

PREFACE

Early in 2002 the Geneva Centre for the Democratic Control of Armed Forces (DCAF) asked the Centre for European Security Studies (CESS) to conduct an exploratory cross-national inquiry into transparency and accountability in the running of a number of countries' police forces, security services and intelligence agencies. The DCAF interest had two aspects. First, DCAF wished to further extend its investigative work on security sector reform in the areas covered by this study. Secondly, it wanted material to allow for discussion on the transparency and accountability of non-military security-sector organisations at the October 2002 5th International Security Forum (ISF) in Zurich.

CESS determined that a worthwhile study could be produced by soliciting a number of country profiles from national experts, arranging an exchange of views among these authors, and adding basic commentary on similarities and differences, convergence and divergence, plus observations on what might be judged good practice in the area of interest. DCAF invited CESS to organise an investigation along those lines. It was agreed that the exercise should cover seven countries: Bulgaria, France, Italy, Poland, Sweden, the United Kingdom and the United States.

The present text is the outcome of this endeavour. It is presented here as an edited work with my own name (as Project Director) and that of my colleague Sander Huisman (Principal Investigator) on the title page. However the heart of the study is, of course, the material contributed by the country experts whose essays make up Part Two of the volume. These collaborators were recruited by the Principal Investigator in the second quarter of 2002. We are indebted to them not only for agreeing to address the questions we formulated but also for providing their answers promptly. Papers were received in time for the envisaged exchange of views – at a Roundtable held in mid-July 2002 at Bergen-aan-Zee in The Netherlands – which in turn made possible preparation of the required input to the ISF three months later. This took the form of the country profiles themselves (which were distributed in Zurich) and commentary

by Sander Huisman (who briefed the DCAF-sponsored Workshop IV at the meeting).

After the ISF this material – the contributed country profiles and the Principal Investigator’s observations – was assembled in a formal Project Report that was sent to DCAF at the end of 2002. There followed a review process, as a result of which it was decided to revise and reconfigure the CESS commentary to produce a document more appropriate for general dissemination. I did this supplementary work myself, essentially elaborating and fine-tuning what Sander Huisman had written, to yield Parts One and Three of the text as it now appears. At the same time, I took the opportunity to do some layout- and language-editing of the country profiles in Part Two. Thanks are due to Joke Venema for her help in this restructuring and revision, and for careful preparation of the final version of the study.

Groningen
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David Greenwood
Project Director

CHAPTER I

INTRODUCTION

This study is a contribution to the literature on transparency and accountability in the running of non-military security-sector organisations. It is exploratory in nature and limited in scope. It comprises accounts of policy and practice in just seven states – Bulgaria, France, Italy, Poland, Sweden, the United Kingdom and the United States – written ‘to order’ by knowledgeable experts from those countries, plus observations on these essays that highlight general issues and offer comparative perspectives.¹

The core country profiles are presented in Part Two of the volume. Part Three is the editors’ commentary and conclusions. In Part One – this Chapter and the next – we state the purpose of the exercise, outline its conceptual basis, and note some themes to which other students of the subject-area have drawn attention. Perhaps the most important parts of this introductory material are the specification of the analytical framework for the inquiry, and its terminology, in this Chapter; and the elucidation of the ‘orders’ we gave to our country authors, which is contained in Chapter II and the supplement thereto.

Purpose

The reasons for embarking on even an exploratory and limited inquiry in this subject-area are straightforward. It is now generally recognised that in the so-called transition states of Central and Eastern Europe, and in developing countries everywhere, security-sector reform is, or should be, a policy priority; that creating and consolidating machinery for

¹ The origins of the study are explained in the Preface (p. iii and iv above). The correspondents who wrote are: *Yonko Grozev*, Head of the Legal Department, Bulgarian Helsinki Committee, Bulgaria; *Fabien Jobard*, Researcher at Centre Marc Bloch (Berlin) and CESDIP (Paris), France; *Francesca Longo*, Lecturer at the Faculty of Political Science, University of Catania, Italy; *Laurence Lustgarten*, Professor of Law, University of Southampton, United Kingdom; *Kate Martin*, Director, Center for National Security Studies, United States of America; *Andrzej Rzeplinski*, Professor of Law, University of Warsaw, Poland; and *Dennis Töllborg*, Professor in Jurisprudence, Gothenburg School of Law and Economics, Sweden.

‘democratic control’ ought to have a central place on the reform agenda; and that this in turn requires more openness about security-sector institutions’ business (greater transparency) and more attention to ensuring that they are answerable for how they do their business (greater accountability). However, whereas advocates of reform – from transition specialists to development economists – have scrutinised military forces and defence organisations from this standpoint quite extensively, this is not the case with respect to police forces, security services and intelligence agencies. Some relevant work has been done by criminologists and others, but most of it focuses either on internal accountability mechanisms (in the case of the police) or on legislative oversight (in the case of intelligence agencies). This study aims to broaden the analysis, addressing the good governance issue within the non-military security sector as a whole.

The principal objectives are to analyse the nature and effectiveness of provision for executive direction, legislative and judicial oversight, plus internal control of police forces, other internal security forces, security services and intelligence agencies in our seven selected countries (the *accountability* aspect); to describe the institutional arrangements and current practice on provision of information about the organisation, planning, budgeting, administration and operations of these forces, services and agencies in the selected countries (the *transparency* aspect); and to offer a preliminary comparative evaluation in order to highlight ‘good practice’ in controlling these various bodies.

The countries covered are a South East European state (Bulgaria), a Central European state (Poland), a Scandinavian state (Sweden), a Mediterranean state (Italy), two West European states (France and the United Kingdom), and a North American state (United States of America). The selection is to some extent arbitrary: neighbouring countries would have been appropriate choices as well. The requirement was to have a cross-section of pluralistic democratic countries from the Euro-Atlantic area having a similar mix of security organisations, but differing in terms of history, political culture and socio-economic development.

Analytical Framework

The conceptual basis of the investigation is an understanding of what we mean by the key terms *transparency* and *accountability*, how the two are inter-related and how they are central to good governance.

Transparency is a word widely used in discourse on security-sector reform, and generally. Yet there is no single satisfactory definition of the expression in the professional literature, and certainly not a succinct one. Writers rely on a ‘definition in use’ – recognising what the term means, as concept or condition, from the connotations it carries and the settings in which it occurs. In politics and public administration, comprehension is derived from an image: the idea that (metaphorically speaking) there is, or should be, a glazed window or windows through which it is possible to see how the business of government is being carried on in a state, region, municipality (or, indeed, in any public organisation). ‘Seeing’ here implies both a willingness on the part of the authorities (or ‘insiders’) to show what they are doing *and* the ability of elected representatives, the media and society-at-large (or ‘outsiders’) to view what is going on.

The metaphor of fenestration is conveniently versatile. It admits the possibility of government that is not open to scrutiny of its security-sector (or other) affairs at all: business is done in secrecy – ‘behind closed doors’ or, in this context, covered windows. Furthermore, it accommodates circumstances where the powers-that-be do not ‘show what they are doing’ clearly: the window-panes are dark or frosted or simply dirty – translucent but not transparent.

The question arises: do governments have a duty to show, and do ‘outsiders’ have the right to view, how official business is done? The short answer is that, according to democratic theory, they do, because fundamental to democratic decision-making is the concept of *accountability*. Governments and all executive agencies are accountable, through the legislature, to ‘the people’; and elected representatives are expected to hold governments to account, for both their actions and their expenditures.

It is the essence of democracy itself that the ultimate authority in matters of governance lies with ‘the people’ (in Greek, *demos*). In practice, power is exercised by a ministerial team, which may be chosen by a directly-elected leader or selected from the party or coalition with a majority in the elected assembly. However, the executive – the ministers and their departments (collectively “the government” or “the

administration”) – is, or should be, obliged to account to the populace for what it does (policy accountability) and for how it spends the taxpayers’ money (financial accountability). Provision of information, explanation and justification to – and openness to interrogation by – the people’s elected representatives is normally seen as sufficient fulfilment of this obligation. In well-run democracies, though, attention is paid to public information also.

The mirror-image of this executive obligation is the legislature’s responsibility for overseeing what the government does and spends, enforcing accountability. Effective legislative oversight is thus a *sine qua non* of sound democracy also. Ideally, such oversight should extend across the decision-making continuum. Enforcing policy accountability should cover both policy-making and policy-execution. Enforcing financial accountability should cover not only budgeting or resource allocation but also budget execution (the traditional audit function) plus, nowadays, resources management issues (value-for-money auditing).

The relationship between the core concepts is crucial. Transparency is the guarantor of accountability. In mature democracies it is accepted that there should be open government in the security area as in any other. Here as elsewhere the electorate, through their chosen representatives, have the right to know about the executive’s business – subject only to constraints in sensitive areas where the authorities may have to invoke need to know restrictions. This proviso does not, however, detract from the status of transparency as a democratic imperative.

The foregoing argument applies to all security-sector institutions. However there are certain special considerations that enter the reckoning when dealing with non-military organisations. These arise because by and large police forces, security services and intelligence agencies are going about their operational business all the time and for the most part on home territory and dealing with the state’s own public. Navies, armies and air forces on the other hand are not continuously on operations – at least not normally – and, when they are, it is more often than not on foreign soil, and non-citizens are the object of their attention. One consequence of this difference is that democratic societies typically require that non-military organisations should be *operationally accountable*, answerable not only for what they spend and what they do but also, politically and juridically, for how they do what they do in the domestic arena and legal regime. On the whole, the same demand is not made of a country’s regular armed forces, beyond the expectation that when conducting military operations they will observe appropriate rules

of engagement, all relevant international conventions, the laws of war and so on.

There is a further consequence of how military and non-military security-sector organisations differ. Since police forces, other (internal) security services and intelligence agencies are at all times actively engaged in safeguarding society within the domestic domain – which fighting services are not – as a general rule it is acknowledged that there are necessary *constraints on transparency* so far as the conduct of their day-to-day operations is concerned. A veil of secrecy must lie over some activities. Recognising this does, however, raise a host of questions about how discretion is exercised here, according to what ground-rules (and set by whom). Needless to say these questions loom large if and when new threats to ‘homeland security’ emerge – as they did in the United States, and elsewhere, in the wake of the terrorist attacks on New York and Washington of 11 September 2001 – especially when new powers are sought.

Our sample survey of seven states’ policy and practice in the matter of non-military organisations’ accountability and transparency rests on these conceptual foundations; and they determined the agenda that we asked our collaborating national experts to address. How this agenda was formulated and communicated is the subject-matter of the next Chapter. It is appropriate to note here, though, that this effort to elicit a commonality of approach – in terms of information sought and questions asked – could not ensure, and was not expected to produce, uniformity of treatment in the country essays. Our cross-section of countries covers, as noted, states widely differentiated by constitution, culture and custom. Because of this there is not only a diversity of arrangements for executive direction, legislative and judicial oversight (plus internal control) of the different organisations examined, but transparency and accountability issues are perceived in a variety of ways. On top of that, each of our contributing authors obviously brought to his or her descriptions and analyses a personal perspective based on professional background, interest and concern.

It is appropriate to register two further points in this Introduction. First, while there is a sound case for examining all ‘non-military security-sector organisations’ in a single study – defence ministries and armed forces having received the lion’s share of attention hitherto – this approach has its drawbacks. Most obviously, the challenge of fashioning suitable provision for transparency and accountability in the police and law enforcement area is quite different from that which presents itself

with respect to, say, intelligence agencies. The public contact involved in day-to-day policing is a factor here, of course: so is the fact that – largely for this reason – many police forces are locally-managed and locally-accountable constabularies rather than national institutions. Second, while this inquiry is exploratory from the standpoint of the security studies community, in other contexts several specialists – among them, naturally, our contributing authors – have had things to say about the matters it addresses. It makes sense to summarise some of these before proceeding.

Themes

It is noteworthy, for example, that at the end of the 1990s public trust in the police was at an all-time low. The police appeared unable to protect the public and there were revelations of misconduct and corruption. This prompted demands for greater accountability to law and public opinion, and for forces to demonstrate that they make communities safer, manage their affairs efficiently, and treat citizens fairly. Primarily as a result of external pressure, police organisations have accordingly been providing more information and statistics on their work and effectiveness. At the same time, police in jurisdiction after jurisdiction have been required to share responsibility for maintaining appropriate levels of discipline with newly-created civilian review bodies. In effect, the police lost their monopoly on determining whether officers were treating citizens correctly.²

Effective policing is based on public confidence and trust. This requires transparency and accountability to independent oversight bodies. In the all-important area of fighting crime this is necessary to ensure that investigation can take place free from professional impropriety and political influence. However, it is essential that supervisory bodies are well-resourced and well-equipped with capable and knowledgeable staff. Moreover, oversight institutions will only be truly effective in affecting police practice if they win over and work in conjunction with internal disciplinary and self-regulating processes. Their writ cannot be enforced by a heavy hand. Struggles over nominal policy control that alienate the police may well be counterproductive.

² D. Bayley, *Police for the Future* (Oxford University Press, 1994) 11, 66.

The function of formal rules and accountability mechanisms in the regulation of police work is typically indirect and subtle. One writer distinguishes three functions:

1. The constitutional function. Rules and accountability structures have a symbolic function in asserting the ideal of police subordination to democracy and the rule of law. They must express values and norms.
2. The co-optive function. These rules will only become effective if they transform and co-opt the informal values of police sub-culture.
3. The communicative function. Some signalling mechanism registering the need for change is necessary to spark off internal reforms.

The last of these tasks, this author notes, is often performed by scandals in the absence of adequate channels for the routine communication of grievance and complaint.³

Noteworthy too is a possible consequence of an increase of oversight and accountability. Scandals in the police often directly affect the public's perception of the legitimacy of the police institution, and mostly lead towards more accountability and more regulations. Yet a drawback of more accountability and regulations *could* be that it diverts resources from the police organisation (as more procedures have to be followed and more paperwork has to be submitted). This could lead to a lower rate of solved crimes, and less visibility on the street, which again could cause the public to question the efficiency and legitimacy of the police. Therefore it is argued that requests for more accountability and greater efficiency must be accompanied by a well-conceived policy and strategy on how to increase the capabilities and capacities of the police and the judiciary to meet them.

As suggested above, provision for accountability and transparency of intelligence agencies has a different meaning and purpose than arrangements for law enforcement agencies. In theory, intelligence exists only to support policy-makers. The intelligence process is set by the requirements of the policy-makers. Because intelligence agencies are operating in a world that is largely shut off from the public, from the legislature and to a lesser extent also from the executive, this environment can easily turn into a secretive and self-serving world where the intelligence instruments become ends in themselves. This reinforces the need for constant independent oversight and effective accountability.

³ R. Reiner, *The Politics of the Police* (Harvester Wheatsheaf, 1992) 218-222.

As one analyst puts it "intelligence is not without its ethical and moral dilemmas [but] the trade-off between ethics and increased security is acceptable, provided that the intelligence community operates with rules, oversight and accountability."⁴

In democracies, oversight of intelligence tends to be a shared responsibility of the executive and legislative powers. The situation in the US is unique in the extent to which responsibilities and powers reside in the legislature. Other parliaments have committees devoted to intelligence oversight, but none have the same authority.⁵ To a large extent, of course, this is a reflection of the difference between Washington-style and Westminster-model parliamentary democracies. In the US the executive and the legislature may not be under the control of the same political party, whereas in the Westminster system the political party that can command a majority in the elected chamber of parliament forms the government. Whereas in the US a system of checks and balances exists, in the Westminster system most elected representatives support the policies and activities of the executive. This is what happens in several of the countries in our sample survey.⁶

⁴ M. Lowenthal, *Intelligence. From Secrets to Policy* (CQ Press, Washington D.C., 2000) 199.

⁵ Lowenthal, 133.

⁶ L. Lustgarten, 'Accountability of Security Services in Western Democracies', in: D. Töllborg, ed., *National Security and the Rule of Law* (Gothenburg University 1997) 57-58.

CHAPTER II

COUNTRY OVERSIGHT PROFILING

The core material of this study – the seven stand-alone country profiles in Part Two (Chapters III – IX) – was commissioned from national experts to illuminate, as has been explained,

- the nature and effectiveness of provision for executive direction, legislative and judicial oversight, plus internal control of police forces, other internal security services and intelligence agencies in the selected countries;
and
- the institutional arrangements and current practice in the seven states on information provision about the organisation, administration, planning, budgeting and operations of these forces, services and agencies.

To guide the participating authors in addressing these topics – respectively the *accountability* and *transparency* aspects of the inquiry – the editors prepared a template for the country profiles, designed on the basis of the study's analytical framework.

Content

We sought, first, an elementary enumeration of the non-military security-sector organisations in the subject-state – to establish the *coverage* of the country essay – together with an indication of whatever provision for inter-agency *co-ordination* there might be.

Secondly, we asked for description, explanation and critique of *accountability* provisions, inviting contributors to distinguish among

- a) the executive organs to which organisations were formally answerable;
- b) the legislature's role, in principle and in practice;
- c) the role of other bodies, including the courts, municipal authorities (where applicable), and internal boards;
- d) obligations to the media and society-at-large (if any);
and
- e) the requirements of international codes and conventions.

In addition to (e) we also asked if expectations under international co-operative arrangements carried implications for domestic accountability – this primarily to discover if extra-territorial police or other operations might escape effective scrutiny.

Thirdly, regarding *transparency*, our country specialists were requested to elucidate policy and practice with respect to information provision in terms of

a) what material is, or can be, made available to whom – about the organisation, personnel strength, finances and operations of the different organisations;

and

b) what regular publications about non-military security-sector entities are generally available – policy statements, reports of activities, statistical bulletins or whatever.

We raised also the possibility that international conventions and international collaboration might impinge on transparency, perhaps imposing obligations, perhaps inhibiting disclosures.

Finally, we thought it appropriate in a 2002 inquiry to ask our seven participating authors whether institutional and/or procedural changes had been made – or were likely to be made – in their respective countries in response to the events of 11 September 2001, with particular reference to the assignment of new powers (or dispensations) to police forces, security services and intelligence agencies. As states rushed to sign-up for the ‘war on terror’ in the aftermath of ‘9/11’, did this augur well or ill for transparency and accountability in the running of such organisations?

The document sent to our country contributors, setting out the input sought in accordance with the template, is reproduced as a Supplement to this Chapter. It will bear repeating that this invitation to a common approach was not expected – nor could it have been expected – to produce standard responses, for all the reasons given earlier. There is no lack of diversity of provision for accountability among our seven countries and no lack of variety in transparency arrangements; and that is reflected in our authors’ pieces.

With respect to the basic composition of the non-military security sector, and the extent to which agencies do (or do not) engage with each other, each state is similarly *sui generis*. It is instructive to comment on this element in the study’s findings now – by way of prologue to the individual country profiles – while leaving our main observations on transparency and accountability to Part Three.

Coverage and Co-ordination

For historical reasons, and because of differences in political and socio-economic circumstances, each of the states examined in this survey has its own particular array of non-military security-sector organisations, whose structures and tasks conform to no rigid pattern. Some countries have a multiplicity of services designed to deliver law and order, and (internal) security broadly defined. In others just a few national institutions serve this purpose. In some countries the functions of law enforcement and intelligence have been distributed among different agencies, whereas in other countries one single organisation has wide-ranging powers covering both law enforcement and intelligence.

However, there is an increasing overlap in tasks among law enforcement bodies, which results in a blurring of organisational boundaries. The same can be said of the relationship between law enforcement and intelligence agencies. More and more intelligence agencies are expanding their area of work to policing (e.g. tackling organised crime), whilst many police forces are conducting intelligence operations (e.g. wiretapping). Furthermore there is a growing tendency to provide other governmental agencies with law enforcement powers (e.g. agencies that deal with money laundering or with social matters).

Furthermore the distinction between internal and external security becomes more vague. This leads to increasing co-operation between law enforcement bodies, security services and intelligence agencies on the one hand and the military on the other. But it also gives rise to a growing concern about duplication of effort, and to turf wars between Ministries of Interior and of Defence. In France and Italy the *Gendarmerie* and the *Carabinieri* have a remit that goes into the military sphere. So both are accountable to the Ministry of Defence. However, in France there is a new tension between the Ministries of Defence and the renamed Ministry of Internal Security (previously the Ministry of Interior), since the functions of the national police and the *Gendarmerie* are to be merged under the authority of the Ministry of Internal Security.

In *France*, security has gained (political) importance. The dramatic rise of petty crime and delinquency is the main cause of this change. Three kinds of policies have therefore been adopted: (1) greater financial means for police forces and security provision, (2) greater law enforcement powers, and (3) reduction of the effectiveness of judicial control on police activities, especially regarding the authority of the public prosecutor over daily police activities.

Not all countries under review have made appropriate arrangements to co-ordinate the activities of their organisations. In the *United States* the different law enforcement bodies and intelligence agencies operate without much co-ordination. While the CIA Director in theory has responsibility for the entire intelligence community, in practice he only exercises formal supervision over those agencies located in other government departments. A more recent and widely-publicised example has been the lack of co-ordination and communication between the CIA and the FBI. The creation of a new Department of Homeland Security is expected to result in a more cohesive approach. Also in the *United Kingdom* and in *Poland* no single high-level office oversees different forces, services and agencies. (The UK however has a **Joint Intelligence Committee**, composed of senior civil servants, which co-ordinates and 'tasks' the intelligence services.)

In *Bulgaria* the Council of Ministers has the ultimate decision making powers over the country's plethora of law enforcement bodies and intelligence agencies. It is assisted by a Security Council, which has proven to be an effective tool in co-ordinating the different services. *France* has a similar approach: a Council for Internal Security under the Prime Minister which co-ordinates the national police and the *Gendarmerie*.

A satisfactory arrangement exists in *Sweden*, where the National Police Board has the task to co-ordinate the different police and security services (although it cannot make decisions on operational work). The national police commissioner heads the Board, and the head of the Security Police is his deputy. *Italy* has a plural law enforcement system; there are many forces charged with parallel tasks but all are largely centralised in their administrative set-up. They include an organised Crime Investigative Directorate (DIA) – an inter-force agency within the Public Security Department of the Ministry of Interior – which is staffed by officers coming from the three other main law enforcement agencies. The intelligence services are co-ordinated by a committee of the two heads of the services, which falls under the Prime Minister. The Public Security Department directs all law enforcement bodies, and for this purpose it has an office for co-ordinating and planning of the country's police forces. There also is an advisory body within the Ministry of Interior that comprises the heads of the most important forces.

These passing observations are a foretaste of the many national idiosyncrasies that are a recurring theme in the country profiles that follow.

TRANSPARENCY AND ACCOUNTABILITY OF POLICE FORCES, SECURITY SERVICES AND INTELLIGENCE AGENCIES

PROJECT DESCRIPTION

The Centre for European Security Studies has been asked to extend its work on democratic oversight of military armed forces to the transparency and accountability of police forces, security services and intelligence agencies. The project is focusing on countries in the Euro-Atlantic area that do not have identical frameworks: Bulgaria, France, Italy, Poland, Sweden, United Kingdom and the USA.

The rationale for conducting this project is that relatively little research has been conducted in this area (contrary to the military area), and that therefore it would be useful to look into these matters, especially since so many changes have been taking place in the accountability and transparency of these non-military forces and services during the last years (e.g. new tasks, more openness, increasing internationalisation, and of course '11 September').

The aim of the study is (1) to describe the nature and effectiveness of provision for the executive direction and legislative oversight of police forces, other internal security forces, security services and intelligence agencies in selected countries (the accountability aspect of the inquiry); (2) to describe the institutional arrangements and current practice which cover provision of information about the organisation, planning, budgeting, administration and operations of these forces, services and agencies in the selected countries (the transparency aspect); and (3) to undertake a preliminary comparative evaluation of the material thus generated in order to highlight 'good practice' - as a basis for provisional conclusions about 'best practice' - in controlling these non-military security-sector bodies.

QUESTIONS FOR CORRESPONDENTS

Please read this document in its entirety, before you write your responses. (Similar questions occur in different sections. An initial overview will help you to decide what information goes where.)

1. Coverage and Co-ordination

- 1.1 Please enumerate the country's *national* police and other internal security forces, security services and intelligence agencies – that is to say all security-sector bodies except the military (regular and reserve) – and describe briefly the role and function of each. Please give the correct official designation of each of the forces, services and agencies – in the approved English-language and/or local-language form – and assign each a reference letter (A, B, C, ...) for later use. (This is simply a device to avoid needless repetition of full titles or designations.)
- 1.2 Have there been any changes to this institutional structure in the past decade or so: new forces, services or agencies established or old ones disbanded? Have there been any significant alterations to 'size and function': new responsibilities assumed, old ones relinquished or redefined?
- 1.3 Which body co-ordinates the different forces, services and agencies?
- 1.4 What are the constitutional provisions and/or legislation and/or framework of regulations that authorise the *existence* of these various organisations and define their several *roles and responsibilities*? Use the reference letters (A, B, C, ...), assigned under 1.1 above, as appropriate.

2. Accountability

To the executive

- 2.1 Please specify to which *executive* organs of the state the various organisations are *formally accountable* (answerable) for what they do and what they spend (policy and operational accountability, financial accountability) – Head of State (Presidency), Head of Government (Prime Minister), Council of

Ministers (Cabinet), designated Government Department, inter-Departmental or special Commission – and which of these is empowered to provide executive *direction*. Use the reference letters (A, B, C, ...), assigned under 1.1 above, as appropriate.

- 2.2 Have there been any significant changes to these arrangements in the past decade or so?
- 2.3 What constitutional or other provisions underpin these arrangements?
- 2.4 How do you assess the extent to which these formal arrangements work *in practice*?
- 2.5 What are the modalities of accountability to the *executive*?
- 2.6 Can the forces, services and agencies evade their obligations in this respect?

To elected representatives

- 2.7 Regarding accountability vis-à-vis the *legislature*, please indicate (a) whether the various forces, services and agencies are directly accountable to elected representatives through a designated committee or are they answerable only indirectly through the legislature's general oversight of the executive and (b) what are the legislature's *formal* powers in this connection. Use the reference letters (A, B, C, ...), assigned under 1.1 above, as appropriate.
- 2.8 Have there been any significant changes to these arrangements in the past decade or so?
- 2.9 What constitutional or other provisions underpin these arrangements and what institutional and procedural controls exist?
- 2.10 How do you assess the extent to which these formal arrangements work *in practice*?
- 2.11 Can the forces, services and agencies evade their obligations in this respect?

To other institutions

- 2.12 Do any of the following institutions have specific powers in relation to police forces, other internal security forces, security services and intelligence agencies in your country?
 - The courts
 - Human rights commissioners
 - Municipal authorities

- Internal boards (internal accountability)
Use the reference letters (A, B, C, ...), assigned under 1.1 above, as appropriate.

- 2.13 Have there been any significant changes to these arrangements in the past decade or so?
- 2.14 What constitutional or other provisions underpin these arrangements?
- 2.15 How do you assess the extent to which these formal arrangements work *in practice*?
- 2.16 Can the forces, services and agencies evade their obligations in this respect?

To the media and society-at-large

- 2.17 Do the print and broadcast media, and individual citizens, have right of access to state information about these bodies? Has this been secured in the constitution (or elsewhere), and can it be juridically enforced? Use the reference letters (A, B, C, ...), assigned under 1.1 above, as appropriate.
- 2.18 Are there procedures whereby irregularities can be revealed by serving personnel; and are 'whistle-blowers' guaranteed anonymity?
- 2.19 If questions are raised in the media do the authorities acknowledge the right of journalists to protect their sources?
- 2.20 If an individual citizen believes he/she has been improperly treated, is there an office or official (Ombudsman) empowered to receive and investigate complaints and correct abuses?
- 2.21 What is your personal opinion on the level and quality of media coverage of the activities of police forces, other internal security forces, security services and intelligence agencies?
- 2.22 Do you know of any poll data on public attitudes to police forces, other internal security forces, security services and intelligence agencies with particular reference to accountability?

To codes and conventions

- 2.23 To which international codes and conventions does your country subscribe?
- United Nations (e.g. 1979 UN Resolution: Code of Conduct for law-enforcing officers)
 - Council of Europe (e.g. 1979 Council of Europe Declaration on the Police)

- OSCE (e.g. 1994 Code of Conduct on Politico-Military Aspects of Security)
- Europol (e.g. 1995 Europol Convention)
- Interpol (e.g. 1999 Interpol Seoul Declaration)
- European Convention on Human Rights
- Requirements of the European Union
- Any other organisation?

Are all such international obligations respected (to the best of your knowledge)?

2.24 Does (international) co-operation between police forces, other internal security forces, security services and intelligence agencies affect the domestic accountability of your nation's forces?

- SECI Center (only applicable to Bulgaria)
- Interpol
- Europol
- Any other form of co-operation?

(For example, is it possible that extra-territorial operations escape scrutiny?)

3. Transparency

Domestic transparency: dimensions

- 3.1 Please specify about which of the enumerated 'forces, services and agencies' (cf. 1.1) the authorities are *obliged* to make information available to *elected representatives*. Use the reference letters (A, B, C, ...), assigned under 1.1 above, as appropriate.
- 3.2 What constitutional or other provisions impose this obligation (and are there constitutional or legislative provisions which state explicitly that for some bodies there is *no* such obligation)?
- 3.3 Is information made available about the *organisation* of the different forces, services and agencies? Please indicate whether relevant information is made *public* or subject to *privileged* access by selected persons (e.g. members of a specialist committee of the legislature or even a sub-committee or group of carefully chosen individuals).
- 3.4 Is information made available about the *personnel strength* of the different forces, services and agencies; and, if so, is there any

breakdown of personnel by category (field officers, headquarters staff, clerical and other support personnel)? Again, kindly state whether the public/privileged distinction applies (cf. 3.3).

- 3.5 Is information made available about *budgets*; and if so does the material (a) contain detail covering what money is spent *on* (inputs) and what funds are used *for* (outputs) or (b) provide only an abbreviated statement of money requested? Once more, please say whether the public/privileged distinction applies.
- 3.6 Is information made available about the *nature of operations* conducted? Is the material specific or expressed only in the most general terms? Is it in the public domain or subject to privileged access?

Domestic transparency: publications

- 3.7 For which, if any, of the forces, services and agencies under review are regular *policy* statements issued?
- 3.8 For which, if any, are regular *reports of activities* published?
- 3.9 For which, if any, are *statistics* available in the public domain?
- 3.10 Are there any regular publications that do not fall into any of the foregoing categories (3.7 - 3.9) of which we should be aware?
- 3.11 Could you list all official publications relating to these bodies, of whatever sort, that appeared in 2001 (or in a typical year, if 2001 was in some way unusual)?

