate human rights for the interest of national security. More specifically, the aforementioned law gives intelligence agencies the right to investigate premises and confiscate property, while they also have the freedom to conduct espionage. Hence, the existing legal framework in China does not protect Chinese citizens against arbitrary actions of intelligence agencies.

United Kingdom (UK)

The Government Communications Headquarters (GCHQ) Intelligence Agency has been accused of violating citizens' personal data. In 2013, it was disclosed that GCHQ Intelligence Agency was gathering in a database millions of private communications without any legal justification or solid suspicion of a threat against national security. Many human rights organizations such as Amnesty International brought the case before the European Court of Human Rights, which ruled that the mass surveillance conducted by the GCHQ Intelligence Agency was illicit.

European Union (EU)

Under the European Convention of Human Rights and Fundamental Freedoms, the European Union has managed to create a legislative framework, which protects the right to privacy and citizens' personal data against any arbitrary actions of intelligence agencies. The right to privacy is further protected by the 'General Data Protection Act', which was passed on the 27th of April, 2016. However, according to article 4 the right to privacy is not an absolute one. More specifically, article 4 says that 'it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality'⁵. This means that intelligence agencies have the right to collect information regarding individuals only when there is a serious threat to national security and hence there is proportionality between the interference with the right to privacy and the protection of national security.

⁴ "中华人民共和国国家情报法 (2017)." *China Law Translate*, 28 June 2017, www.chinalawtranslate.com/en/national-intelligence-law-of-the-p-r-c-2017/.

⁵"EUR-Lex - 32016R0679 - EN - EUR-Lex." *EUR-Lex — Access to European Union Law — Choose Your Language*, eur-lex.europa.eu/eli/reg/2016/679/oj

Amnesty International

Amnesty International has played a significant role in supervising the operation of intelligence agencies, reporting any malpractices and providing assistance to victims. For example, amid the revelation of scandal of mass surveillance in the UK in 2013, Amnesty International brought the case before the European Court of Human Rights and managed to win the case in 2021 when the Court ruled that there was no guarantee provided by the UK against arbitrariness. Moreover, Amnesty International has reported a number of cases pertaining to intelligence agencies' malpractices in countries such as Afghanistan, South Sudan and the USA.

TIMELINE OF EVENTS

DATE	DESCRIPTION OF EVENT
7 th September, 1927	The lotus case was brought before the Permanent Court of International Justice.
10 th December, 1948	The Universal Declaration of Human Rights passed, according to which rights such as the right to privacy and the rights not to be subject to torture are protected
16 th December, 1966	The International Covenant on Civil and Political Rights was passed by the United Nations General assembly, which further protects the right to privacy
10 th December, 1984	The Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment was passed, which bans the use of torture under all circumstances.
26 th December, 1991	The dissolution of the Soviet Union took place, which signals the end of the Cold War, according to many historians.
9 th September, 2001	The 9/11 attacks took place resulting in the death of 2,977 people. The severity of these events led many intelligence agencies to using unlawful methods for the acquisition of information in order to safeguard national security.
6 th September, 2006	The US President Bush accepted the accusations regarding CIA's malpractices.

26 th March, 2009	Human Rights Council Resolution 10/15 passed, which highlights the importance of supervision of the operation of intelligence agencies by the United Nations Special Rapporteur.
14 th June, 2013	The UK's Intelligence Agency (GCHQ) violation of personal data was disclosed.
27 th April, 2016	The European Union passed the General Data Protection Regulation, according to which the right to privacy is further protected.

RELEVANT UN RESOLUTIONS, TREATIES AND EVENTS

Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment

Under article 2, paragraph 2 of the Convention against Torture 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'⁶ In number of cases, governments have justified the use of torture or other cruel, inhumane or degrading treatment or punishment as a necessary means of gathering information for the protection of national security and the maintenance of the rule of law. However, under international humanitarian law no situation, however extreme, may justify the use of these methods.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights – one of the founding documents of international humanitarian law- also prohibits the use of torture under article 5, which suggests that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'⁷. Adding to that, the right of privacy is also protected by the Universal Declaration of Human Rights under article 12, which establishes that 'No one shall be subjected to arbitrary interference with his privacy'.⁸

⁶"OHCHR | Convention Against Torture." www.ohchr.org/en/professionalinterest/pages/cat.aspx.