International transparency

- 3.12 Do any of the international codes or conventions to which your country subscribes (cf. 2.23) impose 'transparency' obligations?
- United Nations (e.g. 1979 UN Resolution: Code of Conduct for law-enforcing officers)
 - Council of Europe (e.g. 1979 Council of Europe Declaration on the Police)
 - OSCE (e.g. 1994 Code of Conduct on Politico-Military Aspects of Security)
 - Europol (e.g. 1995 Europol Convention)
 - Interpol (e.g. 1999 Interpol Seoul Declaration)
 - European Convention on Human Rights
 - Requirements of the European Union
 - Any other organisation?

- 3.13 Do the authorities comply with any such obligations: and, if not, why not?
- 3.14 Does (international) co-operation between police forces, other internal security forces, security services and intelligence agencies affect domestic transparency regarding these bodies in terms of any of the 'dimensions' mentioned in the preceding subsection?
- SECI Center (only applicable to Bulgaria)
 - Interpol
 - Europol
 - Any other form of co-operation?
- (For example, can information which would be released if relating to domestic activity be withheld if international (extra-territorial) operations are involved?)

4. Recent changes 2001/2 and general appeal

- 4.1 Have the events of 11 September 2001 led to (declared) changes to 'normal practice' so far as the transparency and accountability of police forces, security and intelligence services are concerned?
- 4.2 Have there been, to your knowledge – or in your opinion – undeclared changes: and, if so, of what sort?
- 4.3 If you think that these Questions have not covered some important aspect of the transparency and accountability of police forces, security services and intelligence agencies, could you kindly cover such matters in your contribution?

CHAPTER III

BULGARIA

Yonko GROZEV¹

1. Coverage

There are quite a few government agencies, which are part of the executive branch and whose activities fall within a broad definition of a security service, including the police and the intelligence agencies. These are the National Police Service (NPS), the National Service for Combating Organised Crime (NSCOC), the National Border Police Service (BPS), the National Gendarmerie Service (NGS), the National Security Service (NSS), the National Intelligence Service (NIS), the intelligence and counterintelligence units within the Ministry of Defence (DefInt), and the National Protection Service (NPRS)².

Most of those services are within the structure of the Ministry of Interior (hereafter the MoI), which is a centralised administration with the Minister of Interior on top. The heads of services report to the Minister of Interior, but also have some independence, which creates a system of dual subordination for the regional staff of the services. The staff of the regional departments of those services report not only to the respective head of national service, called Director of the service, but also to the Regional Directors of Interior³. There are 27 Regional Directorates of Interior (RDI), which consist of units of the services NPS, NSCOC and NSS under the Regional Director and his deputies, who in turn report directly to the Minister of Interior. The security services within the structure of the Ministry of Interior include also the BPS and NGS but these are not part of the RDIs. There are also a number of other departments within the Ministry of Interior, the directorates,

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² The designations of the services in the English language are in accordance with those used by the Bulgarian Government.

³ On the structure of the Ministry of Interior and the Regional Directorates of Interior see 2.1 below.

which perform tasks like surveillance, electronic surveillance, run information data bases, and perform general administrative functions. The NIS and NPRS are independent, reporting to the Council of Ministers and the President and, of course, the defence intelligence services are under the Ministry of Defence (MoD).

The following is a brief description of the structure, the powers and field of activities of the different security services:

ORGANISATIONS AND ABBREVIATIONS

A	National Police Service (NPS)
B	National Service for Combatting Organised Crime (NSCOC)
C	National Border Police Service (BPS)
D	National Gendarmerie Service (NGS)
E	National Security Service (NSS)
F	National Intelligence Service (NIS)
G	Defence Ministry Intelligence and Counter-Intelligence (DefInt)
H	National Protection Service (NPRS)

National Police Service

The National Police is the largest force in the Ministry of Interior (MoI). The powers of the police, the structure and the tasks of the National Police are set forth in the Ministry of Interior Act and in some secondary legislation, not all of which is public.⁴ The Act describes the National Police as a special service within the system of the Ministry of Interior charged with maintaining public order, detecting, investigating and preventing crime. A more detailed list of tasks as described by the MI Act would include *inter alia* the following⁵:

- protecting public order;
- preventing and detecting crimes and other violations of public order;
- crime investigation;
- protecting the rights and liberties of citizens;

⁴ Ministry of Interior Act, promulgated in State Gazette no. 122, 19 December 1997, last amended State Gazette no. 45, 30 April 2002.

⁵ Article 60 para. 1 sub-para. 1 through 19 of the Ministry of Interior Act, *ibid*.

- protecting the property rights of citizens, organisations and the state;
- organising and controlling traffic and registering motor vehicles;
- taking crime prevention measures;
- carrying out crime research.

The NPS includes patrol police, traffic police, riot police, detectives and investigators, who have formal investigation powers. The powers of officers of the national police include *inter alia* the powers to arrest and detain individuals for 24 hours, search and seizure powers – in some urgent cases the law does not require a prior judicial warrant – electronic surveillance powers, and the use of force and firearms.

There is a system of dual subordination of the police. This is due to the fact that the head of the service, the Director of the National Police Service, is appointed by the President of the Republic, and nominated by the Council of Ministers. The President of the Republic is elected at general elections, and the experience of the last 12-plus years has demonstrated that more often than not the political support for the President would be different from that for the majority in parliament and the Council of Ministers respectively. This makes the Director more independent of the Minister of Interior than any other police officer and provides him a certain degree of autonomy. To balance this, the law has reduced the powers of the Director to issuing general instruction and what the law calls “methodological management”.⁶ The law instead, made the heads of the territorial units – the Directors of Regional Directorates of Interior – directly responsible for the day-to-day management of the police force. As they are directly appointed by the Minister of Interior, this creates a much stronger hierarchical line of subordination.

The National Service for Combating Organised Crime

The NSCOC is an agency within the Ministry of Interior. It is established and is regulated with the Ministry of Interior Act.⁷ Like the police on the regional level it is integrated in the Regional Directorates of the Interior, and its regional officers report both to the Director of the Regional Directorate and to the Director of the BPS. The Director of the NSCOC service is appointed by the President upon a motion by the Council of Ministers, but reports to the Minister of Interior.

⁶ Article 31 para. 1 sub-para. 3 of the Ministry of Interior Act.

⁷ Articles 89 through 93 of the Ministry of Interior Act.

The NSCOC is considered to be an elite police force, with better trained and better qualified officers. Its tasks as set forth by law are combat organised crime, both domestic and transnational. It has also functions with respect to countering terrorism. The law provides for a detailed description of the field of its activities, which are: countering terrorist activities, kidnappings, illegal arms production and trade, drug trafficking, organised criminal business, money laundering and corruption. The NSCOC's officers have police arrest, search and seizure and use of force and firearms powers. They could also request electronic surveillance and are empowered by law to collect and store information in the field of their activities. This leads to an apparent overlap of tasks with the NSS, and there have been in the last ten years examples of institutional controversies and lack of co-operation.

The National Border Police Service

The BPS is a service within the structure of the Ministry of Interior. Its main task is the protection of the state borders and border control. It performs its functions at the border checkpoints, including airports and seaports and along the land border. It is authorised to collect and file information related to border control and is also one of the services authorised to request the use of electronic surveillance. The Director is appointed by the President upon a proposal of the Council of Ministers and reports to the Minister of Interior. The BPS is one of the two services within the MoI with regional units, but these are not integrated in the Regional Directorates of the Ministry of Interior.

The National Gendarmerie Service

The NGS is a police service with all the typical police powers and functions of providing security, preventing and investigating crime, however, with a special geographical jurisdiction. It covers the non-inhabited areas of the country. The Ministry of Interior Act describes also as one of its tasks combating terrorist activities and countering subversive groups. The head of the service reports directly to the Minister of Interior, but it is not integrated in the RDIs and thus not subordinate to the RDIs' Directors. The NGS could also be active within inhabited areas upon an order of the Minister of Interior, and is regularly used particularly as anti-riot police.

The National Security Service

The NSS is the counterintelligence national service within the system of the Ministry of Interior. It is the successor of the Second Department

of the Communist State Security. The head of the Service is the Director of the National Security Service, and is appointed by the President of the Republic upon a proposal by the Council of Ministers. Though not appointed by the Minister of Interior, the Director reports to the Minister of Interior.

The NSS is established with the MI Act, where the tasks and the structure of the Service are described.⁸ Its tasks are to protect the “constitutionally established system of government, the unity of the nation, the territorial integrity and the sovereignty of the country”.⁹ By law it should counter security threats from foreign intelligence services, and other organisations and individuals. The tools the service should use in carrying out its activities are collecting information, provide analysis of existing security threats and build forecasts. It has also the task of organising the protection of the confidential information held by other governmental agencies. The service is allowed to collect and file information only following a procedure established by law. Collection could be via official channels, via informers on their payroll or volunteers and via electronic surveillance. Reporting is to the President, the Prime Minister and the Speaker of Parliament. The service has a central office and regional departments integrated in the 27 RDIs of the MoI. The personnel number is confidential information.

Through the 1990s there was a shift in the focus of NSS’s work. Its communist era predecessor was a counterintelligence service of the cold war times. With the political changes of the 1990s, emphasis shifted from countering acts of espionage of foreign intelligence to other activities. The field of activities of the service has dramatically expanded, to include countering threats to the internal political security of the country, potential threats from terrorist and extremist groups, illegal arms trade, corruption within the government, illegal production and trafficking of narcotic substances, illegal migration. There has been absolutely no public debate on the proper focus of the service and no publicly expressed concern about expansion of its work into standard law enforcement fields.

⁸ Article 44 through 48 of the MI Act describe the tasks and statutory defined activities of the service, while Article 49 through 56 describe the statutory powers of the service personnel.

⁹ Article 44 of the MI Act.

The Operational and Technical Information Directorate

The Operational and Technical Information Directorate is a unit within the MoI that does electronic surveillance as requested by some of the services A through E (see table) and where a court has granted a surveillance warrant. Officers of this unit work with the MoI and every Regional Directorate, reporting the results of their surveillance to the service which requested it.

National Intelligence Service and DefInt

The NIS is only briefly mentioned in the parliamentary act regulating the army. It is within the structure of the Ministry of Defence, and the act itself sets the requirement for it to be regulated by a separate act of Parliament. No such act was passed as of June 2002. The NIS is also mentioned in the State Budget Act, where its annual budget is specified, and in a Regulation of the Council of Ministers. The Regulation sets forth that the Director should be appointed by the President, upon a proposal by the Minister of Defence. Some lawyers argue that this is unconstitutional, as it cuts into the constitutional powers of the President as Commander in Chief of the Army. There is no statutory or any other public description of the tasks and powers of the NIS, or of the intelligence and counterintelligence units at the Ministry of Defence (DefInt). One could only guess that their tasks are identifying and countering threats to the armed forces and the defence system of the country. The adoption of a statute on these matters is not very likely in the near future, although every Government and every Parliament in the last ten years has stated that adopting legislation on these matters is on their agenda. In the end, there are always higher legislative priorities.

National Protection Service

The NPRS was created with Decree N 145 of 02.02.1990 (not promulgated). It is the successor of the Fourth Department of the Communist State Security. The task of the service is the physical protection of high-ranking governmental officials, and foreign officials visiting the country and government employees, the list of names being adopted by the Council of Ministers. Though the Decree might be amended only by an act of Parliament, the Council of Ministers adopted a Regulation N 151 from 05.08.1992 on the structure and activities of the National Protection Service. This raises some concerns as to the formal legality of the Service, but as its main task is providing for the physical safety of public officials, potential violations of privacy rights are not very likely. There have been no cases of violations of other rights of

individuals and the issue of legality of the service has never come to court. The head of the NPRS is appointed and reports directly to the President of the Republic. The organisation does not have a mandate to collect information, but instead it can address other services for information it might need.

At the time of the breakdown of the communist regime besides the police there was one security agency, namely the State Security. Currently existing services succeeded the six departments of the State Security, which was dissolved in 1991. One department that was not transformed but instead was closed down was the Sixth Department, the so-called “political police”. Some of its functions were taken over however, by the NSS. All other departments were transformed into what are now the services E through H (see table). Changes of the staff working for the services did not take place at once, after 1989, but instead took place gradually over time. The Bulgarian Socialist Party (BSP), the successor of the Communist Party, won the first democratic elections in 1990. Even though the services stayed generally intact at the time, their leadership was changed, as a result of the political changes within the BSP. Large-scale discharge of personnel took place only after the 1991 parliamentary elections when the BSP lost its parliamentary majority. There has never been an open procedure though, or publicly declared standards on the basis of which the security services staff was discharged. Instead, party political loyalty seems to have played an important role. Services A through D succeeded different police units that existed within the MoI prior to 1991.

The new democratic Constitution, which was passed by Parliament in 1991, contains precious little with respect to the services. It provides for the creation of the National Security Consultative Council, a body whose purpose is political crisis management. Besides that the Constitution describes only the President as the Commander in Chief of the army¹⁰ and places the powers and responsibilities for maintaining law and order and protecting national security with the Council of Ministers.¹¹ The changes in the structure and functions of the services, however, were part of the same political agreement that brought the Constitution into existence. At the same time when the Constitution was adopted, Parliament voted new legislation on the Ministry of Interior, which created the services A to F, although some of them had different

¹⁰ Article 100 para. 1 of the Constitution, promulgated in the State Gazette no. 56 on 13 June 1991.

¹¹ Article 105 para. 2 of the Constitution.

names at the time.¹² This new legislation established also the system according to which the Council of Ministers nominate and the President appoints the heads of services.

From the very start this system was thought of as providing a system of political check and balance, as at the time the government was a Bulgarian Socialist Party government and the President was supported by the main opposition party, the Union of Democratic Forces (UDF). This system of appointment of the heads of services was never changed, despite subsequent changes in legislation. In 1997 however, the newly elected UDF government amended the overall structure of the MoI, by changing the MI Act. The major change was in shifting the day to day management responsibilities for the work of the regional units of services A, B and E to the Regional Directors of Interior appointed by the Minister of Interior, leaving the Directors of those services (appointed by the President) the powers to issue general instructions. The government at the time argued that there had been too much overlapping and lack of co-operation between the services and the MoI needed a more centralised line of control, in order to better co-ordinate the work of the different services. There had been no suggestions of changing that set-up since.

The Council of Ministers is the government body which has the ultimate decision making power with respect to the services. The Ministry of Interior and the Council of Minister respectively have direct control over services A, B, C, D and E. Services F and H are controlled by the President, to the extent that the President has the powers of appointing and dismissing the heads of those services. The President, the Prime Minister and the Speaker of Parliament have equal access by law to information collected by services E and F and the analytical papers produced by them.¹³

In 1998 the Council of Ministers created a special body called the Security Council, to assist it in exercising its powers with respect to the security services.¹⁴ This body was to collect and consider all the information and analysis prepared by the security services. Members of the Security Council were the Prime Minister, the Ministers of Interior, Foreign Affairs, and Defence, the Secretary of the Minister of Interior, the Directors of services E and H and Deputy Ministers of Interior and

¹² Ministry of Interior Act, promulgated in the State Gazette no. 57 on 16 June 1991, abrogated State Gazette no. 122 of 19 December 1997.

¹³ Article 50 para. 2 of the Ministry of Interior Act.

¹⁴ Regulation no. 216 of the Council of Ministers of 29 September 1998, on the creation of the Security Council with the Council of Ministers and the adoption of Regulations on its functions, tasks and operational procedures.

Defence. At the time of the creation of the Council fears were raised by the opposition parties of a super security agency at the service of the Government to be used for party political purposes. The new body was also seen as an effort by the Council of Ministers to take more control over the National Protection Service, which by law reports to the President as a Commander in Chief. The government argued that it needs better co-ordination and co-operation between the different services and creating a council was the perfect solution.

Despite objections to its creation the Security Council established itself as a necessary and useful institution. Although there have been public accusations of abuse of some services for party political purposes, such accusations have been levied against individual services, most notably the NSS, not at the Security Council. The Security Council does not have formal decision making powers, but may only submit proposals to the Council of Ministers. To alleviate fears of sidelining the President in the process of taking national security decisions, the Regulations on the Security Council expressly guaranteed the right of the President to attend sessions of the Security Council in person or commission a representative to attend the sessions. After the election of 2001, the new government did not dispute the need of the Security Council, but only created two sets of members of the Council (permanent and non-permanent).¹⁵

As already mentioned, the Constitution contains no references to the services. It only describes the President as the Commander in Chief of the army and places the powers and responsibilities for maintaining law and order and protecting national security with the Council of Ministers. Services A to E are regulated by the Ministry of Interior Act but there is extensive secondary legislation on these and other agencies, a substantial part of which was never made public.

The NIS was never regulated by parliamentary legislation. In 1991 the Council of Ministers passed a Decree no. 216 of 4 November 1991, with a total of five sentences. It provides that the NIS is a legal entity, and grants it certain property, which is described in a confidential attachment. The service is also mentioned in the annual State Budget Acts, where its annual budget is set forth. No regulations on its activities have been published. Similarly, service NPRS was also created by secondary legislation that was never promulgated.

¹⁵ These changes were interpreted by analysts as reflecting issues of personal trust rather than issues of institutional set up.

2. Accountability

2.1 To the executive

The Minister of Interior plays a central role in the activities of the security services within its structure. The heads of services A, B, C, D and E report directly to the Minister, though the Minister does not appoint them himself. They are accountable by statute to the Minister of Interior for everything related to their work, general policy, individual operations and also financially.

The Ministry of Interior Act sets forth the structure of the MoI with all the services included in it and the field of activity of the different services or units. The tasks of the Ministry are also defined in this legislation: the protection of public order, investigation and prevention of crime, protection of national security, the constitutional system of government, the state borders and control over border crossings.

The Minister of Interior, a member of the Council of Ministers, has all the powers to implement government policy in internal security matters and protecting public order. The Act (article 28, paragraph 3) mandates the Minister to be a civilian. He/she may not appoint and delegate his/her powers to deputies. The only exception to this rule is in cases of prolonged absence of the Minister, when the Council of Ministers may appoint a deputy.

Employees of the MoI are prohibited from membership in political parties. They are under the duty to abstain from acts that may be in violation of their political neutrality. The Ministry is a hierarchical structure; orders of a superior are mandatory to those to whom they are directed. The Minister is at the top of the hierarchy. When orders are issued in writing, the employee to whom they are directed may not refuse to perform them, even if he/she considers them to be in violation of the law.

The Ministry of Interior Act provides also for the position of Chief Secretary of the Ministry of Interior.¹⁶ The Chief Secretary is described as the highest non-party-political position in the MoI and is appointed by the President upon a proposal of the Council of Ministers. The Chief Secretary should directly control the operational work of services A, B, C and E. Such legislation was adopted to further the concept of neutral services in party political terms. In the same logic the Act defines the “political cabinet” of the Minister of Interior, which should consist of the Minister, the Deputy Ministers, the Chief of Cabinet, the Parliamentary

¹⁶ Article 27 of the MI Act describes the functions of the Chief Secretary.

Secretary and the Head of the Press Service.¹⁷ However, this distinction between political and non-political positions on the highest level did not work in practice. The experience in the last ten years clearly demonstrates that every new government would appoint politically loyal individuals in all high positions, including those described by statute as non-political. With the changes introduced in the Act of 1997 – and the fact that Regional Directors would also often be replaced with the change of the central government – the MoI and the Council of Ministers have had full control over the services A to E.

Not only the Executive, the Council of Ministers and individual Ministers, but also the President, who is the Commander in Chief of the Army, has powers with respect to the security services. The Bulgarian President is the elected Head of the State and has a five years term in office, one year longer than the term in office of Parliament and as consequence of the Government. The President has limited powers and was conceived by the founding fathers as the institution that would not so much rule but balance between the executive and Parliament and between different political parties and bring for a continuity and permanence in the government of the country. For most of the last several years the President and the Government have had the support of different political parties and as a result the institutional checks and balance between the President and the Government turned out to be fairly important. With respect to the security services this was particularly important, because of the complete lack of effective parliamentary control over the security services (see below).

The system of executive direction has remained largely unchanged since its creation in 1991. There had been only a few substantial changes. One such change has been the shift of subordination of services A, B, C and E from the Directors of those services to the MoI and the Regional Directorates. The second change has been the introduction of the requirement of a judicial warrant for electronic surveillance in 1997, replacing the prosecutorial warrants required before that. And finally, an important change was the creation of the Security Council. Governments since 1991 had tried in one way or another to streamline the information coming from the different intelligence and counterintelligence agencies. With the creation of the new Security Council the Cabinet could feel safe that no important information gathered by the services will be missed and that the Cabinet will have a good knowledge of the activities of the services. The public debate on the Security Council and the compromise

¹⁷ Article 29 of the MI Act.

reached in the end did barely mention issues of parliamentary oversight and accountability to the public. There have been no changes to introduce better guarantees that the security services in the end do operate within the limits set by law.

The executive does have effective control over the services. There have been cases where heads of services A through E have been more independent from the Minister of Interior and the Council of Ministers, but this has been conditioned on the support of the President, where the President was backed by a political party different from the party in government. Even in such cases, however, a newly elected government had been generally able to replace disobedient heads of services. Because of the high degree of centralisation of the system, there is little input of the local authorities.

Executive control is comprehensive. The executive determines the amount of funding, determines the number of personnel working for the services, controls appointments and dismissal of individual officers (except for the Directors of services) and has access to all the information generated by the services and information about individual operations.

For the services within the system of the MoI, it would be very difficult to evade their obligations because of the high degree of subordination to the Minister. The NIS is by far the most independent organisation, and there have been cases of tension between its Head and the Council of Ministers. This has only been possible because of political support by the President, where the President and the Cabinet were of different political parties.

2.2 To elected representatives

On a more general note, the oversight and control mechanisms over the services are insufficient. The President has some control functions, through the system of appointment of the heads of the different services. Some control might also be exercised by the Prosecutor General, who is completely independent from the Government, but this has not proved to be an effectively working control mechanism. There is no Ombudsman or any other governmental institution with the task of protecting basic rights. Most important, parliamentary control does *not* function effectively.

Parliamentary Oversight. The Internal Security Committee

The principal document regulating parliamentary oversight of the executive, including oversight of the security services, is the Rules on the

Structure and Activities of the National Assembly.¹⁸ These Rules provide for a number of permanent committees of Parliament, among which is the permanent Internal Security Committee (“the Committee”).¹⁹ Currently this is one among twenty-one other permanent parliamentary committees, though at times the number total number had been different. Occasionally, Parliament may create ad hoc committees, to deal with some specific case or issue, which may also touch upon activities of the security services.²⁰

There are almost no provisions in the Rules on the Structure and Activities of the National Assembly (“RSANA” or “Rules of Parliament”) specifically on the Committee. Its activities are regulated by the provisions applicable to all permanent and ad hoc committees, describing their powers. Only very few provisions deal particularly with the Internal Security Committee. The Committee itself has passed Rules on its structure and activity, but these Rules are confidential and not accessible to the public.²¹

According to Article 62 of the Constitution, Parliament has the power to exercise parliamentary control over the executive. Article 79 para. 1 of the Constitution explicitly authorises the permanent committees to exercise such control on behalf of Parliament. There is no formal description in any legal document of the precise scope of the parliamentary control exercised by the Internal Security Committee or any of the other permanent Committees for that matter. There is an implicit understanding, though, that the Committee is charged with acting on behalf of Parliament with respect to issues concerning the

¹⁸ Rules on the Structure and Activities of the National Assembly passed by Parliament, promulgated in the State Gazette no. 69 of 7 August 2001, amended State Gazette no. 86, 5 October 2001. Although every new Parliament would pass new Rules on its structure and activities, there are no significant amendments from one Parliament’s Rules to another.

¹⁹The Committee was first established by Great National Assembly, 1990-1991, under the name National Security Committee. Even though there had been changes in the overall number and functions of the committees of Parliament since that time, there had always been a National Security Committee, which however was split into two by last Parliament, creating an Internal Security Committee and a Foreign Security Committee.

²⁰ One example had been the creation by the 1997-2001 Parliament of an ad hoc Committee, which was charged with reviewing the overall performance of the services active in fighting crime and crime prevention.

²¹ The rules on the Structure and Activities of the National Assembly confer to every permanent committee the powers to pass such Rules (Section 21 para. 1.). Still, there is nothing in the Rules on Parliament to suggest that the Committee Rules of the Internal Security Committee may be classified. Under current law it is impossible to challenge such classification.

army, the police and the security services. It is these institutions over which the Committee will carry out its oversight functions.

The bulk of a parliamentary committees' work – including the Internal Security Committee – is in working on draft legislation, though, not oversight. It is the Speaker of Parliament who would decide which draft decisions and draft legislation should be reviewed by a particular committee. Any legislation concerning the structure and functions of the army, police or security services would be considered by the Committee, before it goes to the plenary session of Parliament.

As a rule, the Committee holds its hearings behind closed doors, though it has the powers to hold an open session.²² It is the Board of the Committee, not the Committee itself that would decide whether to have a public hearing. There are no standards, published or made public in some other way, as to when the hearings may or should be public.²³ It could be that after a session the Chair of the Committee or other members of the Committee would address the media, informing them about the discussions that took place, but this is not common and there is no formal procedure.

Every Member of Parliament may attend a session of the Committee, though only members of the Committee have the right to vote. Decisions are made by a simple majority. Besides the Committee's powers to review draft legislation and draft decisions of Parliament it may also prepare reports, proposals and observations on such drafts and study the effects of already passed legislation. The Committee shall issue statements on the effects of proposed or passed legislation.

There are no special rules or procedures specifically dealing with parliamentary oversight over the security services. The whole issue is regulated as part of the general powers of Parliament to oversee and control the executive. Using such powers the Committee may investigate activities of the security services. According to the Constitution and the Rules of Parliament, no government agency, public or private organisation or citizen may refuse to co-operate, testify and/or present to the Committee any document or information requested.²⁴ The

²² Section 25 para. 4 of the Rules of Parliament reads: "The sessions of the Internal Security Committee and the Committee on Foreign Relations, Defense and Security shall be held behind closed doors. The Committee may decide to hold an open session."

²³ It could be that there are such standards in the Rules on the Internal Security Committee, though this is only a guess.

²⁴ The Constitutional provision, Article 80 reads: "Public officials and citizens, whenever asked to, shall appear before the parliamentary committee and deliver the information and documents they were requested." The Constitution explicitly provides

Constitutional provision is of higher rank than any other statutory provision and the Rules of Parliament are adopted by Parliament, so they should have the power of a statutory provision. Thus, from a purely legal point, the Committee should be able to have access to any document or information.²⁵ The Committee shall receive any government data, whether it is statistical or individual data and general reports and reports on individual cases drafted by the services for the Government. Legally speaking, the Committee should also be able to investigate any particular case it might be interested in. Whenever state or official secret information is revealed in the reports or in the process of investigation, the members of the Committee and those other members of Parliament present are bound to keep such information secret.²⁶

Still it is not quite clear how these provisions square in practice with laws limiting access to classified information. According to the Constitution, Parliament should prevail and have access to any security service information. There are voices, though, arguing that the Committee shall not have the right to access to methods of information gathering and the identity of secret agents and informers.²⁷ It is impossible to justify this from a legal perspective, but such statements are very telling about the actual state of parliamentary control exercised by the Committee. There has been no public case yet where the issue of the limit of parliamentary access to security services information has been raised and authoritatively decided.

Whatever the powers and the actual scope of parliamentary control, the results of such control never becomes public. There is no requirement for annual or other periodic reports of the security services to the Committee and there is no requirement for the Committee to publish the results of its oversight activities. All the sessions of the Committee are recorded, but like all other Committee documents the record is classified. In fact, there is very little the public will get to know about the activities

for the obligation of a Minister to also appear before a committee or the plenary session of Parliament whenever asked to.

²⁵ The issue of physical access to the premises of security services is not regulated though, and it seems that members of Parliament would have no special right to access to such premises.

²⁶ Section 26 para. 5 of the Rules of Parliament: "Members of the committees shall be liable in accordance with general rules for the protection of state and official secret information as well as with respect to information related to the reputation and the private life of individuals".

²⁷ Statement of the former Director of the National Security Service General Atanas Atanasov, in a radio interview on Radio "Free Europe".

of the Committee, The only exceptions are individual cases, where the Committee would inform the public about investigating the case, but not about its findings.

The lack of effective parliamentary control is probably to a large extent due to party politics and the set-up of the Committee. Section 19 of the Rules of Parliament says that the overall ratio between the political parties in Parliament should also be reproduced in the committees. Thus it is known in advance how many members in every committee each political party will have. This means that the majority in Parliament, which also formed the Cabinet and would have control over the security services, would always have a majority in every parliamentary committee, including the Internal Security Committee: a fact which comes to explain the relatively passive behaviour of the Committee in exercising its oversight powers. Members of the Committee are nominated by their respective parties and then the plenary session would take one vote for all of them.

The first ten years of the existence of the Committee in Parliament displayed little that could be said to be effective oversight over the security services. The Committee has been dominated by the same political party ruling the country, and has not been enthusiastic about making public anything of what is going on behind the “state secret” curtain. Discussions within the Committee never become public, and whatever information would surface is as a rule leaked to the press by members of the Committee. Naturally party political interests would make such information less reliable. There has been no pressure by the opposition parties, the public or the media to make oversight more effective and the services more transparent. Issues like the budget, the number of staff, and the priorities of the services are extremely rarely discussed in public, thus preserving the secrecy of the services.

The Prosecution office, despite the fact that it is fully independent of the executive, has also failed to play any meaningful role in providing that non-military security sector organisations do not evade their legal obligations. In one of the most widely reported scandals of alleged illegal wiretapping, it was charged that the Chief Prosecutor himself was the victim of illegal wiretapping. The story broke out in early 2001, with information provided by the Prosecution that listening devices were found in the Chief Prosecutor’s apartment. The story got media attention for several months and the Prosecution brought charges against several MoI officers. However, a year and a half later (mid-2002) the story is

completely dead and the Prosecution never submitted those charged to trial.

Public information on the extent to which parliamentary control functions is insufficient, as sessions are confidential. There are no mandatory reporting requirements and public reports; and the executive, which has close to full control over the services, has also the support of the majority on the Committee. This seems to justify a conclusion that parliamentary control does not work in practice. The forces can evade their obligations as long as they have the support of the executive. They can to a large extent escape other forms of control.

2.3 To other institutions

Judicial Review

Judicial review has played only a limited role so far in controlling the services. Only recently the procedural rules were changed, to require prior judicial approval of searches and seizures and electronic surveillance.²⁸ By law, any administrative decision related to “national security” is exempt from judicial review. And criminal responsibility of police officers for the unlawful use of physical force or firearms does not function efficiently. Court hearings in labour disputes in cases of disciplined officers are often held behind closed doors.

The Special Surveillance Methods Act was passed in October 1997 and was an improvement over the earlier 1994 Act. It regulates not only electronic surveillance, but any surveillance, including wiretapping, taking of pictures, correspondence monitoring and physical watching and following of persons. The Act sets forth two grounds on which surveillance can be granted. The first ground is for the collection of evidence on a “grave crime” committed or planned, where such evidence could not be obtained using other methods, less restrictive to individual rights. The second ground is less clear, with a higher potential for abuse. Electronic surveillance could also be employed for the surveillance of “individuals or sites related to national security”.²⁹ As the procedure for obtaining a surveillance permission is confidential and the courts do not

²⁸ In September 1997, the Electronic Surveillance Act was amended and the powers to authorize use of electronic surveillance was shifted from the prosecutors to the Presidents of the Regional Courts. In 1999 the Criminal Procedure Code was amended to make the same shift in powers from the prosecution to the courts. Until then it was argued that as prosecutors in Bulgaria are fully independent of the executive, such powers were not in violation of individual liberties.

²⁹ Article 12 para. 3 of the Electronic Surveillance Act.

publish their case law, or even the overall number of surveillance warrants granted on any of the two grounds, there is no meaningful way to say how extensively or narrowly that ground is interpreted. A recent amendment to the law has allowed the services to resubmit their request for permission to a higher judge if turned down by the President of the respective regional court. Service A, B, C, E, F, G and H (see table) are among the agencies authorised to request surveillance. Actual surveillance is carried out by the Operative-Technical Directorate of the MoI for services A, B, C and E. Services F, G and H carry it out themselves.

The services have also full discretion as to defining certain matters as “national security” issues and thus avoiding judicial review of their administrative decision in that respect. Legislation excludes judicial review of decisions related to national security. The question as to whether the decision to define an issue as a national security issue should be reviewed by the courts came up in the year 2000, following several expulsions of foreigners. After conflicting interpretations by the courts, the issue finally came to the Constitutional Court. It also had to consider whether the statutory ban on judicial review also in cases where basic rights are infringed does violate the Constitution and international human rights law. The Constitutional Court did not reach a decision as it split even, six to six votes.³⁰ The result was that the statutory ban stayed, and the executive has unchecked discretion in defining issues as matters of national security. Several cases of deported foreigners are pending at present before the European Court of Human Rights and in June 2002 the ECtHR delivered its first judgement in such a case. It found that Bulgarian legislation with respect to expulsion of foreigners on grounds of national security does not meet the requirements of the Convention for clarity and precision and thus gives room for arbitrary decisions. It also found that the lack of judicial review is in violation of the Convention.³¹

Human Rights Commissioner and Local Government

There is no Human Rights Commissioner or other Ombudsman-type institution in Bulgaria. There is a draft law in Parliament (mid-2002), but it explicitly excludes issues of national security and would thus largely exclude all services and fully exclude services E, F, G and H. Local

³⁰ Judgment no. 4 of 23 February 2001 of the Constitutional Court. As there are 12 judges sitting on the court, the Constitution requires a seven judges majority to strike down a statute.

³¹ *Al-Nashif and others v Bulgaria*, judgment of 20 June 2002.

governments have absolutely no powers with respect to the services.

Internal Accountability

Internal accountability is carried out by the “Inspectorate” of the Ministry of Interior for services A, B, C, D and E. The Inspectorate reports to the Minister of Interior. The procedure however is totally non-transparent. Findings of the Inspectorate are not public and even where a procedure was opened on the basis of a complaint by an individual that individual will not be informed of the findings. The report of the Inspectorate would be submitted to the Minister of Interior or Regional Director of Interior, depending on the officers investigated. Only the decision to discipline or not to discipline an officer is communicated to the complainant. The general public does not trust the system of internal control.

All existing mechanisms of accountability lack transparency, which leads to a general doubt about their efficiency. There have been no structural changes in the system of oversight and accountability. Internal control is regulated by the MoI Act. As a rule newly appointed governments would announce a more open and trust-developing approach with respect to internal accountability, but that did not lead to meaningful changes. Judicial review is excluded by the Administrative Procedure Act. The Constitution contains no provisions on the matter.

The various services claim that the existing control mechanisms are sufficient, and that they are held under strict control by the President, the respective ministers of defence and interior, and the Council of Ministers.³² As such control receives very little if any publicity, except for statements that there has been a policy and operational audit and no violations were established, the public may either believe it or not.

2.4 To the media and society-at-large

The Constitution contains a provision on information.³³ This sets the standard on the matter, which however is not particularly precise.³⁴ This

³² A good example is an interview by the head of service F, given on 2 June 2002 on a Bulgarian TV station, “Btv”. There he stated: “In a totalitarian society the special services could act arbitrary, but in a democracy this is impossible. The activities of the services is under strict control. Claims voiced in the media that the intelligence service is beyond control are simply not true. At every moment all the operational work is reported and strictly controlled by the Prime Minister and the President”.

³³ Constitution of the Republic of Bulgaria, promulgated State Gazette No 56, 13 July, 1991.

³⁴ Article 41 para. 1 of the Constitution reads:

provision was interpreted by the Constitutional Court to mean that a government agency is under an obligation to provide information upon request only where Parliament had explicitly passed such an obligation.³⁵

Parliament adopted such legislation in June 2000.³⁶ This act provides for a general duty of government agencies to submit information upon request. The legislation however contains vaguely-defined exceptions, particularly with respect to classified information. New amendments were introduced to this legislation in April 2002, providing explicitly for the powers of courts to review whether information was classified in accordance with law. How the courts will interpret the law and how it will in the end work in practice remains to be seen.

“Whistle-blowers” are most likely facing serious problems and possibly criminal charges for “disclosing state secrets”. Anyone with official access to state secrets would risk a jail term, if he/she would reveal these secrets to another person.³⁷ Not only the wilful disclosure of state secrets is a crime, but also the negligent disclosure (for example, losing secret documents and the breach of safety regulations that had resulted in disclosure). Such acts would also be infringement of discipline and would result in disciplinary discharge. Not only a person

“(1) Everyone shall have the right to seek, receive and distribute information. The enjoyment of such a right shall not be targeted against the reputation of others and against national security, public order, public health and the morals.

(2) Citizens shall have the right to information from a government agency or an institution on issues which are their legitimate interest, if the information is not state secret or some other secret protected by law and does not infringe on the rights of others.”

³⁵ Judgment no. 7 of 1996 of the Constitutional Court. In this judgment the Court stated, that “The right to seek and receive information laid down in Article 41 para. 1 of the Constitution encompasses an obligation on government agencies to provide access to information of public importance. The exact content of such an obligation though, shall be laid down in an act of Parliament. It includes the duty of government agencies to publish official information and to provide access to sources of information.”

³⁶ Access to Public Information Act, promulgated in State Gazette no. 55 of 7 June 2000.

³⁷ The willful crime of violating the state secrets is described in Section 357 of the Criminal Code, which reads: "

(1) Any person who disclosed information which is state secret and which has been entrusted to him or has come to his knowledge officially or in connection with his work, or any person who disclosed such information, being aware that as a result the interests of the Republic of Bulgaria might be injured, if not subject to a harsher punishment, shall be punished with imprisonment of up to five years.

(2) If as a result of such actions, the state security had suffered particularly grave consequences, the punishment shall be imprisonment between 3 and 5 years.

with official access to classified documents but also any other person may be held liable for publicising state secrets. For a person without official access to be convicted, the prosecution should prove that this person acted knowing that publicising the classified information might “endanger the interests of the Republic of Bulgaria”. Since 1990 however, there have been no such cases and no prosecution for violation of state secrets.

Traditional criminal law on state secrets does not provide for a ‘right to know’ defence. Even though one could argue on the basis of the 1991 Constitution that there should be such a defence, it is doubtful whether the courts would accept such a line of reasoning.

Exemptions from the general duty to testify under Bulgarian criminal law are very limited. Everyone except for close relatives and the legal counsel of a suspect faces potential criminal liability if they refuse to testify. One could argue a right of a journalist to protect sources on the basis of international law, as international law is directly applicable by domestic courts; but, again, chances are that the courts will not accept such an argument.

There is not an official like an Ombudsman empowered to receive and investigate complaints. A person who believes himself/herself to have been improperly treated could complain to the Inspectorate of the Ministry of Interior or to the prosecutor, in case there is sufficient evidence that a crime was committed.

The media are certainly a crucial factor in achieving some degree of openness and democratic accountability of the services. The Bulgarian media, however, have not lived up to the high standards of a public watchdog. Although the press has played a crucial role in ensuring the democratic accountability of other public institutions, it failed to address the issue of the activities of the security sector in a meaningful way. It has done a better job with respect to services A, B, C and D, prompting change on such issues as police brutality and use of firearms, investigating and discussing cases vigorously. It has also published, although more carefully, on cases of alleged corruption in the services.

In several respects the press has covered organisations only to the extent that they would be willing to provide information about their own activities. This is probably less true about services A, C and D, as they are more numerous and their activities are by their nature more public. It is certainly true, however, about services B, E and F, which have developed good skills in feeding the media with the information they want made public. This has created a certain bias in the coverage of the

services in their favour.

Investigative journalists have exposed alleged misconduct by officers of services A, B, D. There is very little if any independent media investigation of services E, F, H. With respect to the latter accusations of misconduct have come from opposition politicians, and have been mostly of unlawful surveillance. The most publicised such event concerned bugging devices found in the apartment of the Chief Prosecutor (see above). In all such cases the suspicions have always been that the services are being used by top government officials to spy on their political opponents. With the lack of properly functioning mechanisms of public accountability it is very difficult to verify or deny such allegations.

As consecutive governments have been replacing the heads of services with politically loyal individuals, this has created regular changes throughout the years, leading to media analysis of personnel policies. “Who is the next director of service X?” is the most popular genre of media coverage. As a rule the media rarely addressed structural issues and questions of oversight and democratic accountability.

The public regards the police force as one of the most popular government institutions, with approval ratings around 60 per cent. Its ratings are second only to the army, which has always been the most popular institution. The courts have approval ratings usually around 20 per cent. Such figures are to be explained also by the sharp rise in crime rates in the last ten years and successful media interventions by the police, portraying itself as the institution “arresting the criminals”, who are then let free by a corrupt court. With respect to the other services there are no opinion polls.

2.5 To codes and conventions

Bulgaria subscribes to all the main international codes and conventions. (See Supplement to Chapter II.) There is no publicly available information that would justify a conclusion that international co-operation between police forces, security services and intelligence agencies affects their domestic accountability.

3. Transparency

3.1.1 Domestic transparency: dimensions

In accordance with the effective Rules of Parliament, adopted by Parliament itself, there are no distinctions between the different services;

and authorities are obliged to make any information available to the Security Committee. Parliament had passed such a decision on the basis of its constitutional powers to hold the executive accountable. The sessions of that Committee are confidential. As described above, the services do argue that they are under no obligation to reveal to members of the Committee information about the identity of agents, informers and methods of gathering information.³⁸ The constitutional basis for such obligations is the general provision on parliamentary control of the executive. There is no specific provision in the Constitution on the police, security services and intelligence agencies.

Information about the organisations is available to members of Parliament. It is however classified. Occasionally, information about organisational structure would be also discussed in the media, but this is only to the extent the services would decide to give such information to the press. Personnel strength is confidential information. However, there have been media stories mentioning overall numbers of personnel. These are aggregate figures provided by the services themselves, without specification of type of personnel and it is impossible to verify them.³⁹

The budget of the services is determined following the same procedure as any other government agency. Every year every service would draw a draft budget. The draft budgets of services A, B, C, D and E would be included in an overall budget of the Ministry of Interior. The MoI and Services F and H would then submit those drafts to the Minister of Finance, who would draft an overall budget proposal to be approved by the Council of Ministers and then submitted to Parliament. The plenary session of Parliament would vote the budget item by item, before publication in the State Gazette. The reports on the budget are approved by the Council of Ministers and are also public. Figures on services F and H are separate. More detailed financial information is not available.

3.1.2 Domestic transparency: publications

There is no practice of issuing regular policy statements. The MoI and heads of services might go public: holding press conferences, interviews, explaining priorities and activities. The services would also inform the media of what they consider important cases and the MoI

³⁸ Official requests for a description of the actual practice and the interpretation by the Committee of this issue were never answered by the 1997-2001 Parliament. A similar request has been filed with this Parliament too.

³⁹ For the purposes of this study the MoI was addressed with an official letter, where it was asked to provide information on personnel strength of the different services. As of July 2002 there was no response.

publishes regular press releases describing crime incidents and overall statistics.

Crime rates statistics are available. They are published by the MoI on an annual basis. Occasionally, statistics about shorter periods are also published. Clearance rates are made public but it is impossible to compare the figures to actual conviction rates. Further, only recently UNDP started carrying out victim studies and provide figures on unregistered crime.

Parliament has adopted a National Security Concept Paper in 1999, which is a policy paper describing threats to security and government priorities in that respect.

4. Recent changes and general appeal

There have been declarations by government officials and heads of services that the country does not face a real terrorist threat. Media tales of Al Qaeda fighters hiding in Bulgaria have been dismissed by the authorities as absolutely unfounded. At the same time officials have stated that they are investigating any possible threat of terrorism diligently. The most recent such statement was made by the Director of the NSS. Beyond such assurances there has been no public pressure for more detailed information.

Public statements did not mention change of normal practice and there is no evidence to suggest undeclared changes. Members of the NSS are lobbying for some changes in the National Security Concept Paper adopted by Parliament in 1999, to include some more specific threats after September 11. As this is a policy document anyway, this does not seem to be of paramount importance.

One of the key issues of the last decade or so has been access to the files of the communist services, agents and informers. Access to former secret police files was a hot political issue. It had been raised on many different occasions, and was one of the issues on the UDF's campaign list for the May 1997 Parliamentary elections. On 30 July 1997 Parliament adopted a special act regulating such access, the Access to State Security Documents Act (promulgated in State Gazette N63/06/08/1997). This legislation was repealed by the current Parliament in early 2002, despite strong criticism by the opposition, some media and foreign observers.

CHAPTER IV

FRANCE

Fabian JOBARD¹

1. Coverage

Internal security forces in France are the Police nationale (PN) under the direction of the French Home office (Ministère de l'Intérieur) and the Gendarmerie nationale (GN) under the direction of the French Defence Ministry. Regarding "police and other internal security forces" as the institutions and bodies in charge of police functions (i.e. internal security, maintenance of order, crime control and law enforcement) requires inclusion of the GN even though the force is led by the Ministry of Defence and its personnel are military. However, municipal police forces – under the functional direction of and provided by the mayor – are not going to be treated here. (Specificity between Parisian and provincial PN forces are only going to be mentioned in case of substantial differences in the matters of transparency and accountability.)

Forces under the PN and GN are in charge of the protection of public order, repression of crime and law enforcement. Theoretically, PN forces are city police forces and GN forces rural police forces. The approximately 130.000 civil servants under the PN do their job in cities with more than 10.000 inhabitants, and the 98.000 militaries serving in the GN work in the rest of the remaining sites (with the exception of mobile units, which can be requisitioned by the Ministry to cover demonstration even in a big city). Attempts have been made since 1999 to reorganise the geographic partition but are not relevant to our study.

In both organisations, crime control and "daily policing" (from community policing to maintenance of order) gave birth to two separate bodies. In charge of crime investigation are personnel under the "Direction centrale de la police judiciaire" and the Service de police judiciaire de la gendarmerie nationale. "Crime" can be understood as petty crime as well as serious offences or organised crime. In regard to the questions of accountability and transparency, a distinction has to be

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made between crime control forces and public security forces, because of the specific statute of the police officers in charge of crime control – they are "officiers de police judiciaire" (OPJ) or investigative police officers – and because of the specificity of possible complaints against crime control actions conducted by OPJs: they are regular police officers, but have some specific abilities and protection. Above all, OPJs are requested or delegated by the Public Prosecutor ("procureur de la République"), they work under his supervision or the supervision of examining magistrates ("juges d'instruction"), and they are controlled and evaluated by their own superiors and hierarchy and by the Public Prosecutor as well. There are 6.475 OPJs within the PN, 19.000 within the GN.

INSTITUTIONS AND ABBREVIATIONS

A	Police Nationale (PN)
A1	Officiers de police judiciaire (OPJs) (crime investigation)
A2	Regular police officers
A2'	Compagnies republicaines de securité (CRS)
A3	Police aux frontières (PaF) (air and border police)
A4a	Renseignements généraux (RG) (community intelligence)
A4b	Direction de la sûreté du territoire (DST) (territorial intelligence unit)
B	Gendarmerie Nationale (GN)
B1	Officiers de police judiciaire (OPJs) (crime investigation)
B2	Regular gendarmes
B2'	Gendarmes mobiles
B3	
B4	Intelligence
C	Douanes (Border and immigration services)

Note: Municipal police forces not included here (see text)

Where the OPJs are positioned in their respective organisations is shown in the accompanying table (see A1 and B1). The regular police – A2 and B2 in the tabulation – are the main bodies in charge of public security (i.e. public tranquillity, security of persons and property). Their duties include law enforcement; fighting drug possession and use, controlling its trafficking; combating the illegal employment, entry, or stay of illegal aliens; public order maintenance, crowd control; VIP security; and responding to the approximately 5.000 daily emergency calls. They are under the control of the respective "directions de la sécurité publique" (public security central directorates) of the PN and GN. The activities are defined at the central level, in close co-operation with the delegates of the government at the local level ("préfets", in the "départements"). Cities and mayors are always very closely associated to the definition of daily policing goals (specifically since 1997). There are approximately 70.000 civil servants within A2 (no figures for B2).

The entries A2' and B2' in our table are the specific "mobile units" within A2 and B2 in charge of protest policing and maintenance of order: the "Compagnies républicaines de sécurité" and the "Gendarmes mobiles". These forces are directly requisitioned by the respective ministries and are sent to the larger (or riskier) public protest events. (The majority of these kinds of events – for instance, the suppression of a local protest inside a classroom at a public school – are dealt with by regular forces.) The mobile units perform various security tasks on the main roads and motorways as well, and rescue operations at sea and in the mountains. They help monitor the ports, airports, borders, and international traffic routes. They provide also VIP protection and security for some official residences in France, and French embassies and consulates abroad. For some years, CRS forces have been working on specific missions in dangerous city areas to prevent public disturbances and common offences. Some 13.000 officers of all ranks work within A2' and 17.000 within B2'. Another specialist group is the "Police aux frontières" (air and border police) – A3 in the table. It covers France and French overseas territories and employs 7.200 personnel.

The other groups, listed A4 and B4, are intelligence agencies. The "Renseignements généraux" (community intelligence central directorate) are the controversial legacy of the Napoleonic police system. They gather and centralise intelligence in order to inform the government, and they monitor gaming establishments and racetracks. They report to the préfets and to the central government: first of all, to know about public opinion or social trends (specifically in suburban areas) and secondly to

identify possible radical, violent, anti-democratic, or terrorist activities or organisations. Definitions of the goals of A4a are quite unclear and highly controversial. The service employs 3.200 police officers.

The "Direction de la sûreté du territoire" (territorial intelligence unit) was created in 1944, to fight espionage and interference activities inspired by foreign powers in territories under French sovereignty. At the end of the 1970s it experienced an important change as a result of two new phenomena: first of all, the shifting of classic espionage from the military sector towards economic, scientific and technical areas; and secondly, the appearance and subsequent diversification of international terrorist threats. Divisions within the organisation are: counter-terrorism, security and protection of national heritage, international terrorism, technical and general administrative services, and national and international relations.

Finally, our table lists the border and immigration services, under the direction of the Treasury Minister. They are OPJs and have stop and search abilities and can conduct criminal investigations and procedures. They have 20.000 agents.

No main institutional changes occurred in the decades since the creation of the PN (1941), which coincided with the unification and centralisation under the Home office of all municipal (town) police forces; and since the reorganisation of the relationships between provincial and Parisian forces in 1965, after a scandal which affected the intelligence forces during and after the war in Algeria. Nevertheless, since the end of the 1970s, and the first national law on public security ("loi sécurité et liberté", February 1980), some organisational and financial changes have occurred in the field of public security.

First of all, there is an increased need for a re-municipalisation of police tasks. On the one hand, more and more towns have created their own municipal police forces. Police officers within these municipal bodies are not OPJs : they have no right to control the ID of persons who have committed a misdemeanour or offence *in flagrante delicto*. They only have the possibility to catch somebody in the act, and therefore they have no more rights than ordinary people so far as the use of force and stop and search are concerned. On the other hand, there have been more and more attempts to stop excessive centralisation and top-down policies in the field of public security. Elected mayors and town councils are more and more involved in the definition of the aims of forces deployed on their respective towns. As a result, specific police policies are defined

by town, in ways that try to bring into French towns British and American policies, such as community or problem-solving policing.

Secondly, security became (like in other European countries) an always more important issue, and has been one of the main issues of 1995 and even more of 2002 election years. The dramatic rise of petty crime and delinquency is of course the main cause of this political change: official recorded criminality showed some 600.000 criminal acts in 1964, one million in 1969, two million in 1977 and three million in 1982. At the same time, one could observe a constant fall of deterrence rates. Three kinds of policies (beside "municipalisation" of police policies) have been consequently adopted.

- a) Greater financial means for police forces and security policies, mainly with the general laws on security in 1985, 1995 and 2002.
- b) Greater police powers, specifically in the field of stop and search bills, of drug enforcement and anti-terrorism.
- c) Reduction of the effectiveness of judicial control on police activities, specifically in the field of the control by the Public prosecutor of day-to-day police activities.

Thirdly, there have been some attempts in the aim of a better control of police deviancies. On the one hand, a Code of Practice has been adopted thanks to a government act in March 1986 and a new agency for the control of public and private security forces and agents has been created through a national law, which has been adopted in June 2000 (National commission for the ethics of security, "Commission nationale de déontologie de la sécurité" - CNDS). That said, no significant change can be attributed to the introduction of the Code of practice, nor to the new commission.

The way the forces are co-ordinated is put down in the French constitution. It says that the Prime minister is the chief of public administration and of the government: that is to say that every minister is individually responsible to the Prime minister.

As noted, A forces are under the control of the Home office ("ministère de l'Intérieur"), B forces are under the control of the Defence minister ("ministère de la Défense"). There have been recently more and more attempts to unify both administrations directly under the Prime minister's office. A significant step towards it has been the creation of a Council for internal security, under the direction of the Prime minister (1997). Tasks of this council are to co-ordinate the two forces and other actors of the field (mainly in the social and school sectors and the field of

crime prevention) and to promote new ideas, concepts, or decisions in order to shape new forms of crime control. Under the Jospin government (1997-2002), the Council actively promoted the generalisation of a kind of problem-solving policing, the transformation of the judicial treatment of criminality (specifically of juvenile delinquency), and co-operation between the police and the gendarmerie.

The existence of these various organisations is defined by the law, which defines the greater orientations of their roles and responsibilities. Powers of criminal police forces (criminal procedure) are defined by the law as well. The ways of applying these greater principles set up by the law and the different nominations are specified by government decrees and orders and, if they are more concrete or singular, by internal circulars of the Home office or of the ministry of Defence.

The constitutionality of laws can be contested after laws have been adopted by the Parliament and before they are promulgated by the President of the Republic (who promulgates and publishes adopted laws within 15 days after laws have been adopted). Either the President of the Republic, the Prime minister, the President of the "Assemblée nationale", the President of the "Sénat", 60 representatives ("députés"), or 60 members of the Sénat ("sénateurs") have the possibility to refer the law to the Constitutional Council ("Conseil constitutionnel"). After the rejection or acceptance by the Council, the law cannot be contested any more and is considered as being adopted and then promulgated.

Administrative acts such as government orders, decrees, and ministerial circulars can be contested by any one at any time at the level of the administrative justice, up to the Council of State ("Conseil d'Etat", the highest level of administrative jurisdictions).

2. Accountability

2.1 To the executive

As far as the formal accountability of the policy is concerned, one must distinguish between the law in general and the financial aspects of the law. Laws can be submitted to the Parliament by the Government (in most cases) or by representatives. Representatives cannot submit or suggest a law whose consequences are the increase of expenditure. "Président de la République" (Head of State), "Premier ministre", 60 members of the Assemblée nationale (the main House of Parliament), 60 members of the Senate (the second House of Parliament), President of

the Assemblée nationale, or the president of the Senate can contest the constitutionality of an adopted law and submit it for examination to the Constitutional Council ("Conseil constitutionnel"). The Council can declare some parts or the whole part of the law unconstitutional. In that case, the law cannot be promulgated and published. It must either be renewed by parliamentary debates and the new adoption of the law, or the revision of the constitution (which was the case in 1993 after the declared unconstitutionality of a police law concerning the entry and stay of foreigners in France). After the law has been promulgated, no one can submit it to the Council of the Constitution. If there is a common interest between government, parliamentary majority, and opposition not to contest the law, the law is adopted, even if substantially unconstitutional: this was the case for the law about day-to-day security ("Loi sur la sécurité quotidienne"), adopted on 15 November 2001, after September 11th.

After the law has been voted, the Head of State promulgates it. Government orders define the concrete conditions under which the promulgated law will be applied. The administrative Supreme Court examines automatically the compliance of the orders to the law, and can reject an order for non-conformity to the law. Circulars are the documents that define – for example, within A and B, or some specific central directorates within A or B – the conditions for the concrete application of Government orders. Individual and legal entities can invoke the administrative jurisdictions (up to the administrative Supreme Court) if they consider that Government orders or concrete applications of these orders are against their fundamental rights.

As far as formal accountability of the police and gendarmerie units is concerned, all PN services and units mentioned above are under the responsibility of the Home office and the respective central directorates. The Home minister has the possibility to remove one or all of the central directors, and in case of individual failure the individual servant or police officer. The Prime minister can remove the Home minister, with the agreement of the Head of State. The Prime minister (and then the government) can be removed either by an individual decision of the Head of State or by the absolute majority of the members of the Assemblée nationale.

Financial accountability is bound to the same procedure in the case of the PN and the GN.

- a) First of all, the constitution (the constitutional law of January 1959) establishes the separation between those who decide to

finance a specific programme or task (“ordonnateurs”) and those who give the authorization to spend for these programmes and tasks (“comptables”).

- b) Within the government, the most important institution in this field is the ministry of finances (“ministère des finances”). Every expense must be part of the annual finance law, which is discussed and adopted by the Parliament (art. 34 Constitution). The main executive control over resources and spending occurs during the elaboration of this finance law. Finance ministers evaluate bidders’ needs and resources. Then they negotiate with the Prime minister and the Finance commissioners the PN and GN regarding the needs and expenses of their forces, which will be presented to the Parliament through the annual finance law.
- c) Internal boards have finance control powers.
- d) Finance ministry: i) delegates permanently a commissioner (“Contrôleur financier”) to every ministry, to control the way resources are spent and above all, to make sure that the way resources are spent conforms to the provisions of the annual finance law, and ii) leads the (formally) independent Finance inspectors (“inspecteurs des finances”) who can ask at any time for any kind of finance control within every public administration. Their observation report is then sent to the minister, who can ask for the possible financial or penal accountability of the actors in charge of finances within the ministry.
- e) The Prime minister can ask for specific controls or information in the matters of financial accountability. He has the possibility to instruct the Audit Court (“Cour des comptes”), an internal board, or Parliament’s members to do the report.
- f) Ministers have no financial accountability (to the Audit court): they only have a political accountability.

There have been no significant changes to these arrangements in the last decade. They are underpinned by Article 20 of the Constitution. This assumes that the Head of government (= Prime minister) holds decision and nomination powers upon the whole administrative organ. He is the only accountable individual to the President of the Republic (Head of State) who can dismiss him as a political decision. The highest positions (such as central directorate positions) are decided by the Council of ministers and therefore assume the countersignature of the President of the Republic.

These formal arrangements are set up to give a maximum of autonomy to the Executive and the greatest amount of political responsibility to the level of the Prime minister. The President is not responsible – even in case of penal offences he has possibly committed – so long he is still in power; so that the Prime minister is the only accountable person for possible faults or mismanagement coming from the lowest ranks of the administration. Of course, such a concentration of accountability at the level of the head of government and such a political conception of accountability reduces the probability of effective evaluation of the responsibility of the Prime minister for what his ministers do. As a result, the Prime minister can always terminate the appointments of his ministers and of the central directors. However, this power has to be countersigned by the president of the Republic, and may lead to some tensions in the case of "cohabitation".

The modalities of accountability to the executive are the powers of appointment and of dismissals (art. 8 Constitution). The forces, services and agencies cannot evade their obligations in this respect. The only exception is the DST, which is under the direct and secure command of the President of the Republic and Prime minister. (In our table A4b.)

2.2 To elected representatives

No administrative organ is directly responsible to elected representatives. In case of treason or of a criminal offence, the Court of Justice of the Republic, formed and called by members of Parliament, can possibly decide sanctions against the ministers. It has been the case once, to retrospectively decide about the responsibility of the former Prime ministers and two Public Health ministers in the case of misconduct, which led to massive AIDS infections through the French public blood transfusion system. This Court of Justice of the Republic tries the criminal liability of members of the Government for acts performed in the exercise of their duties, which are classified as serious crimes or other major offences. Any person claiming to be a victim of a serious crime or other major offence committed by a member of Government in the exercise of his duties may lodge a complaint.

Senate or National Assembly members have the possibility to create a specific enquiry commission about misconduct of individuals within police forces or about bad decisions taken by PN or GN leaders. These enquiry commissions are ad hoc commissions: they can publish a report after their inquiries and hearings, but final decisions about possible sanctions are in the hands of the Head of government and then of the

Prime minister. This was the instance in a case after violent demonstrations in 1986.

There is one Defence commission and one Commission about police and policing in each one of the two representative houses. They gather information from security-sector organisations' forces and leaders in order to be kept informed about security policies and activities in France and in order to propose new laws or to debate and gain support for the law to be adopted. These commissions only exert a general oversight of executive organs, much more in order to help the legislative work than to directly control police and security activities. In this perspective, the Prime minister (who can propose law to be adopted by the Parliament) can mandate a député or a sénateur to give a report for the evaluation of the implementation of a specific law or for the planning of a law proposal.

Except in case of treason or of criminal offences by ministers, there is no formal power of the legislature and of the elected representatives over police forces and more generally over the executive. The only formal power is a political power: the dismissal of the whole government through the adoption of a motion of censure, which can possibly be connected to a need of the Parliament to articulate a sanction against the Prime minister because of a failure in the field of a security policy or because of a specific mishandling from some police forces or police officers. There is no such example in French history. More generally, only one successful motion of censure can be found (1962, as the members of both chambers rejected the decision of the Head of State, Charles de Gaulle, to elect the President of the Republic directly).