⁷United Nations. "Universal Declaration of Human Rights." *United Nations*, www.un.org/en/about-us/universal-declaration-of-human-rights.

⁸United Nations. "Universal Declaration of Human Rights." *United Nations*, www.un.org/en/about-us/universal-declaration-of-human-rights.

International Covenant on Civil and Political Rights ⁹

Under article 17 of the International Covenant on Civil and Political Rights, the right to privacy is established as 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation'.

Human Rights Council Resolution 10/15 ¹⁰

Under clause 12 of the Human Rights Council Resolution 10/15 the United Nations Special Rapporteur is called to supervise that the function of member states' intelligence agencies abides by international law. Clause 12 is an example of the role that supervision plays in ensuring the compliance with international law standards.

PREVIOUS ATTEMPTS TO SOLVE THE ISSUE

Even though there have not been many solutions on an international level, many countries have taken legislative action to create a framework, within which intelligence agencies can work without violating fundamental rights and freedoms of citizens. For example, in 2016, the Belgian government amended the 1998 Law for Intelligence and Security Agencies and created an independent committee which supervises the work of intelligence agencies. Both the independent committee, as well as, the Belgian government monitors the operation of the intelligence agency, its efficiency and its compliance with the existing legal framework. Furthermore, the Netherlands has also taken action to eliminate unlawful practices conducted by Intelligence Agencies. The 'Intelligence and Security Services Act' of 2002 obliges the Dutch Intelligence agencies to obtain ministerial clearance before conducting investigations. Hence, intelligence agencies have not legal grounds to act arbitrarily.

What is more, Sweden has also taken actions so that there is adequate supervision of the Swedish intelligence agencies. More specifically, the so-called 'Riksrevisionen' is the body that has been set up in Sweden and supervises that intelligence agencies abide by the existing legislation.

Finally, in 1946 the so-called UKUSA Agreement was signed according to which five countries – Australia, Canada, New Zealand, United Kingdom and United States of America- would share

⁹ "OHCHR | Human Rights in the World."
www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx.

¹⁰ "Protecting human rights and fundamental freedoms while countering terrorism."
ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_15.pdf

intelligence. This is an example of international cooperation and acquisition of information not through means such as espionage, but through diplomacy.

POSSIBLE SOLUTIONS

Despite the intricacy and complexity of the issue, there are several measures that can be taken in order to eliminate the malpractices of intelligence agencies. To begin with, it should be established by international law that intelligence agencies may not arbitrarily gather information regarding individuals and thus violate their right to privacy without the existence of a severe concern for national security. More specifically, the so-called 'principle of proportionality' should apply. This means that the benefit derived from the violation of the right to privacy should be proportional to the harm caused by the violation. Practically, states must be obliged to gather information regarding individuals only when there is a serious concern or actual threat to national security. Otherwise, the potential harm caused due to the violation of the right to privacy is greater than the benefit derived.

Furthermore, any confession that took place under the use of torture, methods of enhanced interrogation or any other cruel inhumane or degrading treatment or punishment should not be considered as proof in court proceedings. This will discourage intelligence agencies from using unlawful means of interrogation, as the confessions arising from such methods will have no practical use. What is more, all countries should ratify treaties and conventions such as the Convention against Torture that obliges them reform their intelligence agencies in such a way that fundamental human rights are not violated. Should all member-states participate in such treaties and conventions, there will be greater difficulty for all states to commit any violation of fundamental human rights and even if that happens, the citizens will be able to bring such cases before the court and hence protect themselves from the arbitrariness of any state.

In addition, there should be observation by transparent international organizations so as to ensure the compliance with the legal framework. The creation of a transparent committee with the authority and obligation to supervise the operation of intelligence agencies throughout the globe will ensure that all intelligence agencies respect the human rights, while several intelligence agencies might be discouraged to engage in any unlawful act in the fear of its disclosure.

Lastly, all member states should adjust their domestic legislation to international standards. This practically means that all states should make sure that their legislation abides by all international treaties and conventions. For example, a state that has ratified the Convention against Torture must make the necessary amendments in the domestic legislation so that torture is banned by the domestic laws, as well, and there is no legal loophole whatsoever that may justify the perpetration of crimes such as torture.

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