In terms of financial accountability, there is no formal accountability to elected representatives other than through specific representatives' demands for information or through the motion of censure. Nevertheless, members of Parliament have the possibility to exert a kind of control over resources and spending of forces, mainly during the preparation and discussion of the annual finance law.

- a) During the preparation of the finance law, Parliamentary members can ask every minister or director of the central administration or the finance director about each topic, in order to obtain better information concerning the resources and needs of the administration. Of course, during the discussion, they can use their right of amendments. But in the matter of finance, they have no right to introduce a bill or an amendment which would have as a consequence either the diminution of public resources

or the creation or increase of an item of public expenditure (art. 40 of the Constitution). And in the matter of finance as well, time allocated for the general discussion on the law is limited. Should the Parliament fail to reach a decision within seventy days, the provisions of the law may be brought into force by ordinance.

- b) Beside the preparation and adoption of the annual finance law, parliamentary members can exert some control over the way resources are spent within the police and the gendarmerie.
- Finance commissions within the National Assembly or the Senate can do specific audits on the organisations or parts of them.
 - Finance commissions can ask the Audit court to do audits or inquiries about specific matters.
 - Every Member of Parliament can ask a government member a financial question (written or oral) concerning its administration.
 - More generally, every kind of audit committed by the Audit court is given to the ministry for finance, to the concerned minister and to the Finance Commissions of the Parliament.

The only significant change to these arrangements, as far as control by elected representatives is concerned, is the constitutional change that occurred in order to introduce the possibility for members of the Parliament to judge criminal offences possibly committed by ministers and former ministers.

Given the general meaning of the principle of the control of elected representatives over executive decisions, one could say that French system is far away from an effective parliamentary control of the executive. Considering the fact that formal or constitutional provisions for such a control are so tiny, the absence of effective or real parliamentary control over the executive is not surprising. There are only two ways for representatives to exert a control over police forces. One is politically through a very unlikely motion of censure (which is based on a dramatic shift of alliances between parliamentary majority and opposition, like in the German *Mistrauensvotum*). The other is through the informal means of political questioning of government members once a week in each chamber. These questions can be very concrete (about the known misconduct of a specific police force) or more general (about broad police policy), but can have formal consequences only in case of the vote of a motion of censure.

The forces can evade their obligation in this respect: if the appearance of the leader of a police force is needed by one of the two representative houses, a failure of appearance has no formal consequence, only political consequences. That is to say that the government declares itself ready for a kind of escalation concerning its relationship to the parliamentary forces. The only ways for them to react are either a mobilisation of public opinion or the use of the motion of censure.

2.3 To other institutions

The CNDS

France has no human rights commissioners with institutionalised powers of control over police, security, or intelligence agencies. The only independent agency which can exert a formal control on police activities, is the CNDS, created in June 2000. Only the Prime minister and individual members of parliament can refer a matter to the CNDS. The matter can be an individual case (such as an offence presumably committed by a single police officer against an individual) or the matter can be a general need for information or control regarding a specific agency. For instance, the Prime minister asked the CNDS in 2001 to give him a report about the ethical aspects of intelligence activities of the RG on radical political groups and associations. Every person who thinks he or she has been victimised by a police officer or by some police forces – and every witness of such an alleged matter – can ask a député or a sénateur to refer the matter to the CNDS.

The CNDS members have full inquiry or investigation powers: they can organise hearings of police officers and of their chiefs and they can conduct direct investigations into the concerned police forces or security agencies (including private security agencies). As a result, the CNDS releases recommendations in order to improve police activities. If the CNDS discovers or finds a concrete misconduct or offence having been committed by a police officer or a security force, it must refer it to the criminal court and to internal (disciplinary) boards of police forces. The CNDS gives a report every year that includes general recommendations and observations, and that shows the proceedings (including the correspondence with the concerned ministers and/or directors of the agencies) and results (in terms of recommendations or referrals to the courts).

In case of individual allegations against police forces because of possible misconduct or lack of transparency, and if criminal procedures

have not respected the rights of the accused person, he or she can refer to a kind of national Ombudsman ("Médiateur de la République"), created in 1973, who is in charge of all cases of conflict between individual persons and administrations. His role concerning the abuse of power by the police or by the gendarmerie is quite limited, even if an increase of the use of this institution could be observed after the ways of lodging have been reformed.

In case of phone tapping, the European Court for Human Rights has condemned France so often that the government decided at the beginning of the 1990s to allow the adoption of a law on that matter. There are two kinds of phone tapping: the proactive, preventive or administrative kind; and the repressive, penal or judicial kind. The supreme penal court admitted the first type as conforming to the general principles of the French law in 1980, but did not concede such legality to the second kind. The decision *Kruslin vs. France* (24 April 1990) led to the adoption of a law on the control of phone tapping (10 July 1991) and to the creation of the National commission for such control ("Commission nationale de contrôle des interceptions de sécurité"). Two main changes have been introduced. The first alteration was a general limitation concerning the matters about which 'interceptions' can be decided. They are still quite vague: national security, prevention of terrorism and criminality (!), and protection of essential economic and environmental resources. The second change related to an official and transparent procedure that must be followed up when an administrative phone tapping is planned. The authority that asks for it has to ask for the authorisation to the Commission through the Prime Minister.

The courts

Together with internal boards the courts have the main powers in relation to police forces (but not to intelligence forces).

- a) Every complaint lodged against police forces by a person in case of misconduct or of an offence or of a breach of the law committed towards him is examined by the Public Prosecutor and can lead to a criminal law procedure against the concerned police officer. There are every year, for instance, between 250 and 300 complaints against police officers because of unjustified use of force or mistreatment, which lead to around 30 effective trials and to around 20 sentenced police officers every year.
- b) Beside it, the Public Prosecutor exerts a formal control upon the OPJs and their activities.

- c) In terms of financial matters, the Audit Court ("cour des comptes") can control proactively the use of resources within PN and GN forces (with specific and restricted procedures for the DST). A report on the use of resources within the Parisian police forces was given in 1998, as well as an audit about salaries and wages of police officers in 2000. More generally, the Court can examine every individual matter and possibly go to the criminal courts in case of a criminal offence committed.

Internal boards (internal accountability)

Concerning the PN, there are two internal boards, which have exactly the same skills and abilities. The one is the General Inspectorate ("Inspection générale de la police nationale" - IGPN), which has national jurisdiction over all operational departments and training establishments, but not over the ones in Paris and its three nearby administrative departments. These are under the control of the Paris Inspectorate ("Inspection générale des services" – IGS). Both bodies have the same competences. They conduct studies and make proposals to improve the proper functioning of police departments. They investigate individual complaints when requested by administrative or judicial authorities. Around one-third of all cases arise from individual complaints, two-thirds from internal needs. Disciplinary sanctions are pronounced against police officers and officers may be temporarily or permanently dismissed. Around 2 per cent of *agents* are subjected every year to disciplinary penalties.

Concerning the GN, military inspectorate bodies exercise control and disciplinary powers over the 98.000 *agents*. Here too around 2 per cent are every year subjected to disciplinary penalties.

Municipal authorities

Municipal authorities have no control over national police forces. The mayor of a town can nevertheless call to public opinion or to the CNDS (through a député or a sénateur) to conduct some investigations on controversial cases.

There have been some significant changes to the existing arrangements in the past decade. First, the national law of the CNDS brought about the main change. Some attempts have been made by former left governments and through government decrees. The first one occurred some days before the electoral disaster of the left at the parliamentary elections of 1993. In February 1993, the minister of the Interior was created by a decree from a body like the CNDS, but with

much lower abilities. However, the conservative government abolished it in May 1993, and replaced it in 1995 by a National Council on police ethics, which only made two reports (one on sects in France and one on police training in ethics). Secondly, we should record the adoption in 1991 of a law about the protection and guarantee of individual privacy in case of phone tapping.

The arrangements are underpinned by legislation.

- a) CNDS was created by the law of 10 June 2000.
- b) The mediator was created by the law of 3 January 1973.
- c) Judicial control upon OPJs is based on a constitutional principle (article 65) and is explicitly mentioned in the Code of criminal procedure (since 1958).
- d) IGPN and IGS were created in 1854 and reformed in 1986.
- e) CNCIS was created by the law of the 10 July 1991.

The extent to which the arrangements work in practice can be described as follows. France's police forces, specifically the PN, are known for a high level of force abuse cases and for a lack of transparency; these are the conclusions of at least the 1991, 1994, and 2000 reports of the European committee for the prevention of torture. Some specific historical matters of police forces in France – such as the Independence war in Algeria, as well as such socio-economical factors as the high concentration of poor and (as a consequence) immigrant populations in specific and isolated neighbourhoods – neither contribute to the openness of police practices nor to the abrogation of the opacity of the control systems and practices. French police forces are not open to external control systems or authorities. Internal boards such as the IGPN and the IGS are opaque to the public in two ways. First of all, there is no obligation for publishing reports about their activity or inquiries, so that no one really can evaluate their works. Secondly, they are internal administrative boards, which do not afford procedural justice and equity like the justice system does. Plaintiffs are not really involved in a procedure that, to a certain extent, promotes procedural secrecy. The new board CNDS exemplifies the fact that political powers and decision-makers do not really encourage such external complaint authorities. First of all, as already said, governments for a long time did nothing to create such external control institutions, and when they did create one, the next majority quickly suppressed it (1993) or created a new institution, that was quickly never called to life.

Concerning judicial control systems, the structural dependence of justice on criminal police remains a great obstacle. Prosecutors are more

and more independent from the political authority in France, but have less practical, material, and financial resources for dealing with their daily tasks. It leads to two difficulties. The first one is a lack of time to exert its competence in the field of controlling the police. The second difficulty is a greater dependence on the OPJs concerning the daily routine of criminal justice. Only the most spectacular cases of individual offence or failure or mismanagement can correctly be dealt with by the Prosecutor. The forces cannot evade their obligations in this respect.

2.4 To the media and society-at-large

Print and broadcast media have access to information about these non-military security-sector organisations, with restrictions concerning the intelligence agencies. These powers are defined by the law (29 July 1881) and are confirmed as constitutional matters by decision of the Constitutional Council (16 July 1971 and 10 October 1984).

Individual citizens have the right to ask the administration questions, but the police and gendarmerie are not obliged to answer them. Two remarks on that are important:

- a) Individual persons have now the right to ask for a copy of their possible file built and kept by the intelligence bureaux, but the request can be refused to protect the interests of national security.
- b) Since the law of the 6 January 1978, every electronic file containing individual data must be approved by the National Commission, called "Information technology and liberties" ("Informatique et libertés"). Those files will generally contain no individual or nominal information about racial origins, political, philosophical, or religious opinions. Every individual person can ask for the correction or cancellation of data about himself. As soon as State security or public security is concerned, his request must first be examined by the highest level of administrative jurisdiction ("Conseil d'Etat").

Generally, journalists from print and broadcast media cannot be obliged to reveal the provenance of their information or to reveal the identity of the possible 'whistle-blowers'. This principle has been even posed by the law of 4 January 1993 (art. 109 al. 2 Criminal procedure code).

There is no major specificity in France concerning the quality or level of media coverage of the activities of police forces. The media agenda is connected to the political one, especially with voting

campaigns, so that the media can deal as moral panic entrepreneurs for a while. In this regard, the only specificity of France is the absence of a 'fundamentalist' yellow press such as the one of England or of Germany. On the other hand, the media can exert their power as an independent inquiry commission and bring some specific affairs to the public; like the one of the *Rainbow Warrior* episode in 1985.

2.5 To codes and conventions

France is a member of Interpol and Europol. None of these kinds of international organisations appears to have an impact on the level and quality of police accountability.

3. Transparency

3.1.1 Domestic transparency: dimensions

No police force is obliged to make information systematically or regularly available to elected representatives, with the exception of yearly budgetary and financial information in order to prepare the yearly finance law. On the other hand, no police force (with the exception of the DST) can refuse to answer a specific question coming from an elected representative.

Generally, there is neither constitutional nor legislative obligation for an administration in France to publish any kind of information about its organization. The introduction of the Internet has encouraged the different forces to make some documentation available. However, there is no formal obligation to publish material and if published, there is no formal obligation as far as the contents of publications are concerned.

Concerning information made available on personnel strength the position is as mentioned above. However, in order to control the State budget and finances, the ministry for civil servants ("ministre de la fonction publique") publishes every year a state of the personnel strength of the different administrations. If one refers to one of the last audits, about personnel strength of the State, some reasonable doubts about transparency can be heard: "To sum it up, tables and figures made about the personnel strength in the appendix to finance laws are practically never sincere" (Audit court, report, 10 January 2000). In order to gain a better or more sincere information on that topic, former Prime minister Jospin asked one "député" and one "sénateur" to make a report on the human resources within the police (July 1999).

Concerning information made available about budgets this is the same as mentioned above, as also information on the nature of operations. If some specific interventions lead to dramatic consequences, representatives can set up an inquiry commission to do an audit about these facts. That was recently the case after a dubious operation led by the Préfet in Corsica, which led the Prime minister to ask a parliamentary commission to conduct an inquiry about it (November 1999). The report, like every other parliamentary report, is available to the public.

3.1.2 Domestic transparency: publications

Policies are issued by the law and by the government. There is no regularity (except on financial matters). Some administrations may publish reports of activities. There is no obligation. There is no formal report of activities from the PN and GN forces. Statistics about results of their activities can be published, but again there is no obligation.

There are statistics about recorded crime and delinquency in France, that is to say all criminal details recorded by OPJs. A research and information centre ("Institut des hautes études de la sécurité intérieure") was created by the police in 1990, which publishes a quarterly journal about research on the topics of crime, delinquency, and policing ("Cahiers de la sécurité intérieure"). The gendarmerie has a monthly publication, which looks like a journal for public relations ("Gend'Info").

3.2 International transparency

The situation on international codes or conventions that impose transparency obligations is as follows:

- United Nations (e.g. 1979 UN Resolution: Code of Conduct for law-enforcing officers) / Work in progress
- Council of Europe (e.g. 1979 Council of Europe Declaration on the Police) / Work in progress
- OSCE (e.g. 1994 Code of Conduct on Politico-Military Aspects of Security) / Yes
- Europol (e.g. 1995 Europol Convention) / Yes
- Interpol (e.g. 1999 Interpol Seoul Declaration) / Yes
- European Convention on Human Rights/ Yes
- Requirements of the European Union / Yes

France is a member of Interpol and Europol, and participates in international police missions. None of these kinds of international involvement seems to have an impact on the level and quality of police transparency.

4. Recent changes 2001/2 and general appeal

As a general observation on "normal practice" of policing or of intelligence, the French system only offers a few chances for non-members of the forces (neither from representatives nor from non governmental organisations) to observe the concrete practices; and it is still too soon to tell if '9/11' has had a real influence on policing.

Two main changes have been introduced.

- a) The immediate implementation of a specific provision called "Vigipirate", which is "traditionally" (since the attacks of 1986) employed in case of terrorism and terrorism danger in France. In places of high pedestrian or motor traffic, PN and GN *agents* do common patrols together with military forces. No change nevertheless can be mentioned concerning their competence, specifically in terms of stop and search abilities.
- b) A law about "daily security" was debated in the Parliament in mid-2002. Due to the events of 11 September 2001, specific amendments have been adopted. A specific series of these amendments are explicitly tied up with the '9/11' events (affecting Chapter V of the law of 15 November 2001, "Provisions in order to reinforce anti-terrorism dispositions"): facilitation and extension of stop and search abilities (art. 23); facilitation and extension of searching powers (in private and semi-public places – art. 24, in airports – art. 25, in seaports – art. 26); extension of some searching powers of private security members (art. 27); facilitation of searching and inquiry powers in the field of postal, phone, and electronic communication (art. 29).

Some "additional dispositions" have been adopted as well (chapter VII): rules regarding dangerous animals and pets (art. 45), extension of the control of IDs in the trains coming from the United Kingdom (art. 48), extension of stop and search powers at the entrance of buildings (art. 52), extension of data files of fingerprints (art. 56), and specific dispositions on the protection of witnesses (art. 57).

However, no specific provision appears to have been issued in the matters of accountability and transparency, even as far as the RG is concerned. There is no information available on that topic regarding the DST. At the same time, the greater degree of police discretion brought about by the 15/11/2001 law concerning OPJs only increases the impossibility for the Prosecutor to exert his authority over the police.

CHAPTER V

ITALY

Francesca LONGO¹

1. Coverage

The Italian policing system is a centralised and plural law enforcement system, where several forces are charged with parallel tasks and where all of these forces are largely centralised in their administrative set-up. The system is based on the following different agencies:

- the Polizia di Stato (National Police Agency)
- the Carabinieri
- the Guardia Di Finanza (Custom and Revenue Police Agency)
- and the Direzione Investigativa Antimafia or DIA (Counter organised Crime Investigative Directorate) an interforce agency specialised in anti-Mafia policing established in 1991.

However, as is clear from the accompanying table (overleaf), this apparent simplicity is deceptive. Each of these organisations is a complex entity.

So far as intelligence agencies are concerned, there are two services

- the Servizio per le Informazioni e la sicurezza democratica – SISDe (Information and internal security intelligence service)
- and the Servizio per le informazioni e la sicurezza militare – SISMi (Information and Military security intelligence Service)

Neither has the kind of elaborate structure found in the law enforcement area.

1.1 Law enforcement

The National Police Agency dates back to 1922 when the *Corpo degli agenti di pubblica sicurezza* (Corps of Public Security officers) was established. In 1943, during Badoglio's government, the Corpo was militarised. During the first Italian democratic government of the post second world war the Corpo was renamed *Corpo delle Guardie di Pubblica sicurezza* (Corps of Public Security Guard). Its tasks were the

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guaranty of public security and order, the safety of persons and the protection of property as well as policing. In April 1981 the Act n. 121 established the organisation and the tasks of the present-day service.

ORGANISATIONS AND ABBREVIATIONS (LAW ENFORCEMENT)

A	<p>The Polizia de Stato incorporating</p> <ul style="list-style-type: none"> • the <i>Polizia Stradale</i> (Automobile Service) • the <i>Polizia di Frontiera</i> (Border Service), disposing of a specialised units on the illegal immigration • the <i>Polizia Ferroviaria</i> - Polfer - (Railway Service) • the <i>Polizia Postale</i> (Postal and Communication Service), disposing of a specialised unit on high technology crime. • the <i>Polizia Marittima</i> - PolMare - (Maritime Service) • the <i>Servizio Aereo</i> (air service) • the <i>Reparti Mobili</i> (Rapid Intervention Service) • the <i>Polizia Scientifica</i> (the Forensic Service), disposing a specialised service: the <i>Unità per l'analisi del crimine violento</i> - UACV - (The violent crime analysis Unit). • the <i>Nucleo Centrale Operativo di Sicurezza</i> - NOCS - (Central Security Operational Unit) a highly specialised squad, set up in 1978. • the <i>Servizio Centrale Operativo</i> - SCO - (<i>National Operational Service</i>), set up in 1991
B	<p>The Carabinieri incorporating</p> <ul style="list-style-type: none"> • the regular Corps • the <i>Nucleo Anti Sofisticazioni</i> - NAS - (anti-adulteration Unit) located at the Ministry of Public Health • the <i>Nucleo Operativo Ecologico</i> - NOE - (Environmental Operational Unit), with a "special radioactive materials squad" having the task to investigate on the illegal traffic of radioactive materials and nuclear waste • the <i>Comando Tutela patrimonio artistico</i> - TPA - investigating on the illegal traffic of works of art • the <i>Comando Ispettorato del Lavoro</i> - involved in the protection of the workers' safety • the <i>Comando Tutela Norme Comunitarie</i> - having the special task to control the application of the European Union law in the field of the food production and distribution

C	Guardia di Finanza comprising <ul style="list-style-type: none"> • the regular Corps • the <i>Nucleo Speciale di Polizia Valutaria</i>, specialised in fiscal enquires. • the <i>Servizio centrale investigativo sulla Criminalità Organizzata</i> - SCICO - (National Investigative Service on Organised Crime) • The <i>Nucleo Speciale Repressione Frodi Comunitarie</i> (Special Units anti-EU frauds) • The <i>Nucleo Investigativo</i> - The Investigative Unit
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The Agency exercises a number of police tasks in parallel: its main ones are related to public security as well as prosecution of offenders, criminal investigation towards common criminals and organised crime, and intelligence tasks in the fight against specific forms of criminality (e.g. organised crime, usury, drug traffic, human being traffic). It has also sections placed at the direct disposal of the magistracy that have the capacity of judicial police. Several specialised services come under the direction and the authority of the National Head, as do a couple of 'operational' squads (see table).

The NOCS is responsible for high-risk operations (rescue of hostages, arrest of dangerous fugitives, counter terrorism operations): it has special equipment and its personnel are trained for working daily with high standard techniques of intervention. The SCO specialises in the fight against all serious forms of crime, also in relation with the financial, economic and high tech crimes.

The Carabinieri is the oldest Italian police institution. It has been established from 1814 by the King as the *Corpo dei Carabinieri Reali* (Royal *Carabinieri* Corps), on the basis of the statute of the Gendarmerie Francaise. Since its establishment, it has had both the tasks of military defence and policing activity. In 1861 it was the first military division to be included in the new national army of the united Italy. Its strong involvement in Italian history created the perception of the force as the symbol not only of the Italian policing system, but of the Italian State as well.² In 1864 the Parliament gave it the formal appellation of *Benemerita* (The Meritorious Corps). Legislation in 2000 mandated

² "*Faithful throughout the Centuries*" is not only the Carabinieri's "motto", but also the household name of the corps.

reorganisation of the law enforcement system.³ The main aspect of the reform was the transformation of the Carabinieri into the 4th Army Corps at the direct dependence of the Ministry of Defence but with a dual remit: participation in the military defence of the country, as a corps of the Italian Army; and responsibility for public order, public safety and criminal police activity. It carries on also the sole role of military police at national level and, in co-operation with allied forces, at the NATO military bases located in Italy. In attending its task of Public Order the force has the same duties as the National Police Agency: prosecution of offenders, investigative duties, intelligence tasks and judicial police section. The Carabinieri corps is organised, according to military principle, in a *Comando Generale* (General Command) directed by a *Comandante Generale* (General Commandant) and in the following territorial units:

- *Stazione*, constituted at urban area level;
- *Compagnie*, comprising several *Stazioni*;
- *Comando Provinciale* (Provincial Command) consisting of several *Compagnie*;
- *Comando Regionale* (Regional Command), grouping the *Comandi Provinciali* of one region;
- *Divisione*, grouping more regional commands and standing at the direct dependence of the General Command.

The territorial units have a hierarchical organisation. In addition, the Carabinieri corps disposes of specialised units, with the task to safeguard specific public interests as listed in our table.

The Guardia di Finanza is known also with the popular name of *Fiamme Gialle* (*Yellow Flames*). Its activity is related to the protection of the financial and economic interest of the Italian State and it is under the executive direction of the Ministry of Finance, even if it has a military status. Its traditional task is related to the fight against fiscal frauds. Nevertheless, the increase in the incidence of financial crime – frauds, usury, and the reinforcement of the criminal organisations acting in smuggling and money laundering activities – is transforming the force into an important pillar of the policing and public safety service. At the moment it is involved, together with the other law enforcement agencies, in policing as well. It participates in the public safety service also having at its disposal for this task some rapid intervention units. In 1992 the Ministry of Home Affairs recognised the Guardia as the specialised corps

³ Act n. 6249, March 2000.

in the investigation activities in the field of money laundering-related crime. In addition it collaborates in military police activity and with magistrates as judiciary police. Formally, the act of 21 March 2000, n. 78 assigned to the force the task to safeguard the budget of Italian State and of the European Union with the following duties: to prevent, investigate and prosecute illicit and criminal activities in the field of financial crime, fiscal fraud, economic crime.

The service is organised in a *Comando Generale* (General Command) directed by a *Comandante Generale* (General Commandant), and in the following territorial units: the *Comandi Interregionali*, with the competence of supervisor for big areas, the *Comandi Regionali* and the *Comandi Provinciali*. The central command is organised in several central *nuclei* (units), listed in our tabulation. A special central command on Economic and Financial investigation will be established soon and it will have the central units subordinate to it.⁴

The *Direzione Investigativa Anti-Mafia – DIA* (Anti-Mafia Investigation Agency) was established in 1991 with the specific task to carry out proactive investigation activities and judicial police investigation only in the field of national and trans-national Mafia-related crime.⁵ It is included in the Public Security Department of the Minister of Home Affairs to which it is accountable. It is an inter-force agency, counting 1500 officers coming from the three (other) police forces. It has a rotating direction.

The DIA represents a new element in the Italian policing model. It has been set up with the twofold task of a specialist anti-Mafia service, with both intelligence and operative powers, and a national central body for the co-ordination and direction of others' activity. It is divided into three sections,

- a) Proactive investigations section: it is the anti-Mafia central intelligence bureau and has the task to gather and analyse information on the Mafioso organised crime in order to elaborate the general strategy of the proactive investigation activity against Italian and foreign Mafia-type organisations. This section is subdivided into four divisions. The first division has the task to gather and analyse information only on the Sicilian *Mafiosi* organisations. The second has the competence to gather and analyse information on the other Italian Mafia-type organisations

⁴ See: Press release of the General Commandant of the G.d.F, on the G.d.F web site: <http://www.gdf.it/informa/comunicati/ds151299.htm>

⁵ Act n. 345, 1991.

and on foreign criminal organisations that are believed to act throughout the Italian territory or to have links with Italian Mafia-type organisations. The third division is entrusted with the responsibility to propose the personal and patrimonial precautionary measures for the Mafia-suspected person. The fourth division is specialised in the analysis of the *Mafiosi* assets. It gathers economic information on suspected persons and is involved in the analysis of the suspected financial flows with the particular task to identify money-laundering activities.

- b) Judicial investigation section: it has the task to plan the investigation activities of the DIA and to verify the results. It is also involved in the analysis of the information received from the intelligence services. This section represents the anti-Mafia judicial police at the disposal of the anti-Mafia specialised magistrates.
- c) International co-operation section: it has the task to promote and develop the co-operation and the sharing of information with foreign intelligence and policing structures, in order to study the international interconnection of the various organised crime groups. The agency has competence throughout the entire national territory but twelve functional "operative services" have been set up at subsidiary levels in order to monitor the Mafia phenomenon at local level.

In attaining its tasks DIA is allowed to carry out proactive investigation and undercover activities. In fact, article 266 of the procedural penal code allows proactive policing methods, with particular regard to the interception of communications. According to this code "communication" means all the possible forms of exchange of ideas and information between two or more people. In this sense, the law permits phone-tapping, the interception of electronic communications (e-mail, fax, and videos) and also the use of the "bug" in private houses and offices. Such instruments of proactive policing are allowed under some conditions that are different for the investigations in the field of "ordinary" crime and in the field of "Mafia-type" crime. The public prosecutor must ask for authorisation to a judge (*giudice per le indagini*), but while for the ordinary crime the authorisation is allowed if serious evidence of offence does exist, for the Mafia type crime the existence of sufficient evidence is enough to permit the interceptions.

Another organisation involving the three law enforcement agencies is the Servizio Centrale Protezione Testimoni (Central Witness

Protection Service). It works on special protection and assistance measures, including the social re-integration, to help those witnesses or criminals who decide to cooperate with police forces and judicial authorities.

The act n. 121/1981 designs the organisation of the Italian public security system. It entrusts the Ministry of Home Affairs with the direct responsibility for public order and security, assigning it the function of high authority of public security and the executive direction and co-ordination of the police services in the field of public order and security. In order to implement these functions, the Act established the Dipartimento di Pubblica Sicurezza (Public Security Department) that is under the direct authority of the Ministry of Home Affairs and is directed by the Head of the Polizia de Stato. The latter covers the role of General Director of the Public Security Service and is appointed by the President of the Republic, after the proposal of the Ministry of Home Affairs and the decision of the Council of Ministers. The Dipartimento is specifically entrusted with the task to implement the directives and orders of the Ministry of Home Affairs in the field of public order and security policy and of technical and operational co-ordination of law enforcement agencies.

The Act's section 5 established, within the Department of Public Security and under its authority, the Ufficio per il coordinamento e la pianificazione delle Forze di Polizia (*Office for Co-ordination and Planning of Police Forces*): to draw up the general planning of public security activity in order to define the services and the location of police forces stations; to co-ordinate the use of administrative and logistical services of the police forces; and to co-ordinate the financial planning for the individual police forces. The Department has, also, the responsibility to collect, analyse and evaluate information and data that are considered useful for the judicial and proactive investigation activities of the different police forces. Section 7 of the Act specifies the nature of the information and data that it is allowed to collect. An Information Centre is established, under the Authority of the Ministry of Home affairs, in order to manage the data bank. Access to this is ruled by section 8 of the Act that authorises judicial police and police officers to obtain information and data only with the authorisation of the magistrates. Section 18 of the Act 121 established the Comitato nazionale dell'ordine e della sicurezza pubblica posed under the authority of the Ministry of Interior. It is formed by the Minister, the vice minister, the Head of the Polizia, the General Commandants of the Carabinieri and Guardia. The

Ministry of Home Affairs can enlarge the composition to other police and judicial authorities. The committee is an advisory body of the Ministry of Home Affairs entrusted with the task to analyse the public security policy planning and the organisational policy of the police forces.

The Act 121/81 designs the field structures of public security activity. It put under the direct authority of the Ministry the Prefetto, the provincial official responsible for public order and security. The Prefetto is entrusted with the twofold task of implementing the directives of the Ministry in the field of Public Order and Security and co-ordinating the activities of police forces at provincial level. The Prefetto is not inserted in the hierarchical structure of the police forces, but is the governmental representative at provincial level, directly accountable to the Ministry of Home Affairs. In implementing its responsibilities, each has at his/her disposal a "*Comitato Provinciale per l'Ordine e la Sicurezza Pubblica* (Provincial Committee for public security and order), an advisory body formed by the Questore (see below) and by the provincial Commandants of the three police forces. The Questore is the police provincial authority, under the Department of public security. He/She is accountable to the National Head of the Police for direction and co-ordination of the police forces at the provincial level.

1.2 Intelligence Agencies

The act n. 801/1977 describes the composition and the activities of the Italian secret services. The SISDe is under the Ministry of Home Affairs. It has the task to carry out information and intelligence activity in some specific fields that are perceived as directly connected to the security of the Italian democratic political system – such as terrorism, illegal immigration, computer crime, economic crime. The SISMi is entrusted with the task to carry out information and intelligence activity in relation to external threats facing the Italian State and is at the dependence of the Ministry of the Defence.

The personnel working in these agencies must submit working reports only to their respective Directors who will refer to the Minister of Defence or to the Minister of Home Affairs and to the Prime Minister. Directors must transmit to the judicial police all information relating to criminal offences, even if the Ministry of Defence and the Ministry of Home Affairs, with the explicit consensus of the Prime Minister, have the power to delete the transmission of information, if it is a necessary condition for attaining the institutional tasks of the Intelligence Agencies.

In 1991 the act n. 410 entrusted both agencies with responsibility in the field of organised crime. It was reported that SISDe and SISMi should work on this area with the specific task to gather national and trans-national sensitive information in the field of Mafia organisations and to follow the evolution of every national and trans-national criminal organisation that could represent a threat for the democratic institutions and civil society. The secret services role in anti-Mafia system is very different from the role of police forces. SISMi and SISDe are entrusted with the responsibility to gather information by means of covert methods of investigation and pass it to the DIA. They do not have an operational role. Information passed will be analysed and verified on the basis of the formal anti-Mafia investigative procedures or will be utilised by the intelligence office of the DIA. The secret services' role in the area of anti-Mafia is configured as wide-ranging activity aiming to inform political and police institutions on the potential or actual dangers facing the country. The director of the DIA is the direct interlocutor of the secret services in the area of the anti-Mafia.

2. Accountability and Transparency

2.1 To the Executive

In April 1981 the Act n. 121 established today's Polizia di Stato. Firstly, the organisation was demilitarised and was placed under the authority of the Ministry of Home Affairs instead of the Ministry of Defence. Secondly the Act prescribed a hierarchical architecture that is directed by the *Capo Nazionale* (National Head) appointed by the Council of Ministers. Officers act under the direction of the central and provincial authorities. The legislation describes different responsibilities for each authority: The political and executive responsibility is assigned to the Ministry of Home Affairs, the national authority responsible for public security and public order; the administrative responsibility is assigned to the *Prefetto*, the representative of the Ministry of Home Affairs at provincial level; and the technical and operative responsibility is assigned to the *Questore* (see above). Directed by the *Questore* the "*Questura*" is the office of the State Police and the Department of Public Security in each provincial district.⁶ Each *Questura* is organised basically in two Divisions – Criminal Police and Social-Administrative Police – and six main Offices: the Secretariat, the Personnel Office, the

⁶ Italy counts 103 *Questure*.

General Investigations and Special Operations Office, the Accounting-Administrative Office, the Health Office and the Juvenile Office. The budget of the Polizia is assigned directly to the Head, who is responsible to the Ministry and is controlled by the Italian Court of Auditors.

The Carabinieri Corps answers to the Ministry of the Defence in relation to its military activity. The General Commandant of the corps is at the direct dependence of the General Commandant of the Stato Maggiore della Difesa, the highest Italian military authority. In relation to public security and criminal police service the corps is under the authority of the Ministry of Home Affairs and co-ordinated by the head of the Polizia, in his role of head of the department of public security.

The Guardia di Finanza is under the executive direction of the Ministry of Finance, even if the governmental act n.68/2000 established that in attaining its task of contribution to the safeguard of public order, it is at the functional dependence of the Ministry of Home Affairs. The department for fiscal policy of the Finance Ministry is the direct link between this latter and the Guardia which has a liaison office within the Department.

The general responsibility for the activities conducted by the DIA is assigned to the *Alto Commissario per il coordinamento della lotta alla mafia* (High Commissioner for the co-ordination of the fight against Mafia crime) (Act n. 726/92), attached to the Department of Public Security and to the Ministry of Home Affairs. The DIA must report periodically its activities and achievements to the Council of Ministers; and the High Commissioner is responsible for its provisions to be carried out according to the guidelines issued. Every six months, the Minister of the Home Affairs must report DIA activities and achievements to Parliament.

The Italian Prime Minister is responsible for the Secret Service Policy and the co-ordination of intelligence activity. The Prime Minister has under his direct dependence, the *Comitato esecutivo per i servizi di informazione e sicurezza* - CESIS (executive Committee for the security and information systems), formed by the Directors of SISDe and SISMi. It is entrusted with the task to co-ordinate their activities. Act 801 established the *Comitato Interministeriale per le informazioni e la sicurezza* (inter-ministerial committee for the information and security activity) directed by the Prime Minister and composed by the Foreign Minister, Minister of Home Affairs, Minister of Justice, Minister of Defence, Minister of Industry and Minister of Finance. On 8 September 2001 Berlusconi approved an Executive Act establishing that the Prime

Minister delegates some of his authorities in the field of Intelligence activities to the Minister of Public Administration. In particular the Minister of Public Administration presides at the CESIS, is the representative of the Prime Minister for the relation with the Parliamentary Committee on the Intelligence Services and National Secrets (see below), and is responsible for the co-ordination of Intelligence Policy. The SISDe remains directly responsible to the Minister of Home Affairs who has the power to conduct inspections and enquires on its activity. The SISMi remains responsible to the Ministry of Defence who has inspective and enquiring power as well. Budgets are directly assigned to the Heads of Agencies from the Prime Minister however. Expenses are controlled by the Court of Auditors except for so-called “reserved expenses”, decided by the Prime Minister, which are directly assigned at the budget of the Ministry and are not controlled.

The direct hierarchical responsibility and accountability of the highest ranking of each police force to the responsible Minister is the way by which the law enforcement agencies are accountable to the executive. The relationship between the Ministry of Home Affairs and the Head of the Polizia (who is, as stressed, the General Director of the Public Security Service) is the focal point to analyse the dynamic between police forces and the executive. They should work in strict co-ordination and collaboration both in the elaboration of the strategic police activity on the territory and in the control of the legality of the police operations. When police forces evade legal obligation, judicial and ministerial enquires are carried out. Responsibility for the illegal conduct of the police forces lies at the highest level.

2.2 To elected representatives

Police Forces are not directly accountable to the Parliament. They are only indirectly controlled and answerable through the legislature’s power of control on the Ministries. The article 113 of the Act n. 121/81 established that the Department of Public Security must present an annual Report on the national public security activity carried on by all the Law Enforcement Agencies. Article 5 of the act 410/1991 established that the department is requested to present an annual report to the Parliament on the situation of the Organised Crime in Italy. These reports are not required to be approved by the Parliament, but they inform the elected institution on the activity of the police forces and on the results obtained in relation to the repression and prevention of crime in the country.

The Italian Ratification Act of the Schengen Agreement (n. 388/1993) established a special Parliamentary Committee with the task to control the implementation of the Schengen Agreements. The Europol Ratification Act entitled this Committee to check the activity of the EUROPOL National Unit (ENU). This Committee has the power to summon the ENU personnel in order to acquire information on their activity.

Act n. 675/1996, modified by the act n. 123/97 and in adopting the EC directive 95/46/CE, established the Commissione Garante per la Protezione dei dati personali (National Data Protection Board), formed by four members of the Parliament. It is entrusted with the task to control the respect of the privacy, as ruled by the Italian act n. 675/1996, in the use of personal data by public administration, police forces, and judicial authorities. In that capacity the Board manages the national general register of the data banks collecting personal data. The Commissione Garante is competent to control the validity and correctness of the data inputs and treatment; and it has the power to suspend a data bank if it finds that the data collection or treatment is causing damage for the interested person or is illegal or incorrect. An Italian citizen can request the Commissione Garante to check whether his/her data are stored in the register and may present to the Commissione complaints concerning collection or treatment of personal data. However, police forces do not need the permission of the Data Protection Board for the creation of police databases. The activity of controlling the lawful use of the personal data by the Board has a reactive nature of remedying abuses, instead of being a preventive control on the nature and the method of use of the personal data banks. The Commission presents an annual report to the Government and Parliament.

The Intelligence Agencies are not directly accountable to the Parliament. They respond only to those Ministers who have the direction of the services. The main way by which the legislature controls the activity of the intelligence agencies is the *Comitato parlamentare per i servizi di informazione e sicurezza e per il segreto di Stato* (Parliamentary Committee on the Intelligence Services and National Secrets), established in 1969 and beginning oversight activities in 1977 by the act n. 801/1977 with the task to verify that the security services “act in respect of their institutional attribution”. This ambiguous formula does not permit the Committee to enquire directly on the operations carried on by SISDe and SISMi. In fact, the Committee is only allowed to have interaction with the executive by the power to request the Prime

Minister to have information on the general activity of the Secret Services. It is not allowed to receive directly documents or to conduct inquiries. It has the only power to ask the Prime Minister for information on the general aspect of the secret service activities. Moreover, the Prime Minister is able to deny information requested.

The “State Secret” is ruled by the act n. 801/1977 and by the Criminal Procedural code, art. 202,203 and 256. State Secret is defined as the possibility to avoid the publication and diffusion of acts, documents, information, activities and every other element if they could damage the integrity of democratic institutions, the independence of the Italian state, the efficiency of the defence of constitutional institutions or the military defence of the State. The Prime Minister is directly responsible for the managing of the secret state but must explain to the Parliament the opposition of the secret state to any request of information or documentation.

A long series of administrative acts, approved in 1987, classify the secrecy of documents on the basis of the degree of the damage that the diffusion of the information would cause. Competent Ministries have the responsibility for the classification of documents but the Prime Minister, with a political decision, can cover a document with the state secret even when this document is not classified.

The control of the Parliament on the intelligence policy and activities is exercised by means of the general device of the accountability of the executive and Prime Minister to the Parliament. The combined disposals of the act 801/77 and article 95 of the Italian Constitution give to the Prime Minister alone the power to manage and direct this policy. The committee has no power to conduct budgetary control of intelligence agencies. Parliament is only informed on the activity of the Secret Services throughout a semestral relation paper prepared by Government. (For the first semester of 2001 see: <http://www.serviziinformazione sicurezza.it/pdcweb.nsf/documenti/Isem01>)

The parliament uses the “question time” as a further instrument for probing the activities of the secret service agencies and for transferring in the public and political debate some problems related to the secret service activities, even if the number of answers to the parliamentary written and oral questions on problems related to the secret service activities is very low. In its authority to control the activity of the executive, Italian Parliament can established special enquiring committees on special issues. In its history Italian Parliament has established such committees in intelligence service special activities as

well; for example, the act n. 90/2002 establishing the parliamentary enquiring committee on the *dossier* Mitrokhin, related to the activity and behaviour of the Italian secret services in the case of the suspected secret agents of the KGB acting in Italy.

In sum, the degree of accountability of Police Forces and Secret Services to the Parliament is very low and indirect, being mainly based on the accountability of the Minister of Home Affairs to the Parliament. However, in practice, the Head of the Polizia, formally appointed by Government, is appointed with bipartisan agreement.

2.3 To other institutions

Internal accountability. The internal control of police forces is firstly exercised through its own hierarchy. The highest ranking is responsible for the activities of lower ranking; and the ministers responsible, with the help of their services, have authority over their respective agents and can impose disciplinary sanctions. The Ufficio centrale Ispettivo (Central Inspection Office) is the specialised office of the Public Security Department entrusted with the task to support the Head of Police, Director General of Public Security, in controlling the efficiency of all Public Security Offices and the units of the National Police.

The Courts. The judiciary exercises its control on police forces activities in the framework of activities related to administrative and judiciary inquiries. Inquiries of criminal cases by law enforcement agencies are carried out under the judicial control and supervision of the public prosecution service. In terms of accountability, the hierarchical relationship implies that the lowest ranking official within the Public Prosecution Service is superior to the highest-ranking official within the police forces acting as judicial police. The Public Prosecutor in Italy controls the application of the law and the administration of justice, under the surveillance of the Minister of Justice. At the same time he/she belongs to the judiciary which is autonomous and independent from every other institution and power. The Public Prosecutor controls the investigative action of the judicial police, this latter being under its direct authority according to section 109 of the Italian Constitution.

There is not an official institution like an Ombudsman or a Human Rights Commissioner empowered to receive and investigate complaints by citizens. However, each member of the police forces is answerable to the law for the exercise of his/her powers in the same manner as any other citizen.

2.4 To the media and society-at-large

The average level of information on police forces and secret service activity is low. Generally the media do not inform citizens on this issue. Moreover, they have few sources of information on this kind of activity. All the main information available to public opinion and the media are published online, at the web address of the Ministers of Home Affairs and Defence. In particular the following documents are published: the formal organisation and tasks of the different forces, the organigram of the Police Forces, the general personnel strength, the organigram of the Department of Public Security, and the names of departmental chiefs.

The website of the Minister of Home Affairs has an intranet reserved to the internal personnel and personnel of the Prefettura in which press office information on internal services and offices and the breakdown of personnel are available. The access is permitted by identification (username and password).

The Polizia only publishes a periodical report of activity on its websites, but the language and the rhetoric of these reports have a character of institutional communication. (See, for the 2001 annual report: <http://www.poliziadistato.it/pds/chisiamo/bilancio/2001/index.html>; on the website of the Ministry of Interior are published the annual reports on national public security activity (<http://coordinamento.mininterno.it/sitocoord/pubblicazioni/ordine.htm>) and on the situation of organised crime are published (<http://www.poliziadistato.it/pds/online/documentazione/criminalitaorganizzata/rappanncrimorg.zip>.) These reports inform Parliament and people on the general guidelines underpinning specifically operations conducted. They are provided with statistical information on the nature of main crimes committed during a given year in comparison with the past; the extent of imprisonment; the nationality of persons committing crimes. No statistical data or polls are available on the accountability of the police system in Italy.

On the website of the Italian government (www.governo.it) there is a section dedicated to the intelligence agencies in which the organisation, the general organigram and the acts and provisions underpinning the intelligence policy are published. On the website of the SISDe are published the relation papers on the activity of the Secret Services presented to the Parliament by Government, the relations of the Parliamentary Committee on the Intelligence Services and National Secret and the on-line version of the Sisode Journal. On the website of the Polizia updated statistical data on criminality, drug-related crimes, illegal immigrants are published (<http://www.poliziadistato.it/pds/online/>

datistatistici.htm). The Polizia's journal ("Polizia Moderna") is published online: www.poliziadistato.it.

Section 200 of the Italian criminal procedural code recognises the right of journalists to protect their sources. Only the prosecution judge (not the public prosecutors) can request the journalists to reveal their sources and then only in the case that no other means exist for arriving at the knowledge of the true facts.

The Statistics Central Office has no permanent data on the activities of police forces. The data collected regularly are related to activity against drug-related crime and the number of offences presented by police forces to the judiciary.

2.5 To codes and conventions

The international influence on Italian Police Forces System stems mainly from the establishment of the Europol national Unit and the SIRENE bureau, with the associated standardisation of the collecting and processing of data and the control of such data by the National Data Protection Board.

Italy has signed the Europol Convention, the Council of Europe Convention on protection of Personal data, the Euro Interpol Agreement, the Convention on Human Rights and Fundamental Freedom, the European Convention against Torture, the Schengen agreement. The country has assumed all the transparency obligations stemming from these international documents. An example is the Italian Law on the respect of privacy in collecting, storing and processing personal data and the institution of the National Control Authority on Privacy (Garante Nazionale della Privacy) which stemmed from Italian ratification of Schengen agreement.

4. Recent changes 2001/2 and general appeal

The events of 11 September 2001 have not led to declared changes to 'normal practice'. At the moment there are not enough data for affirming that undeclared changes in the practice of police activities are at work. The only proven changes are the strong personal and documents control at the airports that have all but stopped the Schengen process.

CHAPTER VI

POLAND

Andrzej RZEPLINSKI¹

1. Coverage

The non-military security-sector organisations in Poland are (A) the Police, (B) the Internal Security Agency, (C) the Foreign Intelligence Agency, (D) the Frontier Guard, and (E) an Office of the Security of Government. Until mid-2002 (B) and (C) were parts of a unitary Office of State Protection.

A. Police

The statutory duties of the Police, which is a uniformed and armed formation, are to serve society and to protect people, and also to maintain public safety and order (Article 1.1 of the Law of 6 April 1990 on the Police).² The Polish police is placed within the State government administration as a separate formation subordinated to Minister of Internal Affairs and Administration, a member of the Cabinet. It is headed by the Chief Commander of the Police, subordinated to the Minister of Internal Affairs and Administration, who is appointed and recalled by the Prime Minister on motion of the Minister of Internal Affairs and Administration. The Commander is the superior of all functionaries of the police (Article 5.1-5.3 of the above-mentioned Police Law). Regional and local agencies of the police, like the state forest administration or fire-brigades, are agencies of special government administration as opposed to general administration.

Under provisions of Article 14 sections 4 and 5 of the Law of 6 April 1990 on the Police, the Police may – to the extent that is necessary for performance of its statutory functions – avail itself of information

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² Uniform text: Journal of Laws of 2000 No. 101, item 1092 with subsequent changes.

obtained by the Internal Security Agency [Agencja Bezpieczeństwa Wewnętrznego, ABW] and Frontier Guard [Straż Graniczna, SG] in the course of its operation and investigation activities. Corresponding provisions contained in Laws on ABW and SG authorize those two institutions to exchange information with each other and with the Police. At present, the process of obtaining and exchanging information between individual agencies is coordinated by the National Criminal Information Center [Krajowe Centrum Informacji Kryminalnej (KCIK)], established under the Law of 6 July 2001 on the gathering, processing and providing criminal information.³

The tasks, duties and rights of the Police are stipulated in further articles. Within its duties with the aim to identify, prevent and detect offences and transgressions, the Police performs the following actions (Article 14):

- 1) operational and identification; investigation and inquiry; administrative and orderly.
- 2) actions ordered by the court, public prosecutor's office, state administrative agencies and local government agencies to the extent to which this duty is specified in separate statutes.

In the course of performance of their duties, policemen are obliged to respect human dignity and to observe and protect human rights. To the extent indispensable to perform its statutory duties, the Police may use information on individuals obtained by Office of State Protection and Frontier Guards in the course of operational and identification actions. The Prime Minister shall specify the extent, conditions and procedure of handing over to the Police the information on individuals obtained by Office of State Protection and Frontier Guards in the course of operational and identification actions.

Performing the above-mentioned actions policemen have the right to (Article 15):

- 1) check identity papers of individuals to establish their identity;
- 2) detain individuals according to the procedure and in cases specified in provisions of the Code of Criminal Procedure and other statutes;
- 3) detain persons deprived of liberty who have been temporarily released from remand prison or penal institution under a permission issued by a competent agency but failed to return on a fixed date;

³ Journal of Laws N. 154, item 1800.

- 4) detain persons who pose an obvious direct threat to the life or health of individuals, and also to property;
- 5) search persons and premises according to the procedure and in cases specified in provisions of the Code of Criminal Procedure and other statutes;
- 6) search persons and inspect the contents of passenger luggage and of freight and cargo in seaports, at railway stations and air terminals, and inside means of land, air, and water transport, if there is justified suspicion that an act prohibited by law has been committed;
- 7) demand necessary assistance from State institutions, agencies of State administration and local government, and economic units pursuing activity in the area of public utility; the above institutions, agencies and units are obliged, within the scope of their activity, to render such assistance under valid provisions of the law;
- 8) approach for necessary assistance other economic units and social organizations, and also in urgent cases to approach any citizen for emergency assistance under valid provisions of the law.

A person may be detained only if other measures prove useless or ineffective. A detained person mentioned in point 4 above may be presented for identification, photographed or have his fingerprints taken only if his identity cannot be established in another manner. Actions of the Police should be performed in a manner reducing to the necessary minimum the interference with personal rights of the detainee.

In the event that instructions given by agencies or functionaries of the Police under legal provisions are not followed, policemen may use the following means of direct coercion (Article 16): 1) physical, technical and chemical means to neutralize or escort persons and to stop vehicles; 2) service clubs; 3) means of neutralization with water; 4) service dogs; 5) non-penetration bullets fired from firearms. Policemen can only use such means of direct coercion as are suited to the needs resulting from the situation and indispensable to achieve a person's obedience to orders given.

If the means of direct coercion referred to in Article 16 prove insufficient or cannot be used in the circumstances of a given incident, a policeman has the right to use firearms in the following situations exclusively (Article 17):

- 1) with the object to force back a direct and lawless assault against his own or another person's life, health or freedom, and to prevent actions directly tending towards such assault;
- 2) against a person who fails to obey summons to immediately drop firearms or another dangerous instrument the use of which might threaten the life, health or freedom of the policeman or another person;
- 3) against a person who lawlessly attempts to forcibly to take away firearms from the policeman or another person authorized to carry firearms;
- 4) with the object to force back a dangerous and direct violent assault against objects and appliances of importance for security or defences of State, seats of supreme agencies of State authority, supreme and central agencies of State administration or administration of justice, objects of economy or national culture, against diplomatic representations and consular offices of foreign States or international organizations, and also against objects guarded by armed protective formations established under separate provisions;
- 5) with the object to force back an assault against property if that assault also poses a direct threat to human life, health or freedom;
- 6) in direct pursuit of a person with respect to whom the use of firearms was permissible in cases referred to in points 1-3 and 5 above, or of a person who can be reasonably suspected of having committed murder, terrorist assault, kidnapping to extort ransom or specific conduct, robbery, theft with the use of violence, intentional heavy bodily injury, rape, arson, or intentional causing of public danger to life or health in another manner;
- 7) with the object to apprehend a person referred to in point 6 above, if that person has taken cover in a place difficult of access and from accompanying circumstances it follows that he may use firearms or another dangerous instrument the use of which might pose a threat to life or health;
- 8) to force back a violent, direct and lawless assault against a convoy protecting persons, documents containing State secrets, money or other valuables;
- 9) with the object to apprehend or defeat the escape of a person arrested, detained on remand, or serving the penalty of deprivation of liberty, if:

- a) escape of the person deprived of liberty poses threat to human life or health,
- b) there is justified suspicion that the person deprived of liberty might use firearms, explosives, or a dangerous instrument, or
- c) the person has been deprived of liberty due to a justified suspicion or ascertainment of his commission of offences referred to in point 6 above.

In the course of operations of serried squads or sub-units of the Police, firearms can be used solely by order of their commanding officers. Firearms should be used so as to cause the smallest harm to the person against whom firearms have been used; the use of firearms may not aim at killing that person or at jeopardizing the life or health of others. The Council of Ministers shall specify by way of an ordinance the detailed conditions and procedure in cases of using firearms, and also the principles of using firearms by units of the Police.

In the event of danger to public safety or dangerous disturbance of public order, especially through causing (Article 18) 1) public threat to the life, health or freedom of citizens, 2) direct threat to considerable value of property, or 3) direct threat to objects or appliances referred to in Article 17 point 4 – the Prime Minister may, upon motion of the Minister of Internal Affairs and with the object to secure public safety or to restore public order, ordain the use of armed squads or sub-units of the Police. In cases of great urgency the decision referred to in section 1 above is taken by the Minister of Internal Affairs who immediately notifies the Prime Minister. In cases referred to in section 1 above, if the use of armed squads and sub-units of the Police proves ineffective the Police may be assisted, under a decision of the President of the Republic of Poland issued upon motion of the Prime Minister, by squads and sub-units of Armed Forces of Republic of Poland.

In the event of a natural calamity or extreme threat to the environment, if forces of the Police prove insufficient to perform their duties of protection of public safety and order, the Prime Minister may, upon motion of the Minister of Internal Affairs and Administration cleared with the Minister of National Defence, ordain the use of soldiers of Military Police to assist the Police (Article 18a).

When performing operational and identification actions within a scope not regulated by provisions of the Code of Criminal Procedure, undertaken by the Police to prevent or detect intentional offences prosecuted by the public prosecutor (Article 19):

- 1) against life,

- 2) of heavy bodily injury or grave disturbance of health,
- 3) of deprivation of a person of his liberty with the object to extort ransom or conduct; against public safety; of illegal manufacture and possession of or trade in firearms, ammunition, explosives, narcotic or psychotropic drugs, and nuclear or radioactive materials, economic offences resulting in considerable damage to property, offences against property of considerable value, or fiscal offences consisting in considerable curtailment of tax or other dues to the Treasury; of unlawful acceptance or handing over of great amount of material profit in connection with performance of a public function or a function involving special responsibility; of forgery of money and securities and of uttering counterfeited money and securities; offences prosecuted under international contracts and agreements – *in these circumstances* the district court, upon a motion of a chief district commissioner of Police or the Chief Commissioner of Police and with prior approval of the prosecutor, may order, for a specified period of time, surveillance of mail as well as the use of technical means enabling secret obtaining of information and fixing of material evidence. The Minister of Internal Affairs shall inform the Public Prosecutor General on a current basis about actions undertaken and results thereof. A chief district commissioner of Police or the Chief Commissioner of Police shall inform a prosecutor about effects of covert operations after their completing and on his demand. Those Actions may only be undertaken if other measures prove ineffective or if it is highly probable that they would prove ineffective or useless for the purpose of detection of an offence, apprehension of its perpetrator, and disclosure and securing of evidence. Materials obtained in the course of those actions which do not confirm the perpetration of an offence are subject to officially recorded destruction by a committee within two months of completing of those actions. It does not apply to cases when those actions were undertaken on the motion of a person concerned.

In cases of intentional offences (Article 19a):

- 1) against life, of heavy bodily injury or grave disturbance of health, and of deprivation of a person of his liberty with the object to extort ransom or conduct; against public safety referred and in cases of preparation of offences referred to in those provisions,

- 2) of illegal manufacture and possession of or trade in firearms, ammunition, explosives, narcotic or psychotropic drugs, and nuclear or radioactive materials; economic offences resulting in considerable damage to property, offences against property of considerable value, or fiscal offences consisting in considerable curtailment of tax or other dues to the Treasury; of unlawful acceptance or handing over of great amount of material profit in connection with performance of a public function or a function involving special responsibility; of forgery of money and securities and of uttering counterfeited money and securities – *in these circumstances* the operational and identification actions aimed at verifying previously obtained reliable information about an offence and at detecting perpetrators and obtaining evidence may consist in a secret purchase or interception of things deriving from the offence which are subject to forfeiture, or of objects whose manufacture, possession, transporting and trafficking are prohibited, and also in acceptance or handing over of material profit.

In the course of actions surveillance of mail and technical means may be used according to principles laid down in Article 19. The actions referred to in this section above may not consist in supervision of activities showing the features of acts prohibited by law. Moreover, with respect to acts involving acceptance or handing over of material profit, such actions may not consist in inciting to hand over or accept such profit.

In the course of performance of operational and identification actions undertaken with the object to document offences referred to in Article 19, or with the object to establish the identity of persons involved in such offences or to intercept things deriving from them, the Minister of Internal Affairs may order, before institution of criminal proceedings, secret surveillance of transport and storage of and trade in things deriving from an offence, provided this poses no threat to the life or health of individuals (Article 19b). The Public Prosecutor General should be notified without delay of an order issued under section 1 above, and also of the course and results of actions undertaken. He may order abandonment of such actions. According to the order referred to in section 1 of Article 19b, State agencies and institutions are obliged to permit further transport of mail containing intact things deriving from an offence or after their removal or replacement wholly or in part.

Subject to limitations that follow from Article 19, the Police may obtain, gather, verify and process information, including secret and confidential information (Article 20). The Police may collect, gather and use for detection and identification purposes fingerprints, photographs and other data of persons suspected of intentional offences prosecuted by public prosecutor, and also of persons whose identity cannot be established or those trying to conceal their identity. The Chief Commander of the Police shall specify the procedure of keeping collections of identification data referred to in this Article.

In connection with performance of duties the Police secures protection of the forms and methods of performing duties, of information, and also of its own objects and data identifying policemen (Article 20a). In the course of operational and identification actions policemen may use documents preventing the disclosure of data identifying the policeman and of the means he uses when performing service duties.

Information on detailed forms, principles and organization of operational and identification actions, and also on actions currently performed and the means and methods of their performance may only be given if there is a justified suspicion that an offence prosecuted by public prosecutor has been committed in connection with performance of such actions (Article 20b).

Information about a person obtained in the course of operational and identification actions and according to the procedure referred to in Article 14.4 may only be given on demand of the court or public prosecutor, and may only be used to the aim of penal prosecution (Article 21). The ban introduced by section 1 above does not apply if the duty to provide such information to a specific agency has been imposed statutorily or follows from international contracts and agreements, and also in cases where concealment of such information would result in a threat to the life or health of others.

Performing its duties, the Police may receive assistance from persons other than policemen. It is prohibited to disclose the data of a person assisting the Police within operational and identification actions (Article 22). The data be disclosed on public prosecutor's demand, also in the event of a justified suspicion that such person has committed an offence prosecuted by public prosecutor in connection with performance of operational and identification actions. For assistance referred to section 1 above, persons other than policemen may receive remuneration paid from operational funds. If in the course of reception by the Police of

assistance from a person referred to in section 1 above, and in connection with that assistance such person loses his life or suffers detriment to his health or damage to his property, indemnity shall be due according to the principles and procedure specified in an ordinance of the Minister of Internal Affairs.

B. Internal Security Agency (ABW)

On 24 May 2002, following the Senate's amendments, the Sejm adopted the Law on the Internal Security Agency.⁴ The Law liquidated the former Office of State Protection, which had been in charge of counterintelligence, prosecution of serious offences against the economy and of organized and international crime, and civilian intelligence. As a replacement, the Law established two institutions: the Internal Security Agency and the Foreign Intelligence Agency. The President signed the Law on 10 June; it entered into force on the day of its publication, that is on 28 June 2002.

The Government coalition voted for adoption of the Law. In the opinion of the coalition MPs the new provisions offer greater possibilities of supervising the work and expenses of security services. Those against the Law – Platforma Obywatelska [Citizen Platform], Prawo i Sprawiedliwość [Law and Justice], Liga Polskich Rodzin [League of Polish Families] and Samoobrona [Self-defence] believe that the new Law will make the services political and weaken parliamentary oversight of their functioning.

According to the Chairman of the Sejm Committee for Security Services, the Law in its final wording fails to take into account the major postulates made by the opposition. He said that the reform had been launched at a wrong moment, in the situation of terrorist threat. In its present shape, he added, the reform destabilizes the security services and makes them political. "These will be party and not state services", the Chairman said. He also stressed the danger that previously removed functionaries of the former communist services might now rejoin the newly-created force.

On 28 June – the date when the new Law entered into force – active politicians of the ruling party were appointed heads of the newly-established agencies. One of them, Head of ABW, was actively involved in the communist party machine in the 1980s as functionary of the Central Committee of the Polish United Workers Party, in charge of

⁴ Law of 24 May 2002 on the Agency of Internal Security and Intelligence Agency (Journal of Laws No. 74, item 676).

close cooperation and political supervision over the communist Security Service (he was a head of Unit of Studies and Analyses of the Central Committee).

The Law establishes the Government Information Community (Article 41), headed by the Head of the Foreign Intelligence Agency (AW). Its task would be to compile uniform secret information for the country's highest officials. In our view, this provision is unconstitutional as it subordinates members of the Cabinet, appointed under the Constitution, to the Head of AW. Besides, the Ministers can hardly be expected to follow orders issued by that official.

The internal Agency has been put in charge of counterintelligence, fight against the most serious offences "aimed against the economic foundations of state", and investigation of cases of corruption among public functionaries. The Law obliges ABW to cooperate with AW and Military Counterintelligence and Intelligence (Wojskowe Służby Informacyjne, WSI). The extent of their respective competencies will be defined by the Prime Minister by way of an ordinance).

The tasks of ABW include:

- 1) investigation, prevention and fighting of threats to the internal security of the state and its constitutional order, including in particular its sovereignty and international position, independence and inviolability of its territory, as well as defences;
- 2) investigation, prevention and detection of the following offences:
 - a) espionage, terrorism, breach of state secret and other offences against security of state,
 - b) offences against the economic foundations of state,
 - c) corruption of public officials referred to in Article 1 and 2 of the Law of 21 August 1997 on restrictions on economic activity of holders of public functions⁵,
 - d) offences affecting the production of and trade in commodities, technologies and services of strategic importance for security of state,
 - e) illicit manufacture and possession of as well as trade, on the international scale, in firearms, munitions and explosives, mass extermination weapons as well as narcotic drugs and psychotropic substances; the Agency's tasks also include prosecution of the perpetrators of such offences;

⁵ Journal of Laws No. 88, item 554 with subsequent changes.

- 3) performance, within its specific competencies, of tasks typical of state protection services and of the function of a national security service in the area of protection of classified information in international relations;
- 4) obtaining, analysis, processing and provision to competent agencies of information of potential importance for protection of internal security and the constitutional order of state;
- 5) performance of other activities specified in separate laws and international treaties (Article 5 of the Law on ABW and AW).

Outside the territory of the Republic of Poland, ABW may only act in connection with its domestic activity exclusively in the course of its performance of tasks specified in section 1 point 2 of the provision quoted above.

C. Foreign Intelligence Agency (AW)

This organisation is in charge of foreign intelligence and gathers information mainly outside the territory of Poland. It is to take over several dozen officers of the Military Intelligence (WSI) who have so far dealt with political and strategic intelligence. Military intelligence remains the domain of WSI, which is subordinated to the Minister of National Defence.

The tasks of AW include:

- 1) obtaining, analysis, processing and provision to competent agencies of information of potential importance for the security and international position of Republic of Poland and also for its economic and defence potential;
- 2) investigation of and counteracting external threats aimed against the security, defences, independence and inviolability of territory of Republic of Poland;
- 3) protection of foreign missions of Republic of Poland and of the staff of such missions against activity of foreign security services and other activities potentially detrimental to the interests of Republic of Poland;
- 4) cryptographic protection of communication with Polish diplomatic and consular missions and of messages sent by diplomatic couriers;
- 5) investigation of international terrorism, extremism and international organized crime;
- 6) investigation of international trade in firearms, munitions and explosives, narcotic drugs and psychotropic substances, as well

as commodities, technologies and services of strategic importance for security of state; and also investigation of international trade in mass extermination weapons and of threats resulting from dissemination of such weapons and of the means of their transportation;

- 7) investigation and analysis of threats emerging in areas of international tension, conflict and crisis that affect the security of state, as well as undertaking actions to eliminate such threats;
- 8) electronic intelligence;
- 9) other activities specified in separate laws and international treaties (Article 6 section 1 of the Law on ABW and AW).

With the exception of some operational actions, the tasks listed above are performed outside the territory of Republic of Poland.

D. Frontier Guard

The Frontier Guard (Straż Graniczna, SG) was established to investigate, prevent and detect offences specified in the Law on protection of state frontiers. It performs operational-investigative as well as administrative-orderly functions and conducts preparatory proceedings. SG operates under the Law of 12 October 1990 on the Frontier Guard.⁶ The tasks of SG include:

- 1) protection of the state frontiers;
- 2) organization and performance of the frontier traffic inspection;
- 3) issuing permits to cross the state frontier, including visas;
- 4) investigation, prevention and detection of offences and transgressions as well as prosecution of their perpetrators, within Frontier Guard's competencies, including in particular:
 - a) offences and transgressions related to legality of the crossing of state frontiers, to the proper marking of those frontiers, and to credibility of documents entitling the bearer to cross the state frontier,
 - b) some fiscal offences and fiscal transgressions,
 - c) offences and transgressions related to the crossing of state frontiers or to the transporting across such frontiers of commodities and objects specified in provisions on the marking of products with excise marks, on firearms and munitions, on protection of cultural goods, on the national archival resources, on counteracting drug addiction, and on registration of the population and identity cards,

⁶ Uniform text: Journal of Laws No. 78, item 462.

- d) offences and transgressions specified in the Law of 25 June 1997 on foreigners⁷;
- 5) ensuring safety of international transport as well as public order in the area of the frontier crossing points, and also, within Frontier Guard competencies, in the frontier zone;
- 6) putting up and maintaining ground frontier marks as well as drawing up, updating and storing land-surveying and cartographic documentation of frontiers;
- 7) protection of inviolability of marks and appliances for protection of state frontiers;
- 8) gathering and processing of information in the area of protection of state frontiers and frontier traffic, as well as provision of such information to competent state agencies;
- 9) supervisions of exploitation of Polish sea space and of provision by vessels of provisions governing that space;
- 10) protection of state frontiers in the air space of Republic of Poland by means of monitoring of aircraft and flying objects crossing the frontiers at low altitudes, as well as informing competent units of the Air Forces and Air Defence about such crossings;
- 11) prevention of transport across the state frontier, without a permit required under separate provisions, of waste, noxious chemical substances and nuclear or radioactive materials, and also prevention of pollution of frontier waters;
- 12) prevention of transport across the state frontier, without a permit required under separate provisions, of narcotic drugs and psychotropic substances, and also of firearms, munitions and explosives.

E. Office of Government Protection

The Office of Government Protection (Biuro Ochrony Rządu, hereinafter: BOR) is composed of soldiers from troops subordinated to the Minister of Internal Affairs and Administration. The Office has retained its name from before 1989. The tasks of this particular formation have been defined in Article 2 of the Law of 16 March 2001 on the Office of Government Protection.⁸ They include protection of the following persons and objects:

⁷ Journal of Laws No. 114, item 739 with subsequent changes.

⁸ Journal of Laws No. 106, item 1149.

- 1) President of Republic of Poland; Speaker of the Sejm; Speaker of the Senate; Prime Minister; Deputy Prime Minister; Minister of Internal Affairs; and Minister of Foreign Affairs;
- 2) other persons who have to be protected on account of the interest of state;
- 3) former Presidents of the Republic of Poland;
- 4) delegations of foreign countries during their visit to the territory of Poland;
- 5) Polish diplomatic missions, consular offices and representations at international organizations outside the territory of the Republic of Poland;
- 6) objects and appliances of special importance (BOR also ensures their proper functioning);
- 7) objects of the Sejm and Senate (BOR carries out their pyrotechnical and radiological monitoring);
- 8) objects used by the President of the Republic of Poland, the Prime Minister, the Minister of Internal Affairs and the Minister of Foreign Affairs.

Further Information

All the above-mentioned institutions were re-established after the fall of Communism in June 1989, and acquired a new form in June 1990. The structure was only changed radically in June 2002, as explained earlier. The Office of Government Protection acquired a separate statutory regulation.⁹ The Police underwent several changes: in 1995, district and provincial headquarters were closely bound with the local government; local police was liquidated then, and the police was made nationally uniform. That time the Police was empowered with the right to enlarged covert operations. Since 27 July 2001 any interception of communication needs prior authorization of a district judge. In March 2002, the Central Investigative Office was established, which has a staff of 1,300. It is a separate structure within the Chief Headquarters of the Police for prosecution of economic and organized crime.

All of the services are formally subordinated to the Prime Minister, who appoints the Heads of those formations. There is no single agency coordinating the activities of all those services. Services A, D and E are subordinated to the Minister of Internal Affairs; B and C report directly

⁹ Formerly, BOR was regulated by the Law of 22 December 1999 on temporary subordination of some military units (Journal of Laws of 2000 No. 2, item 6 with subsequent changes).

to the Prime Minister (see the opening paragraph of this Chapter). The activities of B and C are coordinated by the Security Services Council attached to the Council of Ministers (Article 11 of the Law on ABW and AW) and by a separate parliamentary committee – the Security Services Committee of the Sejm of the Republic of Poland (Article 12 section 3 of the Law on ABW and AW).

The Constitution of the Republic of Poland contains a general provision which makes the Council of Ministers responsible for external and internal security of state (Article 146 section 4 points 7 and 8). Activity of the Police is regulated by the Law of 6 April 1990 on the Police.¹⁰ The definition of the force contained in that law calls the Police “... a uniformed and armed formation serving society and designed to protect the people’s safety and to maintain public safety and order”. The basic statutory competencies of the Police have been summarized above. Within a scope defined by the law, the Police also performs actions ordered by a court, prosecutor, state administration or local government agencies. In the course of their service actions, policemen are obliged to respect human dignity and to observe and protect human rights. The statutory competencies of ABW, also the agency's competencies, have been summarized above as have those of the Frontier Guard (SG) which operates under the Law of 12 October 1990 on the Frontier Guard.¹¹

The SG’s functionaries are specifically authorized:

- 1) to carry out checks at frontier crossing points;
- 2) to search persons and luggage contents, check cargo at ports and railway stations and on the means of air, road, railway and water transport, with the aim to exclude the possibility of perpetration of offences and transgressions, especially those against inviolability of state frontiers or against safety of international transport;
- 3) to issue visas and other permits to cross the state frontier under separate provisions;
- 4) to check identity papers and otherwise to establish the identity of persons;
- 5) to arrest persons according to the procedure and in cases specified in provisions of the Code of Criminal Procedure and of other laws, and also to bring such persons to the competent agency of the Frontier Guard;

¹⁰ Journal of Laws No. 30, item 179 with subsequent changes

¹¹ Journal of Laws of 1991 No. 87, item 396 with subsequent changes.

- 6) to search persons, objects, rooms and means of transport according to the procedure and in cases specified in provisions of the Code of Criminal Procedure and of other laws;
- 7) to monitor and record, using the technical means of picture and sound recording, incidents taking place on roads and at other public places;
- 8) to stop vehicles and to perform other traffic control actions according to the procedure and in cases specified in the Law of 20 June 1997: Traffic Regulations¹²,
- 9) to stop noxious nuclear and radioactive materials, chemical and biological substances as well as waste and to return such materials from the state frontier to the sender;
- 10) to stay on and move across grounds without their owner's or user's consent, and to cross plough-land during immediate pursuit, also with a service dog, if not roads are available that could be taken instead;
- 11) to demand necessary assistance from state institutions, government administration, local government agencies and economic units active in the field of public services; the above institutions, agencies and units are required, within their specific competencies, to provide such assistance to the extent defined by valid legal provisions;
- 12) to approach other economic units and non-governmental organizations for necessary assistance, and also to approach any individual in cases of emergency for immediate assistance to the extent defined by valid legal provisions;

When performing the actions referred to in points 4-7 above, SG functionaries have the rights and duties of policemen.

The Government Protection Office (BOR) is a "... homogenous, uniformed and armed formation, [...] which protects persons, objects and fittings". It operates under the Law of 16 March 2001 on the Government Protection Office.¹³ Its competencies also have been summarized above.

¹² Journal of Laws No. 98, item 602, No. 123 with subsequent changes.

¹³ Dz.U. nr 106, poz. 1149.

2. Accountability

2.1 To the executive and generally

Police

The head of the Police is the Chief Commander of the Police, appointed by the Prime Minister on motion of the Minister of Internal Affairs and Administration. The Minister of Internal Affairs and Administration is responsible for police actions (this includes also financial responsibility). It should be added that as far as the grant of subsidies from the budget is concerned – the Police being a so-called budget unit – the institution that has a say on the actual amount of the budget is the Minister of Finance. The carrying out of the budget adopted by the Sejm is also reviewed by the Sejm and the Supreme Board of Audit. Within the Sejm, the effects of Police work are reviewed by the Committee for Administration and Internal Affairs.

In the area of prosecution of offences, the police are commissioned to perform investigative actions by the prosecutor, who also supervises police investigation of transgressions (petty offences). The prosecutor has the sole power to make final decisions (indictment, discontinuance).

Established in March 2002 at the Chief Commander of the Police has an Advisory Committee, composed mainly of Professors of law (7), Professors of sociology (2) and psychology (2), as well as human rights activists (2). The Committee is to give opinions on police strategies and drafts of major legal acts, and also to submit to Police headquarters suggestions and drafts developed by the scientific circles. The Committee has so far met twice (mid-2002). Most of its members are independent of the Police. A similar Committee operated in the years 1997-1999.

ABW

The Head of ABW reports directly to the Prime Minister. In the area of investigation, ABW receives orders from the prosecutor, to whom the functionaries are accountable as to the merits of their actions. Counterintelligence operations outside the agency's own routine actions ordered by the Head of ABW are commissioned by the Prime Minister, who in turn receives "commissions" from heads of other departments and institutions (such as e.g. the National Bank of Poland). Also the President of the Republic of Poland and, through him, the National Security Office (Biuro Bezpieczeństwa Narodowego, BBN) may commission the Head of ABW.

Attached to the Council of Ministers there is the Security Services Council (already mentioned) which acts as provider of opinion and advice on matters of programming, supervisions and coordination of activities of ABW and AW, of Military Intelligence (WSI) and the Police, and of the Frontier Guard and Military Police, undertaken with the aim to protect the security of the state. The Council's competencies include formulation of appraisals and expression of opinions on the following matters:

- 1) appointment and dismissal of the Head of ABW, Head of AW, and Head of WSI;
- 2) directions and plans of activity of security services;
- 3) detailed draft budgets of security services, before their examination by the Council of Ministers;
- 4) draft normative acts and other Government documents pertaining to the activity of security services;
- 5) performance by the security services of specially commissioned tasks according to the directions and plans of activity of such services;
- 6) annual reports on the activity of individual security services, submitted by their respective Heads;
- 7) coordination of activity of ABW, AW and WSI, and also coordination of activity of those security services with that of the Police, Frontier Guard, Military Police, Government Protection Office, Customs Inspection, customs agencies, fiscal offices and chambers, financial inspection and information agencies, as well as intelligence agencies of the Armed Forces of Republic of Poland; also, cooperation of all those agencies in the area of protection of security of state;
- 8) cooperation with the security services of state, local and other such institutions;
- 9) cooperation of the security services with competent agencies and services of foreign countries;
- 10) organization of exchange between government administration agencies of information vital to the security and international position of the Republic of Poland;
- 11) protection of classified information concerning:
 - a) nationwide threats to protection of classified information constituting state secret,
 - b) procedures in the situation of nationwide threat resulting from disclosure of classified information constituting state

- secret, and appraisal of the effects of disclosure of such information,
- c) draft normative acts and other government documents concerning protection of classified information,
 - d) other matters commissioned by the Council of Ministers or Prime Minister and submitted by Ministers in the course of their performance of functions related to protection of classified information.

The Council is composed of the Prime Minister, a Secretary of the Council, the Minister of Internal Affairs and Administration, Minister of Foreign Affairs, Minister of National Defence, Minister of Finance, Head of the presidential National Security Office (BBN), Heads of ABW, AW and WSI, as well as Chairman of the Sejm Committee for Security Services. The President of the Republic of Poland may delegate a representative to meetings of the Council.

AW

The Head of AW reports directly to the Prime Minister. Within their competencies, AW functionaries perform operational-investigative as well as analytical-intelligence actions. They do not have “police” powers (e.g. to arrest a person).

Frontier Guard

The organisation is headed by the Chief Commander of the Frontier Guard, appointed and dismissed by the Prime Minister on motion of the Minister of Internal Affairs and Administration. The Chief Commander of SG reports directly to the Minister of Internal Affairs and Administration, who is also responsible for the budget of SG. In other respects, the Guard is supervised by the same agencies as the Police.

Office of the Security of Government

The Head of BOR is subordinated to the Minister of Internal Affairs and Administration, who is also responsible for the office’s budget. In other respects, BOR is supervised by the same agencies as the Police with the exception of the prosecutor’s office as BOR does not carry out investigation.

Further Information

No significant changes took place over the last decade (with the exception of the 2002 restructuring). Before 1995, there was no parliamentary oversight of the security services. In April 1995, the Sejm

Committee for Security Services was established under an amended resolution of the Sejm of Republic of Poland of 30 July 1992. The Committee focuses on giving opinion on general legal and normative acts pertaining to the security services, and also on directions of the services' work. Its competencies also include appraisal of security services' cooperation with other services that perform functions in the area of security of the state, and examination of complaints against their activity. Besides, the Committee examines annual reports submitted by the Heads of security services, and gives opinion on candidates for the offices of such Heads and their deputies. Opinion is also given on the draft budget in its part concerning the security services, as well as the report on its execution. The Committee has nine members; it is chaired by an opposition deputy.

In practice, parliamentary oversight is the weakest one of all. Within the Sejm Committee for Administration and Internal Affairs, both the opposition and especially the coalition deputies act as a lobby with respect to the police and the Frontier Guard and the BOR. They believe that the three agencies deserve extended powers, including the use of firearms, in the interest of crime control. Most deputies lack professional competencies to perform effective parliamentary oversight; the Committee's experts are former police officers or scholars institutionally dependent on the police.

Weaker still is parliamentary oversight of ABW and AW (against the background of the former experiences of UOP oversight). The ruling parties treat all oversight as an assault against a particularly sensitive fragment of their dominion. So far, all motions for investigation of various scandals, submitted by opposition deputies among the Committee's composition (who always constitute a minority), have been outvoted by the majority.

Highly effective, instead, is inspection by the Supreme Board of Audit, which concerns not only budget expenditure but also its expediency and effectiveness. The problem is that most reports provided by the Board's inspectors are secret (as, for example, one report on the effectiveness – or rather lack of effectiveness – of interception of communication).

The legality of the work of these services is reviewed by the Commissioner for Civil Rights Protection (Rzecznik Praw Obywatelskich, RPO), whose office has a separate department for oversight of civil servants. It is, however, staffed mostly with retired functionaries, who form a lobby for (especially retired) policemen.

Non-statutory oversight of the discussed services is provided by human rights NGOs and the media. The NGOs – such as the Helsinki Foundation for Human Rights – receive several hundred complaints on the Police a year. They conduct inquiries on their own, in next to all cases into alleged breaches of the law by the police and the frontier force. They demand explanations from various structures, inform the prosecutor's office about offences, assist the victims at court, draw up applications to the European Court of Human Rights, inform the media, and publish reports from monitoring of violations.¹⁴

Separate and important oversight factors similar to the watchdog NGOs are the media, including in particular serious national dailies and weeklies, fully independent of the government and local connections with the authorities. Their private inquiries into cases of abuse of power and corruption provide important oversight of all the discussed services.

2.2 To elected representatives

Under Article 95 section 2 of the 1997 Constitution of the Republic of Poland, the Sejm reviews the activity of the Council of Ministers within a scope defined by provisions of the Constitution and of laws. Further, Article 87 section 1 of the Sejm Regulations of 30 July 1992 provides that "... in cases related to enforcement and application of laws and resolutions of the Sejm, review shall be performed by competent committees".¹⁵ The deputies perform this review by means of interpellations and parliamentary questions, inspections commissioned by individual parliamentary Committees and carried out by the Supreme Board of Audit, or directly within the Committees. The Committee for Security Services was established in 1995. As noted in the concluding paragraphs of the previous sub-section of this essay, this 9-member commission performs legislative oversight in largely *pro forma* fashion, while the Sejm's Committee on Administration and Internal Affairs appears uninterested in holding security-sector organisations to account as textbook democratic theory requires.

What is more, the forces can evade their obligations, though not directly. Indirectly it can be done by arranging another case or affair with

¹⁴ See, for example, S. Cybulski: *Policjanci i ich klienci. Prawo w działaniu. Raport z monitoringu* [Policemen and Their Clients. The Law in Operation. Monitoring Report]. Warsaw: Helsinki Foundation for Human Rights 2001.

¹⁵ Resolution of the Sejm of Republic of Poland of 30 July 1992: Regulations of the Sejm of Republic of Poland. (Uniform text: Monitor Polski of 1998 No. 44, item 618 with subsequent changes).

the present forces as the victim of too low a budget or too narrow competencies to fight organized crime.

2.3 To other institutions

Human rights commissioner

The Commissioner for Civil Rights Protection (Ombudsman, Rzecznik Praw Obywatelskich) examines complaints against the conduct of policemen and staff of ABW, AW, SG and BOR, as well as complaints submitted by the civil servants (e.g. by a policeman as an employee). The Ombudsman's Office has a department for cases of functionaries.

If they commit an offence, policemen fall under the jurisdiction of criminal courts. From the policemen's service relationship as envisaged in provisions of labour law it follows that disputes under that law should be brought not before labour courts but before the Supreme Administrative Court.

A policeman is liable to disciplinary responsibility for breaches of service discipline and in other cases specified in the Law on the Police. Agencies competent in such cases are provincial commanders as well as the Chief Commander of the Police. A policeman who has been punished may appeal against the decision on punishment to the Supreme Administrative Court.

The Law on the Police also established courts of honour. They are competent in cases of inobservance by policemen of the rules of professional ethics, particularly of the honour, dignity and good name of the service. They are not competent, though, if disciplinary proceedings have been instituted against the policeman concerned, or if his act constitutes an offence or transgression.

The Courts

The Constitution reads as follows: Article 77.1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights. Article 41. 5. Anyone who has been unlawfully deprived of liberty shall have a right to compensation. The problem with judicial power in relation to security services is that courts have no access to classified material because agencies deny to pass it to them.

Internal boards

All services have internal bureaus responsible for violation of laws and internal regulation of their agents.

Municipal authorities

In the latter half of the 1990s, the provision of Article 6d was introduced into the Law on the Police. It provides that the commanding officer of a police station is appointed by the district (municipal) commander of the Police in consultation with the competent head of commune (mayor or president of a big city) or heads of districts (this does not apply to commanding officers of specialized police stations). At the same time, commanding officers of the Police submit annual reports on their activity, as well as information about the state of public order and safety, to competent heads of provinces, districts or communes (mayors or presidents of big cities), and also to district and commune councils. In the situation of threat to public safety or a dangerous breach of public order, the reports and information are submitted to the above agencies without delay whenever requested. Finally, the chairman of a commune or district board may demand that the competent commanding officer of the Police restore a state consistent with the legal order or undertake actions to prevent breaches of the law and to remove threats to public safety and order. (The municipal authorities have no powers with respect to the other organisations.)

It has to be added that a victim of illicit use of force by the police inside a police car on the premises of a police station finds it extremely hard to prove his/her facts. The practice is that persons wishing to do so complain that if they decide to report the offence, they will be charged with active assault against a policeman, which is what actually happens if the person concerned refuses to accept the warning. Practically all cases in which the prosecutor decides to indict a policeman are those where the victim of abuse of power has obtained assistance from an NGO. The chances of obtaining a conviction are only bigger in cases of extreme abuses of power, where the victim actually dies; yet even in such cases, as a result of pressure exercised by the police lobby and the forgery or destruction of the evidence, the penalties imposed by the courts are relatively lenient (in most cases, 5 years imprisonment at most, for manslaughter). On the other hand, in cases where a policeman is killed, the police – supported by their Minister and by a considerable proportion of the public – demand the penalty of at least 25 years imprisonment

(often increased so as to prevent the convicted person from ever getting released on licence).

Practically all local authorities are lobbies, eager to obtain funds to provide additional support to local police forces. There are hardly any cases where councillors would exercise genuine oversight over the legality of police actions.

2.4 To the media and society-at-large

The right to information is guaranteed in Article 51 of the Constitution of the Republic of Poland. It provides, among other things, that every person has the right of access to official documents and data collections. The right may only be limited by a law. The law in question is the Law of 6 September 2001 on access to information.¹⁶ This imposes on the Minister of Internal Affairs and Administration the duty to create an Internet Public Information Newsletter (the venture is now at the stage of organization). Each citizen may obtain information about the discussed services – see the opening paragraph of this Chapter – from their websites (except BOR which does not have a site, and information about its structure and functioning is scarce).

The possibility of rectifying incorrect data is provided under the Law of 29 August 1997 on protection of personal data.¹⁷ The problem is that “police” data collections are not subject to review by the General Inspector for Personal Data Protection. In practice, this results in a situation where false data possessed by the police cannot possibly be corrected. Informers are guaranteed anonymity; the methods of operational activity of security services are state secrets.

There is an office empowered to receive complaints: the Commissioner for Civil Rights Protection. The Ombudsman enjoys very high social trust in rankings of non-political institutions compiled both by the government-controlled Center for Opinion Surveys and by private institutions such as the Sopot Social Surveys Laboratory.

Beside serious daily papers, there are several dailies and weeklies that thrive on crime and scandals covered in the style typical of tabloids (*Superexpress*, *NIE*). This may well result from a specific cooperation between journalists and the police, or even from information obtained from the functionaries of individual services (which suspicion pertains to *NIE* weekly in particular).

¹⁶ Journal of Laws No. 112, item 1198 with subsequent changes.

¹⁷ Journal of Laws No. 133, item 883 with subsequent changes.

There are poll data on public attitudes to the forces two or three times a year, besides regular rankings of the most trusted among the major state institutions (the Police, UOP/ABW and AW included). The government-controlled Center for Opinion Surveys publishes the findings of surveys concerning the use of firearms and means of constraint by the police in particular, and less frequently also by the former UOP. Interviewed within the surveys are national representative samples of the population. The findings are available on the Center's website. We have not heard of any survey material concerning SG and BOR.

2.5 To codes and conventions

Of the acts of hard international law listed earlier (Supplement to Chapter II), Poland joined the European Convention on Human Rights in 1991 (and the Convention gained binding force in 1993). The country is a member of the UN, OSCE and the Council of Europe, and is therefore bound by the relevant acts of soft international law (the UN Code of Conduct for law-enforcing officers 1979; Council of Europe Declaration on Police 1979; Code of Conduct on Politico-Military Aspects of Security 1994).

The Polish presence in international police organizations goes back to 1923, when INTERPOL was established. However, for political reasons, the Polish eventually government broke off all relations with this organization. The first steps aimed at the resumption of the membership of the Polish Police Service in INTERPOL were made in 1989, with Poland rejoining the organization in 1990 at the General Meeting in Ottawa. The Polish National INTERPOL Office – transformed in 1998 in connection with structural changes in the National Headquarters of the Polish Police into the Office for International Police Cooperation – meets all the INTERPOL standards with respect to fast exchange of information. The Office is equipped with electronic mail facilities enabling it to send and receive information from/to all 117 member states of INTERPOL and from its General Secretariat, and also to send images of fingerprint charts and photographs of individuals. The Office has access to the computerized database at the INTERPOL's Secretariat (ASF), listing all vehicles stolen in almost all European member states. Since 1997, a representative of the Polish INTERPOL has represented Europe in the governing body of INTERPOL's Executive Committee, the top decision-making body of

the organization. (On 3 July 2002 the President of Poland signed a Law on ratification of the country's accession to EUROPOL.)

According to our knowledge, Poland observes its international obligations that follow from the above acts. What leaves much to be desired is the practice of relatively frequent violation by the police of Article 3 of the European Convention on Human Rights, which deals with humiliating treatment or punishment. As a general practice, prosecutors tend to discontinue such cases.

What may serve as an example of international cooperation between the forces are inspections carried out by the European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Poland joined the relevant Convention of the Council of Europe in 1995. Since then, the Committee carried out two inspections – in 1996 and 2000.

Another example of the work of non-governmental organizations is preparation of the document *Śłużby specjalne w demokracji konstytucyjnej. Zasady kontroli i odpowiedzialności* [Security Services in a Constitutional Democracy. The Principles of Oversight and Accountability] (1997), written as a result of the programme Security Services in a Constitutional Democracy, implemented by the Helsinki Foundation for Human Rights, Warsaw, and the Center for National Security Studies, New York. The *Principles...* gained acceptance of the International Helsinki Federation for Human Rights, the International Commission of Jurists, Amnesty International and Article 19. The document also appeared as a special publication of the Polish Government.¹⁸

3. Transparency

3.1.1 Domestic Transparency: dimensions

The constitutional provisions that require the forces to make information available follow from individual laws regulating specific services and agencies mentioned above, and also from the Constitution of the Republic of Poland (Article 146 provides that the Council of Ministers ensures external and internal security).

¹⁸ *Śłużby specjalne RP. Prawne aspekty cywilnego nadzoru* [Security services of Republic of Poland. Legal aspects of civil oversight]. G. Mosur et al. [eds.]. Warsaw: Office of the Prime Minister, Office of the Security Services Board 1997.

Available to the public also is information about the organizational structure of the Police and SG. The remaining services do not publish data on their structure. Such data are available to the privileged: thus, naturally, to members of the Security Services Board and of Sejm committees.

Information about the personnel strength is available to the public only in the case of the Police. The number of posts to be taken by policemen is defined annually in the Budget Law. Detailed data are only available to the privileged. Information about the budget of individual services and agencies can be obtained from general categories of the Budget Law (without a detailed specification that is available e.g. to members of competent Sejm committees, such as the Budget and the Finances Committees). Not even the general categories of information about the nature of operations are available to the public: the only recipients are the privileged.

3.1.2 Domestic transparency: publications

There is no regular policy statement for the organizations covered by this profile; and there are also no reports on activity published on a regular basis. The most extensive statistics are made available by the Police, followed by SG. The remaining services do not publish their statistics. There are also no other relevant publications.

3.2 International Transparency

Forces comply with international codes that impose transparency obligations, but services other than the Police and the Office of the Security of Government do not have codes of professional ethics (collections of rules) to be followed by functionaries. International co-operation affects domestic transparency only within INTERPOL.

CHAPTER VII

SWEDEN

Dennis TÖLLBORG¹

1. Coverage

To understand Sweden, at least in modern time and as far as concern questions raised in this inquiry, you probably must go as far back as to the end of the Second World War. Making a long story short, already in the beginning of the 1940s it was revealed that a secret police intelligence agency had been installed – secret even to the parliament – with almost no limitations regarding the collection of information about Swedish and foreign citizens. Among a population of less than 6 million people, 200.000 letters a week were checked and totally 317.000 stopped during the period of war, while more than 11 million telephone calls were intercepted. Huge lists of primarily Swedish citizens – to be in prisoned in case of war – were kept by the security police and hundreds of people put in special fenced camps, stigmatised as presumptive traitors. Almost all activity – including nation-wide police-raids – was directed against communists, liberals and other antifascist-groups, and when the extent of the activity became known, there was a huge outcry, several official investigations and the post-war social democratic government took the decision to abolish the secret police.²

On the political level the social democratic hegemony started to develop after the war – the social democratic party was in government from 1945 until 1974. The main opponent was the communists, and since Sweden is “the beloved country of organisations” (everyone does everything through organisations, something which influences both the daily life, the parliamentary debate and even the construction of special courts), the struggle against the communists mainly was taken in the daily places of work and in the labour unions.

The Prague coup really frightened the leadership of the social democratic party, and in September 1948 what was left of the Security

¹ Gothenburg School of Law and Economics, Sweden.

² Töllborg, Personalkontroll (Symposium 1986).

Police (*Säkerhetspolisen, SÄPO*) doubled its funding. The development now was fast and, with the Korea-war and finally the invasion of Hungary, all was back to normal order again, in the view of the Security Police. At the same time a group of prominent leaders from mainly the social democratic party, but also in understanding with selected leaders from the conservative and liberal party as well as some prominent leaders from the trade-unions and trade and industry, decided – secretly to everyone else, including the parliament and some members of the government – to start up a military intelligence organisation, later labelled IB. The main focus was like during the war (communists and other presumed leftists) and the *modi operandi* also similar (telephone-tapping and extensive vetting procedures). The vetting procedure was done both by the Security Police and the military intelligence as was the surveillance. The procedure was also absolutely secret – not even the word vetting (*personalkontroll*) was allowed in public documents.

The second public outcry came in the 1960s, starting with a book from a publisher and a researcher in economics, both well-known liberals, revealing the use of the vetting-system (to some extent already revealed through a spy-case and the following official investigations, however not at this time apprehended by mass media, and hence not by the public). The public debate was extremely intensive and included the revelation of the files of the Secret Police containing famous TV personalities, actors, musicians, politicians, writers, as well as cases where “ordinary” citizens had been denied work – as for example hairdressers in military towns – because of having people in their family with connections to the communist party. The debate ended, as so usual in Sweden, with an official investigation and finally new legislation regulating the vetting procedure and including elementary legal safeguards like the right to take part and comment on information handed out and so on. Parliamentary insight was secured through representatives in the National Police Board (*Rikspolisstyrelsen, RPS*). There was also a specific prohibition for the Security Police to file any citizen merely because of his or her political view. However, the existence of the secret military intelligence IB was not revealed, and the legal prohibition to focus on political dissidence applied only to the Security Police: naturally because if the legislation was made to be followed also by the military intelligence, the latter’s existence would be revealed. So the hypocrisy became a structural necessity. But the broad debate ended, and for the next 20 years it was mostly the usual extreme left accusations of a political police that were heard.

From the different coloured governments the accusations were always firmly denied, just as they were by the Security Police and the National Police Board. However, in May 2002 the Government declared – after leaking to Swedish TV4 three days before in order to have good cover by the media (TV4 had to promise not to publish the news until three days later) – that the Secrecy Act was to be amended, opening Security Police files older than from the year 1949, and at the same time from 2003 requiring the Security Police to give a straight answer to citizens if they been filed between 1969 and 1999 (but still not giving them the right to read their files). Once again, this shows how sensitive the period 1949 to 1969 is in the history of the Swedish Security Police and the Military Intelligence Agency.

The third, and in this essay final, outcry started in November 1997; and the final words are still not said. In 1987, the European Court of Human Rights had decided the case of *Leander v. Sweden*, concerning the Swedish security vetting system, more particularly the question of whether the Security Police monitored lawful political activity. Sweden won the case (by a one-vote margin). However, allegations of systematic Security Police monitoring of (mainly leftist) political activity persisted throughout the 1980s and 1990s. In 1997 the contents of Leander's file were finally revealed to the author of the present article, in his capacity as Leander's lawyer. They showed that, contrary to the assurances given by the Swedish government during the hearing in Strasbourg, the only information stored on Leander was information concerning lawful political activities. Leander was granted *ex gratia* compensation and a public apology from the state in 1997.³

The public outcry the Leander revelations caused has resulted in a number of measures designed to allay public concern. There have been three investigations from the body created in 1996 to monitor police files, the Register Board (*Registernämnden*, see below). Its first report, in late 1998, concluded that there had been extensive registration of lawful political activities. Another report was made by the established oversight body for military intelligence after the revelation of the secret military intelligence IB in 1973. The Government also initiated research on post-war intelligence and security policy, supported with a budget of 20 million Swedish crowns (appr. 2,1 million €). This research is widely

³ The background to the case can be found in D. Töllborg (Ed), *National Security and the Rule of Law*, (Centrum för Europaforskning, Gothenburg, 1998) and I. Cameron, *National Security and the European Convention on Human Rights*, (Iustus/Kluwer, 2000).

regarded as having been a fiasco, the government refusing the researchers necessary access to secret files, contrary to previous assurances.⁴ A further independent inquiry (*Säkerhetstjänstkommissionen*) into Swedish intelligence against internal threats from 1945 up to 2001 has been appointed to meet criticism that Sweden needed a detailed, general and independent investigation into internal security practice on the lines of the Norwegian Lund commission.⁵ However, it is doubtful whether the commission can add anything of significance to previous investigations made by the Register Board: it has no members with any detailed knowledge of security matters and has taken relatively little evidence from independent experts in the field. The commission was originally requested to report in September 2001, one year before the next general election. However, this was postponed to December 2002. A public campaign complaining about the composition of the commission, and the timing of its report, obtained signatures from individuals and organisations representing more than 350,000 people (May 2002). Thus, ever since the Leander-file became public, the Security Police have suffered certain legitimacy problems.

Again, in December 1998, the Register Board published its report on the operation of the security filing system during the period 1969-1996.⁶ The report made public all the secret government instructions to the Security Police on surveillance and registration of subversives. These instructions named political groups and parties on which the Security Police was to collect information, all in contradiction to prohibition not only in statutes but also since 1976 in the Constitution (*Regeringsformen, RF*). It was the Security Police itself that proposed the political groups and parties and the government invariably approved the proposal. The great majority of the organisations listed were on the left wing.

Collecting information on political groups and parties meant, in practice, opening individual files on the members. The public government instructions stated that mere membership of a "revolutionary" party was not sufficient to lead to the opening of a personal file. However, the secret instructions identified a number of different grounds for registering members in certain extremist political groups and parties. As well as such relatively uncontroversial factors as a

⁴ See Christer Jönsson, Truth and consequence (on www.toellborg.nu).

⁵ Lund Commission Document nr. 15. Rapport til Stortinget fra kommisjonen som nedsatt av Stortinget for å granske påstander om ulovlig overvåking av norske borgere, avgitt till Stortingets presidentskap 28 mars 1996 ("Lund Report").

⁶ Personalkontroll den 1 oktober 1969 - den 30 juni 1996. Rapport till regeringen av Registernämnden beslutad den 16 december 1998, hereinafter, "Register Board Report".

conviction for a crime of violence connected to political activity or bearing weapons during a demonstration, these included "building or participating in secret cells in the work place", taking part in a political (re)education course and, most general, "having, or having had, a leading position in the party". All three of these grounds for registration were criticised by the Register Board as being vague. As regards the second ground, all of the left wing political parties listed as potentially subversive required, as a condition of membership, that an applicant participated in a "political education" study circle. This meant that registration of members of these parties was automatic. As regards the third ground, the Security Police criteria for determining "leading position" included acting as a member in a working group, receiving an invitation to attend a national party conference, counting votes in an internal election, acting as a steward in a demonstration organised by the party and being responsible for receiving applications to attend a summer camp or to join a study circle.⁷ The vagueness of the "leading position" requirement meant that the Security Police itself decided whether a person had a leading position.

The report of the Register Board confirmed the allegations made by certain commentators, and by Leander himself before the European Commission and Court of Human Rights, that the prohibition was in practice interpreted so narrowly as to be almost meaningless. The figures revealed by the Register Board show that in 1980, 3,998 Swedish citizens were filed in the register *solely* because of their membership of or sympathy with a left or anarchist organisation and 158 citizens for membership of, or sympathy with, a right wing extremist organisation (i.e. if the person was suspected of a security related crime he or she was not included in these figures). The figures for 1990 were left-wing/anarchists 3,467, right wingers 118, and for 1998, left-wing/anarchists 2,062 and right-wingers 98.⁸

The contradiction between the law and the secret instructions to the Security Police was well known to the different governments (at least the different ministers of justice) since 1969, whether social democratic or centre/right. It was also well known to the different supervising authorities and committees. The most stunning example is the investigation from 1989/90 by the senior government law officer, the Chancellor of Justice (*Justitiekanslern, JK*). In his public report, submitted in January 1990, he stated that he had checked both the secret

⁷ Register Board report, p. 75.

⁸ Register Board report, appendix 16

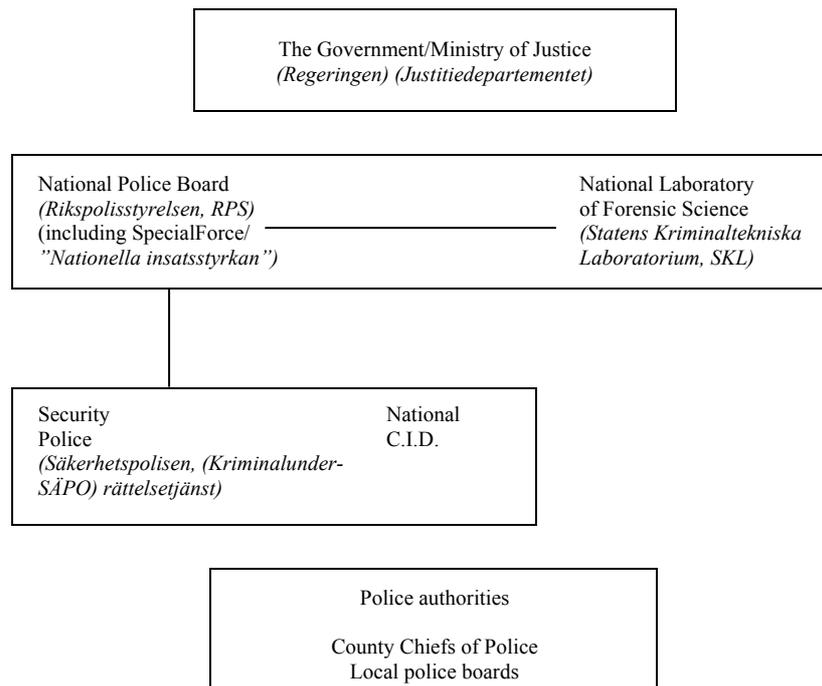
instructions and approximately 1,000 different files (including the Leander file), and that no prohibited political surveillance had occurred. At the same time, he submitted a secret report to the government that stated his opinion that this kind of registration was not only common but also in accordance with the secret government instructions.

To sum up, Sweden has on the one hand a well-earned reputation for transparency regarding official documents, and also as being a stable democratic *rechtsstaat* with low corruption and a good respect for human rights. On the other hand, in the field of intelligence and policing, e.g. Secret Police, Sweden is probably one of the most closed countries among the western democracies, strengthened with a strong hegemony and democratic practice which can be characterized as a feudal democracy. One of the main reasons for this rather peculiar situation might, as a hypothesis, be found in the Swedish position as a formally neutral country, however in practice in case of war in all hegemony alternatives a presumptive ally of NATO.

The Swedish police was centralised in 1965, and organised as a National Police Board (NPB) accountable to the Department of Justice (*Justitiedepartementet*). The National Police Board is placed under the leadership of a national police commissioner appointed by the government, with the head of the Security Police as vice-chairman, and a board of directors drawn from the political parties represented in the Parliament. Until recently neither the Left Party (*Vänsterpartiet*) (formerly the Communists) nor the Green Party (*Miljöpartiet De Gröna*) nor the Christian Democratic Party (*Kristdemokratiska Samhällspartiet*) was represented in the NPB: now it's only the Green Party that lacks representation. It should, however, be stressed that neither the NPB nor the government is allowed to make decisions in operational police work.

Sweden is unusual in having a constitutional provision (Instrument of Government, Chapter 11, section 7) which prohibits the government from interfering in administrative agencies' decision-making in individual cases. It is still possible, however, to steer decision-making more generally in a number of ways, for example by means of rules (government ordinances, formerly called *kungörelser*, nowadays *förordningar*). It should also be pointed out that Sweden does not have a system of ministerial responsibility, so formally speaking the police are not accountable to the Minister of Justice as such, but to the government as a whole. However, as depicted here in organisational terms, the police come under the Ministry of Justice.

The overall organizational structure of Swedish police



SÄPO and CID come under the National Police Board, which also is the supervisory authority of the National Laboratory of Forensic Science. The National Police Commissioner is head of the NPB and chairperson of the Board of the NPB, replaced by the Director-General for SÄPO in police matters handled by SÄPO. The Local police authorities are formally independent of the NPB, steered by County Chiefs of Police and Local Police Boards. All chiefpositions within the Swedish legal system – including not only the head of the NPB and the General Director of SÄPO, but also all other chief-positions, whether it might be at the prosecution authority, local or national, courts, whether it might be the Supreme Court (*Högsta Domstolen, HD*) or local courts, criminal courts or administrative, etc etc – are assigned by the Government, not applied for and awarded. The same goes for the political members of the Board of the NPB as well as the local police boards, though in these cases taking into account the opinion of the political parties allowed to be represented on these boards.

The main purpose of the police force in Sweden is set out in the Police Act (Polislag 1984:387). Section 1 states that "As a component in the activity of society in its efforts to support justice and maintain public safety, the purpose of the work of the police is to maintain public order, protect the public and provide it with other assistance." Section 2 specifies these duties: "Among the tasks of the police are to

- prevent crime and other disturbances of public order;
- to monitor public order, stop disturbances of this order and react whenever such disturbances happen;
- carry out searches and investigations as far as concerns crime subject to public prosecution;
- give the public protection, information and other kinds of help, whenever suitable and proper and
- fulfil the other duties which might be placed on the police through special regulations."

The primary function of the Security Police is mentioned very briefly in section 7 of the Act, namely to prevent and discover crimes against national security (mainly those crimes set out in the Criminal Code (*Brottsbalken, BrB*), chapters 18 and 19). The Act does not specify this primary function further, but other acts and government ordinances have done so. The Security Police also have the main responsibility for dealing with terrorism.⁹ The opinion of the Security Police is sought in all applications for citizenship.

The different rules that apply to the police in general also apply to the Security Police. The Security Police is, however, in organisational terms, a separate agency, albeit under the overall control of the NPB, with special responsibility for certain types of crime. And in practice the Security Police operate with a high degree of autonomy from the ordinary police and from the National Police Commissioner. The chief of the Security Police has the status of "General Director" and is, like other heads of administrative agencies, appointed directly by the government. A General Director cannot usually be sacked by the government during the period of his or her employment contract (usually four or six years) but a special provision allows the government to transfer to other duties persons engaged in work of significance to national security. Sten Hecksher, a former under-secretary of state at the Department of Justice as well as a former minister in a social-democratic government, is the

⁹ The national security offences in Chapters 18 and 19 of the Criminal Code are not seen as encompassing terrorist offences unless these are aimed directly at the government or state of Sweden, so the two categories of crime are treated separately.

present National Police Commissioner (2002). Anders Eriksson, a former first secretary at the Justice Department, was until recently head of the Security Police. Eriksson was appointed by the conservative Minister of Justice in the former government and Hecksher some years later by the social-democratic government. Eriksson had little or no experience of security or police work before being appointed head of the Security Police. In 2000 Eriksson was replaced by Jan Danielsson, a prosecutor engaged *inter alia* in the investigation of the assassination in 1986 of the Swedish prime minister, Olof Palme. As a result of this investigation, and of the investigation of other security crimes, Danielsson obviously has some experience of the work of the Security Police.

The Security Police are organised into a central staff unit and four other main units: an administrative unit, a unit for counter espionage, a protection unit and a unit for technical assistance. The central staff unit handles *inter alia* questions concerning co-operation with foreign security services.¹⁰ It can be noted here that Sweden ratified both the Europol and Schengen agreements in April 1998, and that the latter entered into force for Sweden in April 2001. In the administrative unit there is a personnel section, a financial section and a computer section. The unit for counter-espionage includes a staff for analysis functions and sections for counter-espionage and counter-subversion. The protection unit has a staff section, a security protection section and sections for VIP protection and counter-terrorism.

There are approximately 800 employees in the Security Police, and it is claimed that the number has gradually been reduced since the beginning of the 1990s.¹¹ At 1 January 2000, two thirds were men and one-third women. The average age was 44,9 years. The figures for previous years cannot be presented "for reasons of national security".¹² The total number of police in January 2000 was 16,199 (of which appr. 1,600 working at NPB). There were also 5,808 civilian employees in the police.¹³ The official budget of the Security Police is publicly known as it is specified in the annual bill on the budget submitted to parliament. It should, however, be mentioned here that the true cost of internal security

¹⁰ SOU 1990:51, p 45 and 50f and Annual Report of the Security Police 1995/96, p. 8.

¹¹ The Security Police have refused to give the author of the present article the figures on a number of occasions, claiming national security. Töllborg finally told them that he could find out the figures in other ways, did so and showed it to the Register Board. A month later, the Security Police publicly announced the figures in their annual report for 1998.

¹² Säkerhetspolisen SA 187-2140-98.

¹³ Polisens årsredovisning 2000, page 41.

functions could be somewhat higher, as the Security Police also have the right to call upon the assistance of the CID whose costs fall upon the main police budget. The official budget for the period 1990-2000 shows that the Security Police has increased its budget by over 80 percent (from 300 million crowns to over 550 million), a substantial increase in real terms at a time of cutbacks in public expenditure. The Security Police share of the total police force budget has also increased from 3,77 per cent to 4,61 per cent during the same period.

The growing integration of the work of the Security Police with the work of the ordinary police has led to an official inquiry to investigate whether the Security Police and the National Criminal Investigation Division (CID) should be amalgamated. This inquiry reported in spring 2000, and was in favour of merging the two into one organisation.¹⁴ The National Police Board has agreed to the suggestion, although the CID and other bodies such as the Chief Public Prosecutor (*Riksåklagarämbetet, RÅ*) are highly critical. There is still (mid-2002) no governmental bill in the matter; but the greatly increased emphasis on anti-terrorism, as a result of the events of 11 September 2001, will probably act as a further spur in this direction.

Since the beginning of the 1990s, the Security Police have submitted an annual report to Parliament. These reports are, however very brief and, with one exception, lacking in substance. The exception is the section on the vetting system, which is presented in some detail, since the Register Board, who have the same figures, have decided to do this. Until this the Security Police took the standpoint that nothing – not even the total number of duties subject to vetting, annual vettings or even admitting that vetting had take place – could be revealed, due to reasons of protecting national security.

The decision whether or not to reveal information contained in the Security Police files to prospective employers is now taken not by the National Police Board but by a body specially established for this purpose, the Register Board. This body is also to exercise continuous monitoring regarding the Security Police's registration of information in files, especially as regards the constitutional prohibition (for Swedish citizens) of registration purely on the basis of political opinions. According to its mandate as set out in the relevant government ordinance (1994:633) the Board consists of a secretariat and a maximum of eight members. One cannot apply for a position on the Board. The government instead appoints members. During the two first periods (July 1996-June

¹⁴ SOU 2000:25.

1999 and July 1999-June 2002) there were (and will be) five members: three lawyers¹⁵ and two serving MPs, one from each of the two largest parties, the social democrats and the conservative party. The government does not consult with Parliament before it appoints the members of the Board, although it probably consults with the leaders of the major parties.

The most important change in the institutional structure in the past decade – besides the more superficial decision to give the head of the Security Police status as Director-General – has been the creation of the Register Board in 1996. There is a discussion about making one single unit out of SÄPO and the National C.I.D. This proposal is welcomed by SÄPO but for different reasons (including private and historical prejudices) the C.I.D. has strongly rejected the idea. However, it may be accepted. The background is of course the fact that the Security Police has become more open and is trying to fill the vacuum after the fall of the Berlin Wall with new enemies, while the National C.I.D. at the same time has been working more and more pro-actively, leading to using the same methods as traditionally only been used by Security Police and Intelligence.

2. Accountability

2.1 To the executive

The main mechanism of supervision here is the occasional meetings the Minister of Justice has with the head of the Security Police and the head of the National Police Board. There are also contacts between civil servants in the Ministry of Justice and the Security Police. But, as already mentioned, the Minister of Justice is not entitled to give directions in specific cases to the police. Having said this, it is possible to steer the activities of the Security Police through the power of appointment of the head of the Security Police and the head of the NPB; by budgetary means; by government ordinances of general character; and by encouraging the NPB to issue instructions or supervise particular matters in more detail. As regards the last of these, the Leander case, and the report of the Register Board in December 1998, have shown that the lay members of the NPB have inadequate time and expertise to investigate the activities of the Security Police.

¹⁵ A former senior judge (male), a serving senior judge (female) and an advocate (male).

The government is also able to steer activities by initiating, or threatening, investigations by the Chancellor of Justice or an independent inquiry. But the Chancellor of Justice is not an expert in security matters. Living as they do in a sort of grey zone, it is easy for individual members of the Security Police to evade governmental control and the oversight of the supervising authorities when the lawfulness or the justifiability of their activities can be questioned. No minutes of legally dubious decisions are waved before the face of the Chancellor of Justice on the few occasions when this official has undertaken inspections of the Security Police. The Register Board report of December 1998 confirmed the inadequacy of scrutiny by the Chancellor of Justice at least as regards monitoring the security files.

The government can also decide to appoint special commissions of inquiry, consisting of MPs and/or lawyers. The value of such ad hoc commissions can also be questioned. Bearing in mind the arcane, closed world of the Security Police, it is not surprising if amateur investigators, probably even the standing Säkerhetstjänstkommissionen, fail to discover any dubious or illegal decisions or procedures by listening to reports from officers at the Security Police or by going through their documents. And the Security Police have hardly been encouraged to volunteer information of measures of doubtful legality either. The special investigator appointed by the Säpo committee, Carl Lidbom, noted that at least with some of the lawyers whose task it is to investigate the legality of the activities of the Security Police, there has been an attitude that "it is probably better not to know so much. When it comes to an activity that ultimately is concerned with the security of the nation, it might not always be possible to maintain normal standards".¹⁶

On 1 April 1999 the statutory requirement of absolute secrecy for Security Police files was abolished. Instead, the normal test in the Secrecy Act now applies: the responsible administrative authority (in this case, the Security Police) is to determine whether revealing the information might cause damage to certain protected interests (in this case, national security). The onus of proof is, however, reversed. Information can only be revealed if it can be proved that this can occur without negatively affecting the work of the Security Police in preventing or discovering crimes against national security or terrorist offences (Secrecy Act Chapter 5 section 1), or damaging relations with foreign powers (i.e. foreign intelligence agencies or Europol, Secrecy Act Chapter 2, section 2).

¹⁶ SOU 1988:18, p. 30.

Up until 31 December 2000 there had been 4,219 applications to see files. Of these, 995 of the applicants were, according to the Minister of Justice, filed in the computerised files of the Security Police (whenever such an application is made, the check is only made against these files). No applicant was allowed to see their whole file, and 144 denied all access.¹⁷ Critics have also pointed out that these figures give no idea of whether a person has in the past been registered. Bearing in mind the extensive weeding operations that took place at the end of the 1960s and 1980s, it is quite possible that files had existed. Critics have also pointed out that, in the cases where partial access was granted, it mainly consisted of giving the individual in question copies of his or her own correspondence with the Security Police, together with newspaper clippings detailing, for example, his or her participation in a public meeting. To call this "partial access" to a file is true, but misleading.

In all cases of non-access which have so far been appealed, the administrative courts, and the administrative courts of appeal have rejected the applicant's appeal with a standard formulation. This is hardly surprising. The Stockholm Court of Administrative Appeal (*Kammarrätten i Stockholm*) – which has dealt with the majority of requests for such information – signalled a very restrictive attitude towards revealing any information on the Security Police in its comments on the legislative proposal to amend the Secrecy Act.¹⁸ The Supreme Administrative Court (*Regeringsrätten*) did finally decide not to allow review dispensation, and this independent of whether the application had been totally or only partly denied.¹⁹ The legality of the decision can, however, be discussed. The same court also decided that the number employed at the Security Police in 1965 could not be made public, because of reasons of national security, and this even though there was no danger for the national security to release information about the number employed in 2000!²⁰ All this must be understood not only as something that goes to show that the ordinary and administrative courts rarely have the expertise to evaluate critically government claims that national security would be endangered by the release of certain information, it most importantly shows how blinded you can be by the light of power, if you have done all – as in the Swedish context of

¹⁷ Ju2001/226/PÅ. For discussion of the issue in the travaux préparatoires see SOU 1997:65, pp. 101-102, 268-270 and 344-345.

¹⁸ See Prop 97/98:97, p. 68.

¹⁹ RÅ 2000, ref. 15.

²⁰ Regeringsrättens underrättelse, mål nr 1808-2000.

employment of posts as higher judge - of your career in the corridors of the ministry.²¹ In November 2000, five applicants complained to the European Court of Human Rights, where the case now is pending.²²

Another form of quasi-judicial scrutiny is the Parliamentary Ombudsman (*Justitieombudsmannen, JO*).²³ The jurisdiction of the Ombudsman extends to the police, including the Security Police. The Ombudsman has in fact criticised the Security Police on occasion, but will usually refrain from investigating what can loosely be called operational decisions. The same criticism of lack of expertise made against the Chancellor of Justice can also be levelled against the Parliamentary Ombudsman.

2.2 To elected representatives

Obviously, the type of government in a state (presidential or parliamentary), the type of organisation (part of the police, or with police powers, or a separate civilian organisation) and the constitutional structure of the state (unitary or federal) influence the extent of parliamentary controls. A presidential system will, generally speaking, need more in the way of powerful committees than a system where the government is drawn from the party or parties with a political majority in the parliament, and so is (usually) accountable to parliament. In contrast to for example Norway, there is no specialist organ in Sweden that takes overarching responsibility for monitoring the work of the Security Police. However, there are two standing parliamentary committees that have the competence to investigate the police, including the Security Police. These are the Committee on the Administration of Justice (*Justitieutskottet, JuU*) and the Committee on the Constitution (*Konstitutionsutskottet, KU*). Both these bodies have on occasion investigated the Security Police. The Committee on the Constitution in particular is a useful mechanism for discovering and highlighting alleged governmental abuse of power. But the problems in this area have been not so much governmental abuse of power, but lack of effective governmental (and parliamentary) control of the Security Police.

The same criticisms can be made of these committees as have been made regarding the Chancellor of Justice and the Parliamentary Ombudsman. They do not consist of experts in security matters, their

²¹ See below, section 8, regarding the bureaucratic nature of the Swedish judiciary. For criticism of the system of appointment and training of senior judges see the Swedish Helsinki Committee.

²² Application No 62332/00, Ingrid Segerstedt-Wiberg et al v. Sweden.

²³ There are five Ombudsmen, collectively known as the Ombudsman.

staff resources are limited and they have limited time to devote to investigations of security matters. Neither can these committees take evidence under oath. The inadequacy of these committees in this respect is shown by the fact that they investigated the security vetting system on a number of occasions without ever discovering the extensive practice of registration of lawful political activity.

Thus accountability vis-à-vis the legislature is only indirect. There is a special offence – besides the regular criminal offences, formally applicable to everyone (except the king) within Swedish jurisdiction – called *myndighetsmissbruk/tjänstefel*, which is applicable when you misuse your position as a civil servant. However, this is rarely used and, as far as the author can recall, has never been used against any high police chief within or without the Security Police. However, in the aftermath of the Palme-assassination a couple of high level chief persons at the Security Police and the Local Police of Stockholm were convicted for attempts to smuggle illegal bugging-equipment into Sweden.

A general answer has been given with the long introduction to this Chapter, assessing the extent to which formal arrangements work in practice. At the same time, nowadays, at least as far as concerns the vetting-procedure, the arrangements seem to work well, if not perfectly. Still, the main impression must be that Sweden has a very pragmatic view on legality, and on the field of Security Policing (and presumably also intelligence) it is obvious that formal arrangements, as well as questions of legality, have been and to a big extent still are playing a very marginal role as instrument for steering the activities of these organisations. In a feudal democracy deniability and the principle of need-to-know seems to become two sides of the same coin: "do whatever you want, but do not get caught with your trousers down".

2.3 To other institutions

Finally, there is judicial control over certain Security Police methods, in particular, telephone tapping and search and seizure. One should point out in this respect that the requirement to involve a prosecutor in such matters is itself a safeguard. Swedish prosecutors operate independently from governmental supervision and control and are trained to gather all the evidence, not simply evidence in favour of the prosecution. Still, the closed world of security crimes and the small number of prosecutors involved in security matters means that this control function can easily be eroded. The same can be said for judicial involvement in telephone tapping. Training and experience as a judge is designed to give

impartiality, care and indeed scepticism in weighing evidence, an overriding interest in getting to the truth of the matter and an awareness of the importance of taking account of the rights of the individual. The Swedish judiciary has, for good and ill, a bureaucratic nature.²⁴ Most senior judges have long experience of working in government departments and this naturally colours their approach to the question of the "proper role" of the judiciary in a democracy, as well as the issue of what questions are justifiable and what are not. The main problem here is that the group of judges to whom warrants are submitted is very small and they have operated in total isolation from supervision. At least in the past, some of these judges have shown themselves capable of renewing security telephone tapping warrants for very long periods.²⁵ Transparency is the only reliable guarantee against abuse. As three of the members of the commission of inquiry into bugging (all judges) stated, arguing for a general rule of post-hoc notification of a suspect: "It is inevitable that a system without any transparency sooner or later will lead to that the those who takes the decisions adapt themselves to each other, developing a mutual view on what is demanded to allow for example telephone-tapping. In this fact there is a risk that the decisions will be all too routine. Knowing that the suspected citizen later will be informed about the decision will automatically lead to that the decision maker being more cautious."²⁶

As for other institutions, we may note the following powers in relation to the forces.

- Human rights commissioners have no powers.
- The courts have few, though formally a decision for telephone tapping, control of letters etc (and, in the future, bugging) must be taken or, in some cases, later be admitted by a Court.
- Nowadays the Register Board (see above) is the most important instrument for control over the Security Police, at least as far as concerns questions concerning the handling of their registrations. The Parliamentary Ombudsman and the Chancellor of Justice have the power to examine the Security Police, and the Standing Committee of Justice like the Ministry of Justice has annual

²⁴ For a short discussion of the role of the Swedish judiciary in the protection of human rights, see I. Cameron, *Protection of Constitutional Rights in Sweden*, (1997) Public Law, p. 491.

²⁵ See Svenska Dagbladet, 27 January 1999, which disclosed the information that a tap had been placed on the Gothenburg office of the Communist Party between 1953 and 1966, renewed every month.

²⁶ SOU 1998:46, s 518.

meetings with the head of the Security Police. None of these have however any specific powers to order the Security Police to act in a special manner, or to overrule a decision by the Security Police, and this goes even for the Justice Department.

- Municipal authorities have no powers.

Except for the creation of the Register Board, taking over the duties of the board of NPB as far as concerns the Security Police, there have been no significant changes to these arrangements during the past decade.

Do the Security Police “evade” their obligations if they follow a direct, concrete order from the Government which is clearly in contradiction to the Constitution? On a legal level, the answer is of course yes, but is it really fair to answer this question so simply? The head of the Register Board, Carl-Anton Spak, seems to as far as concerns the present be really tough on ensuring that the legislation is followed. He has great integrity and has created a new climate as far as concerns the present and hence with significant impact on the future, even though this cannot be claimed concerning the special investigations the Register Board has done in the past.

2.4 To the media and society-at-large

Concerning the access to state information about the forces to the public, Sten Heckscher, the National Police Commissioner, was once confronted with the absurd judgement from the Administrative Supreme Court stating that even though the present number of personnel at the Security Police may be public (after being told and proven to the Security Police that that could be counted out anyway), the number employed in 1965, 1970 etc must be kept secret “because of reasons of national security”. Heckscher agreed that there were no reasons of national security whatsoever, and definitely no legal foundation, to keep this information secret. At the same time Heckscher warned not to overestimate the power of the National Police Commissioner regarding his ability to do something about this.

To be a whistle-blower is a crime. We have had two whistle-blowers in Swedish history. The first one, Håkan Isacson, revealed the existence of the secret military intelligence agency (IB, see above) and its operations against Swedish citizens. He was put into prison. The second one was a policeman, Melker Berntler, from the Security Police, who made what he thought a classified report to the Chancellor of Justice, concerning illegal use of information received by telephone tapping. He

had earlier, in secret, reported irregularities to the Minister of Justice, including bugging of the Greek resistance towards the fascist Greek dictatorship (1967-1974), in the capture in Greece of people belonging to the resistant movement. He was not really a whistle-blower, in the sense that he wanted this information to become public, but because of reasons out of his control all this leaked to the press. The result was the end of his career, and maybe this has sent a rather clear signal to the employees in the organisation.

Journalists have a very good protection for their sources generally, but not when a question is raised regarding national security.

We have the Chancellor of Justice and the Parliamentary Ombudsman to whom citizens can go when they believe themselves to be improperly treated. They have the right to examine the case and comment and also prosecute (something which happens very seldom and never has happened regarding the Security Police). They do not have the right or possibility to correct any abuses.

Media coverage is rather good, but that there are only a very few – however some really excellent – journalists with competence, interest and courage enough. One problem is that it is such a difficult area, and the personal price to pay is so high in this feudal democracy, that they tend to burn out after a decade. Today, we have only a couple of journalists with the competence, interest and courage in the field, but they are really good.

It has been rather difficult to find any new poll data on public attitudes to police forces, and there appears to be none on the public attitudes towards intelligence and the Security Police. One investigation from the Institute for Political Science at the University of Gothenburg, covers the period from 1986 to 1996. It asked about the public trust towards the police in general, and shows the following figures: “Rather high or very high confidence for the police forces: 1986: 65 per cent, 1988: 57 per cent, 1990: 58 per cent, 1992: 62 per cent, 1994: 71 per cent and 1996: 53 per cent. Rather low or very low confidence: 1986: 10 per cent, 1988: 15 per cent, 1990: 13 per cent, 1992: 12 per cent, 1994: 8 per cent and 1997: 17 per cent.” The big change 1996 is not explained, and appears inexplicable. Another poll from 2001 only addresses the public confidence towards the police, taking into account the riots at the EU-meeting in Gothenburg, June 2001. This shows that 70 per cent of respondents had big or very big confidence in how the police handled the riots, while 14 per cent had low or very low. The same survey says that 15 per cent had bigger confidence in the police after the EU-meeting than

before, while 10 per cent had less. A third survey – this one done by the Police Workers Union in 1998 and only among policemen – says that 65 per cent of policemen have low or no confidence towards higher police chiefs in the police forces.

2.5 To codes and conventions

Sweden has subscribed to the following international codes and conventions:

- United Nations (e.g. 1979 UN Resolution: Code of Conduct for law-enforcing officers)
- Council of Europe (e.g. 1979 Council of Europe Declaration on the Police)
- OSCE (e.g. 1994 Code of Conduct on Politico-Military Aspects of Security)
- Europol (e.g. 1995 Europol Convention)
- Interpol (e.g. 1999 Interpol Seoul Declaration)
- European Convention on Human Rights

Most international obligations are mainly respected, even though not internalised. Of course, the Leander-case gives you the impression that in the “hard cases” Swedish officials take a rather pragmatic view on these obligations; but on the other hand, it seems and one hopes, that there have not been many hard cases in Sweden. But with a self-image including that we never do anything wrong, the risk is of course obvious that we do not see if we are on a slippery slope.

Regarding the role of international co-operation affecting domestic accountability, the following observations are in order.

- a) Interpol. The creation of Europol has probably led to less significance – as far as concerns the Security Police and the Narcotic Police Squads – being attached to this cooperation, but the National C.I.D. still have good and fruitful co-operation here, with mutual respect.
- b) Europol. There is extensive co-operation, with no specific national supervision.
- c) Other co-operation. Swedish organisations work with counterparts in Israel (Mossad) and (former) West Germany. There is also co-operation with USA, but it was probably more intense during the 1950s than nowadays when it is probably mainly done through Europol.

It is possible that extra-territorial operations escape scrutiny if they fall outside the supervision of not only the Register Board but also the

Board of the NPB. The question has been raised (also in the Standing Committee of Justice), but the answer has been that this is how it is and also how it must be.

To sum up, it is no exaggeration to claim that the main thing that has characterised the Swedish system of control and accountability for the Security Police is that it has not been a 'system'. One of the most significant conclusions that can be drawn from the facts of the Leander case is that all the supervisory bodies failed to provide effective oversight. No one of the different bodies – executive, judicial and parliamentary with all their different areas of responsibility – managed to even see what later became so obvious. Maybe this is because the world became for them too small; deniability and the principle of need-to-know finally became such close sisters that the unbelievable became even unthinkable. Perhaps this is what you can call “Shit happens” in the feudal kind of democracy that characterizes at least present-day Sweden.

3. Transparency

3.1.1 Domestic transparency: dimensions

The authorities are obliged to make information of all forces available to elected representatives, but only through the Board of the NPB, the Standing Committee on Justice or, sometimes and then indirectly, through the Standing Committee of Constitution. The parliamentarians or other elected representatives have no individual right and the members of the mentioned organs have obligations of silence also towards their party colleagues.

The obligation follows from underlying subordination statutes in the Constitution and, for example, regulations from the parliament and the Government. There are no specific constitutional or legislative provisions which exclude for instance the Security Police; but in practice the Security Police, at least against the Standing Committees, decide the terms for their participation.

Besides the vetting procedure, where the annual reports from the Register Board have meant a significant improvement, information is made available about the organisation of the different forces mainly through – besides some journalists (see above) – the present writer's books, articles and website. Much of this information is later repeated in official investigations. The Leander case is one well-known example, but

there are others which illustrate the Swedish model (COPS, Claim openness, practice secrecy).

Information about the official budget is public, but not details. Only the total cost, and then only what is forwarded directly to the Security Police, is public:

Year	Police totally	Security Police	Security Police
			<i>(Share in percentage of Police totally)</i>
90/91	7.959.115.000	300.000.000	3,77 %
91/92	9.097.056.000	360.000.000	3,96 %
92/93	10.262.081.000	400.000.000	3,90 %
93/94	10.883.543.000	470.643.000	4,32 %
94/95	10.867.194.000	482.630.000	4,44 %
95/96	10.721.163.000	476.288.000	4,44 %
1997	10.997.216.000	509.022.000	4,63 %
1998	11.473.693.000	516.984.000	4,51 %
1999	11.687.962.000	533.372.000	4,56 %
2000	11.942.035.000	550.290.000	4,61 %

Information on the nature of operations is not available.

3.1.2 Domestic transparency: publications

For none of the forces are regular policy statements issued. Regular reports on activities are published for all the forces, but the report from the Security Police is mainly lacking all substance. Also statistical information is available of all, except the Security Police where only the vetting-statistic is made public through the report from the Register Board. There are no regular publications that fall into other categories.

The official publications relating to these bodies are:

- a) The annual report from the Register Board,
- b) The annual report from the Security police,
- c) The annual report from the NPB,
- d) The yearly reports from the standing committee on justice.

In addition, of course, there is the annual governmental proposition to the parliament for a national budget.

3.2 International transparency

There are major difficulties with the question whether any of the international codes or conventions to which Sweden subscribes impose

'transparency' obligations. This is partly due to the fact that Sweden has a tradition of dualism, as far as concerns international conventions. This principle means that international conventions are to be regarded as Swedish law, and hence to be followed, only to the extent they have been transformed to Swedish law. Therefore, you can only find the answer if you know a) if they have been transformed and b) in what law and what section they have been implemented. Then you have two alternatives: one is to check all police legislation from the year the convention/resolution was signed by Sweden (which the author has done with no result) and the other is to ask the justice department, the foreign department or the NPB. That has been done also but neither the justice department nor the foreign department knows the answers so far as UN, Council of Europe, OSCE and EU prescriptions are concerned. Contacts with the NPB and the special group for "The Open Sweden", a group under the minister for democracy Brita Lejon, produced no answers. Maybe this says something very concrete about transparency and accountability in Sweden.

In a feudal democracy your loyalties are towards persons and not towards values, *ergo* not towards the law. In a extremely homogeneous society with a strong national hegemony this might explain the lack of whistle-blowers.

However, Sweden has subscribed to the 1995 Europol Convention and the 1999 Interpol Declaration; and international co-operation between police forces affects domestic transparency in the sense that information can be withheld when international operations are involved. This is a commonly used argument, becoming more and more frequent.

4. Recent changes 2001/2 and general appeal

It is too early to say if the events of 11 September 2001 led to changes in the area of transparency and accountability. Looking at other events on a superficial level, of course the changes with the fall of the Berlin Wall led to the definition of new enemies, in order to fill the vacuum. But on a more deeper level you can see that the Security Police always strive towards the preservation of the *status quo* (the only way to be "objective" and "not political"). This means that a) no matter the system, they are always conservative in reflection of the system they work within; and b) their main objectives will always be dissidents to the system, labelled and looked upon as "subversives".

CHAPTER VIII

UNITED KINGDOM

Laurence LUSTGARTEN¹

1. Coverage

The relevant agencies are:

- A. Security Service (popularly called MI5), UK-based only, dealing primarily with counter-terrorism and counter-espionage,
- B. Secret Intelligence Service (SIS, popularly called MI6), dealing with overseas human intelligence,
- C. Government Communications Headquarters (GCHQ), dealing with signals intelligence,
- D. National Criminal Intelligence Service (NCIS), which provides intelligence to UK forces on international criminals, and is the liaison body with foreign police forces and ministries.

There are 43 police forces in England and Wales plus half-a-dozen in Scotland and one in Northern Ireland, each under the 'direction and control' of their own Commissioner/Chief Constable. These enjoy a certain, though decreasing, degree of independence from central government. In what follows occasional reference is made to these forces, but the Chapter deals primarily with the listed national organisations.

On these, two supplementary notes. First, the NCIS was established in significant part as the British representative body in dealing with overseas organisations, but it is not primarily an operational police force and is certainly not the equivalent of an Interior Ministry as found in most European countries. It was set up in its present form in 1997, though it had existed in a different form since 1991. Secondly, in 1996, MI5 was given expanded responsibilities to support the police in prevention and detection of 'serious' crime, interpreted as meaning organised crime on a significant scale. This did not increase its size, though it prevented further shrinkage of numbers in light of the end of the Cold War.

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There is no one body which co-ordinates the different forces, services and agencies. The Joint Intelligence Committee (JIC), consisting of senior civil servants, co-ordinates and 'tasks' A-C. D is more peripheral. Ministers have little day to day involvement, though their priorities will be communicated through their departmental representatives on the JIC.

All authority regarding the existence and definition of roles and responsibilities of the different organisations is statutory.

- A is governed by the Security Service Act 1989, as amended.
- B and C are governed by the Intelligence Services Act 1994.
- D is governed by the Police Act 1997, as amended.

The first three organisations had non-statutory and theoretically secret existences for decades before the legislation was enacted

2. Accountability

2.1 To the Executive

The Security Service (MI5) is responsible to the Home Secretary, although by convention its Director General has direct access to the Prime Minister when specifically requested. Since the authority for issuing warrants to tap telephones, install bugs and/or burgle people's homes rests in the UK with Ministers, not Judges, and the key Minister is the Home Secretary, all proposals for these forms of invasions of liberties must be approved by civil servants in the Home Office (whose decision the Home Secretary in practice rubber stamps). This is a peculiar UK form of executive accountability. The SIC (MI6) and GCHQ are responsible to the Foreign Secretary.

The NCIS is responsible to an Authority of about 15 members, most of whom are appointed by the Home Secretary from classes of representative bodies laid down by statute. It is also subject to directions by the Home Secretary as to objectives and priorities.

All four agencies are subject to very tight financial control by the Treasury, which has no formal statutory basis but is in fact the key means of executive accountability in respect of all government functions in the UK.

There have been very little changes to the existing arrangements in the past decade. A Service Authority was created for NCIS, but as most of its members are civil servants or police officers very little change in

fact occurred. Treasury control has probably become tighter for all the bodies.

Regarding the question whether these formal arrangements work in practice, the following comments have to be made. Since the treasury control is tight, 'economy, efficiency and effectiveness' are looked at very closely. As to MI5, much will depend on the personality and concerns of the Home Secretary. The civil servants appear to take their responsibilities for 'warranty' seriously. What is less clear is how much is hidden from the Home Secretary at the operational level: thus a decision not to bring criminal charges against someone for an act done many years previously – perhaps to protect details of associated operations from becoming public – might not be referred to the political leadership at all. This happened in 1999, to great embarrassment all round, and it appears that the Security Service has been instructed to refer such cases to the Home Secretary in future.

The modalities of accountability to the executive are informal, in common with the style of British higher administration. The heads of the agencies meet regularly with their political master, and there is regular and frequent contact between agency officials and civil servants in relevant departments. Given the degree of supervision within the organisation of lower ranking members (which has tightened in MI5 in recently years; less is known of the others), it would be difficult to hide a rogue operation from its leadership. How effectively the latter could conceal information if it were so minded is difficult to judge.

The recently adopted Police Reform Act 2002 has enhanced the executive powers over the police, giving the Home Secretary even the right to remove a chief constable. Police officers have interpreted the law as intrusion of the government in the operational direction of the police.

2.2 To elected representatives

Until 1994, there was no legislative accountability at all for A-C (see Section 1). In that year the Intelligence Services Act established a parliamentary committee with limited oversight powers. This differs from the normal parliamentary Select Committee, in that a) there are members from both Houses of Parliament and b) they are appointed by the Prime Minister, not by members of the legislature. The appointments up to now have included at least one well-known critic of the Security Service. It is known as the Intelligence and Security Committee (ISC). The Committee of Public Accounts does not have access to information concerning the workings of A-C. There is no legislative accountability

for D (the NCIS). The Home Affairs Select Committee oversees the workings of the Police Service. Legislative oversight could be improved, since the statutory limits to its powers are severe. Already in 1999 the Select Committee on Home Affairs concluded that the security and intelligence services should be brought under parliamentary scrutiny, as such accountability is still non-existent.

Regarding the question whether these formal arrangements work in practice, a couple of comments have to be made. The recently retired Chairman and the members of the ISC, who met an academic delegation, feel that they have received full co-operation from MI5. They are less happy about the fact that their Annual Report, which is presented to the Prime Minister, is published only to the extent that the latter chooses, and has appeared in heavily redacted form. The formal statutory limits on the ISC's powers of inquiry are severe (in fact they have been allowed to range wider than their formal remit) but if an agency and/or Prime Minister wanted to exclude them from almost any area, it/he could do so easily within the law. Therefore such services can evade their obligations in this respect.

2.3 To other institutions

Unusually, in the United Kingdom the courts are excluded from looking at security institutions and very unusually have accepted that. Nor is there a human rights commission in Britain, and the one in Northern Ireland is excluded from looking at security institutions. Municipal authorities, including Scottish institutions under devolution, are wholly excluded from any role in accountability of national institutions.

The specially created accountability mechanism is the Intelligence Services Commissioner, a part-time officer who is normally a senior judge. He has a wide remit to look at the exercise of powers of the intelligence agencies, and also by the minister(s) who have power to authorise bugging and other intrusions by these services. The authorising statute (Regulation of Investigatory Powers Act 2000) is silent on the standard of review to be applied; the Commissioner has adopted the very lax English administrative law test of 'reasonableness'. It is entirely unclear what effect the incorporation of the European Convention on Human Rights into UK law will have on this.

In addition, there is a separate Commissioner and Tribunal that specifically deals with telephone tapping by all agencies. The Commissioners are part-timers with very little staff that can hardly

penetrate very far. The Tribunal is useless, being restricted by many limitations both on what it may inquire into and on its powers of gaining evidence. The original tribunal of this kind, which has jurisdiction over telephone tapping, has been in existence for fifteen years and has never upheld a complaint.

The recently adopted Police Reform Act 2002 has established new independent arrangements for the investigation of complaints against the police and the Independent Police Complaints Commission. The idea is to give the members more security of tenure and also a more independent investigative staff. The Act also provides powers to ensure the consistent application of good practice across the country through statutory codes of practice and a power to make regulations governing policing practices and procedures.

2.4 To the media and society-at-large

Britain has been well described as operating under a 'culture of secrecy' in government generally, and this is strongest in the area of national security. In fact all four institutions under discussion – and any other function that is officially labelled 'national security' – are entirely exempt from the requirements of the freedom of information legislation. There is an official called the Staff Counsellor, a retired senior civil servant, who is supposed to receive complaints of this kind. There is no evidence that he has ever been used for anything serious. There have been several episodes recently of alleged irregularities being aired in the press, which have resulted in criminal prosecution. Nevertheless, the courts tend to be reasonably protective of journalists' rights to protect information and there is a statute requiring that a special procedure be followed before any journalistic material can be seized by the police. There have been some judicial decisions ordering disclosure, and the leading Strasbourg case (*Goodwin v. UK*, 1995) is ignored in spirit whilst purportedly being followed.

The broadsheets cover the police reasonably well, but are seriously constrained by the laws of defamation, the most favourable to plaintiffs in the Western world. The tabloids tend to be more interested in crime stories than in investigating police malpractice. Apart from *The Guardian* and *Sunday Times*, there is very little serious coverage of the intelligence agencies.

2.5 To codes and conventions

The UK subscribed to all relevant international codes and conventions. Apart from the EU and ECHR, it must be remembered that

the UK is a dualist state, which means international law is not part of domestic law. Therefore its requirements are regarded as of minimal significance, and relatively few people know much about them.

The named agencies do not cause problems. The big issue concerns the UK/USA agreement or Echelon as it is known in Europe – co-operation with the USA and the Old Commonwealth countries. There is serious concern that other agencies in this alliance could, for example, undertake electronic surveillance within the UK that GCHQ is prevented from doing by statute.

3. Transparency

3.1.1 Domestic transparency: dimensions

Apart from the Intelligence Services Committee (ISC) none of the agencies is obliged to make available any information to parliament, and would refuse to do so unless ordered to by the relevant minister in charge of the relevant Department to which they report. There is no statutory obligation to make information available; it is just that in the absence of a positive duty to supply information, nothing will be supplied. Regarding information being made available about the organisation of different forces, the Cabinet Office produces a document called 'National Intelligence Machinery' that gives a broad picture of the intelligence agencies (and their overall budgets). In addition, MI5 produces a booklet about itself, revised every four years, which includes more information. Regarding the publication of personnel strength, only MI5 produces an overall total; there are no finer breakdowns by category. No doubt the ISC could obtain this information if it chose to request it.

Regarding the budget, an overall total is given in the 'National Intelligence Machinery' publication; and the total for MI5 is given in its own publication. The global budgets for the others are not published. No details beyond the global sum are provided. Again, the ISC would be able to obtain such information.

There is no information made available about the nature of operations. Even the ISC is barred by statute from obtaining this information, although some of the agencies have in practice been more forthcoming about specific matters.

3.1.2 Domestic transparency: Publications

Relevant publications include an annual report by the parliamentary Intelligence Services Committee, published in redacted form. As well as

periodic revisions of the National Intelligence Machinery publications, and of MI5's handbook about itself, any other publications can be found on the intelligence services' web sites.

4. Recent changes 2001/2 and general appeal

In response to the attacks on New York and Washington DC, the UK passed a huge statute, the Anti-Terrorism, Crime and Security Act 2001. Among other things the Act allows detention without trial for foreigners suspected of terrorism, who cannot be deported because of ECHR restrictions. The Act also does other things, some unexceptionable (e.g. cash freezing) and others more dangerous (e.g. authorising information sharing between government bodies).

CHAPTER IX

UNITED STATES OF AMERICA

Kate MARTIN¹

Introduction

The present system of oversight of the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) dates only from the mid-1970s. It grew out of the Watergate scandals in which one of the articles of impeachment against President Richard Nixon was that he had attempted to misuse the CIA in violation of individual rights. During the Watergate investigations, a reporter from the *New York Times* newspaper uncovered political spying, overseas assassination plots and other abuses by the CIA. At the same time, information about the FBI spying on political dissidents, including civil rights activists and protesters against the war in Vietnam, was also disclosed.

Public outcry led to an extensive and lengthy congressional investigation, which reviewed intelligence agency files, interviewed agency officials and took testimony from many persons, including civil liberties NGOs. The Church Committee, as it was called, wrote a multi-volume, public report that outlined in detail its findings about past abuses by the CIA, FBI and military intelligence agencies. It also outlined a detailed series of legal and administrative reforms to prevent such abuses in the future. That extensive report became the basis for establishing the current system of controls over intelligence activities in the United States.

While many rank and file agency employees resented the reforms and believed that they imperilled intelligence, the leadership of the CIA and the FBI understood their necessity. William Colby, CIA Director at the time, explained about how to ensure the agency's survival in the face of intense public outcry. His remarks are worth quoting at length.

¹ Director, Center for National Security Studies, United States of America. This author does not deal with police forces which in the US are state/local organisations (as in the UK).

“The Agency’s survival, I believed could only come from understanding, not hostility, built on knowledge, not faith... The CIA no longer could operate within the traditions of the past. The CIA must build, not assume, public support, and it can do this only by informing the public of the nature of its activities and accepting the public’s control over them. It must convince the people that it is not some nefarious ‘invisible government’ engaged in heinous crimes and oblivious to American democratic values, but a legitimate, controlled, and immensely valuable weapon in the arsenal of our democracy, serving to protect the nation and promote its welfare.”

“A public informed of the CIA’s accomplishments and capabilities will support it. A public aware of its true mission and the limits of its authority will accept it. A public that understands the issues and problems involving intelligence and its role in the American government will debate and decide them. A public convinced of the CIA’s value will help protect its true secrets. The only way we can have such a public is by making the CIA an integral part of our democratic process, subject to our system of checks and balances among the Executive and the Congress and the Judiciary, responsive to the Constitution and in the end controlled by the informed populace it serves.”

Since 1974, there has been an ongoing, still unfinished, effort to ensure that the CIA and other U.S. intelligence agencies abide by these principles. The reforms have worked better or worse over the past 25-plus years; the politics of the moment, as well as current policy crises, influence how they are carried out. But it is now universally accepted that the intelligence agencies must be subject to the rule of law; that there must be a system of holding the agencies accountable to outside institutions; and that secrecy must be kept to a necessary minimum so that there can be informed public debate on national security and foreign policy issues.

As outlined below, it is not yet known what will be the effect of the tragic events of September 11 on these issues.

1. Agencies: Roles and Functions

First a note about terminology. The term “security agencies or services” is not generally used in the United States; instead agencies are referred to

as either law enforcement or intelligence agencies, or both. The intelligence agencies have responsibility for foreign intelligence, defined as information about the activities, intentions or capabilities of foreign governments, groups or individuals. (This definition includes activities of US citizens.)

Some authorities have identified as many as 26 intelligence agencies in the United States government, most of them found in the Department of Defense.² The Central Intelligence Agency (CIA) is the most important civilian agency. Among the important agencies that are part of the Department of Defense are the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO), and the National Imagery and Mapping Agency (NIMA). The State Department also has its own intelligence bureau called the Bureau of Intelligence Research (INR).

The CIA was created by the National Security Act of 1947 after President Harry S. Truman authorised the establishment of a peacetime centralised intelligence system. The CIA is supposed to be the co-ordinating agency for all intelligence activities that affect national security. Its Director, called the Director of Central Intelligence, in theory has responsibility for the entire intelligence community, which includes all agencies that collect foreign intelligence. In practice, he usually exercises only formal oversight over the agencies located in other executive Departments, like Defense or State, which agencies also report to the Secretaries of Defense and State respectively. The CIA collects, evaluates and disseminates foreign intelligence, mostly from abroad. It also has responsibility to conduct counterintelligence activities and covert actions – activities meant to influence events abroad without the role of the U.S. being known – and other functions related to intelligence and national security as directed by the President. The National Security Act of 1947 made clear the CIA would have no police or internal security functions.³

The National Security Agency (NSA), perhaps the most secret and secretive intelligence agency, was established in 1952 and is responsible for the detection and interception of foreign electronic communications,

² Jeffrey T. Richelson, “The U.S. Intelligence Community, Third Edition,” Westview Press, Boulder, Colorado, 1995. Hereafter cited as *Richelson*.

³ Taken from *Richelson*, The Federation of American Scientists (FAS), Intelligence Resource Program, available at <http://www.fas.org/irp/official.html> (hereafter cited as *FAS*), and, the Office of the Director of Central Intelligence Website, available at <http://www.odci.gov/index.html>.

as well as the protection of the electronic communications of most government agencies.⁴

The Defense Intelligence Agency (DIA) was established in 1961 to consolidate defence intelligence and counter-intelligence activities and is the primary producer of intelligence about foreign militaries in the U.S. government.⁵

The National Reconnaissance Office (NRO) was established in 1960, though its existence was officially classified until 1992. Its existence was known long before it was officially acknowledged, and many objected that classifying the fact of the existence of any government agency was unconstitutional. It operates the satellite reconnaissance programs for the entire U.S. intelligence community. It brought together the space intelligence activities of the Central Intelligence Agency, the Department of Defense and the Air Force, and is headed by an Air Force official, though not always under the direct control of uniformed Air Force officers.⁶

The INR was established in 1946 and is the State Department's and the Secretary of State's primary source for interpretative analysis of global developments. It co-ordinates with other national security agencies on visa applications, information sharing and draws on all-source intelligence, diplomatic reporting and interaction with U.S. and foreign scholars.⁷

The National Imagery and Mapping Agency was established in 1996 and consolidated the Defense Mapping Agency, the Central Imagery Office, the Defense Dissemination Program Office and the National Photographic Interpretation Center. NIMA runs the spy satellite program and provides imagery and geo-spatial information to the military and national security decision-makers in the government.⁸

There are also several federal law enforcement agencies. The largest, the Federal Bureau of Investigation (FBI) has both intelligence and law enforcement responsibilities. The FBI investigates violations of over 200 categories of federal law, protects the United States from foreign intelligence and terrorist activities, and provides law enforcement assistance to federal, state, local, and international agencies. The FBI

⁴ *Richelson, FAS.*

⁵ *FAS.*

⁶ *Richelson.*

⁷ The U.S. Department of State Website, Bureau of Intelligence Research, available at <http://www.odci.gov/ic/dsbir.html>.

⁸ The United States Intelligence Community page of the Central Intelligence Agency Website, available at <http://www.cia.gov/ic/nima.html>.

draws authority from Title 28 of the United States Code, Section 533, which authorises the Attorney General to appoint officials to detect crime. The FBI was established in 1908 as an unnamed group of “special agents” appointed by the Attorney General to be the investigative arm of the Department of Justice.⁹

There are several other federal law enforcement agencies, the most important being the Drug Enforcement Agency (DEA), the Bureau of Alcohol, Tobacco and Firearms (ATF), and the Immigration and Naturalisation Service (INS).

The DEA was established in 1973 by an Executive Order of President Richard Nixon to consolidate other federal agencies that had some drug enforcement responsibility in a separate agency within the Department of Justice. It is a single-mission agency designed solely to enforce the controlled substance laws and regulations of the United States.¹⁰

The ATF is a law and regulatory enforcement agency within the Department of Treasury tasked to enforce federal laws and regulations relating to alcohol, tobacco, firearms, explosives, and arson. It is also a tax-collecting agency that produces the highest return for every dollar spent in the federal government.¹¹

The INS is a division of the Department of Justice and has the dual role of regulating permanent and temporary immigration to the United States and securing the 8,000 miles of international boundaries.¹²

2. Basic Principles of Accountability

The basis for ensuring accountability and control of the intelligence agencies is found in the basic principles of limited democratic government:

- The people have a right to know what their government is doing;

⁹ *Richelson, FAS*, and the Federal Bureau of Investigation Website, available at <http://www.fbi.gov>.

¹⁰ *FAS*, and the Drug Enforcement Agency Website, available at <http://www.usdoj.gov/dea/>.

¹¹ *FAS*, and the Bureau of Alcohol, Tobacco, and Firearms Website, available at <http://www.atf.treas.gov>.

¹² The Immigration and Naturalization Website, available at <http://www.ins.usdoj.gov/graphics/aboutins/inmission/index.htm>.

- The people, including their representatives in the legislature, have the right to participate in decision-making on national security issues through public debate;
- There are limits on government power over individual rights and freedoms; and
- There must be institutional checks and balances, including effective remedies for violations of individual rights.

These basic principles are enshrined in the United States Constitution. The First Amendment protects individual freedom of speech and public access to information about what the government is doing. Other constitutional amendments in the Bill of Rights protect the right to due process of law before being deprived of life, liberty or property (Fifth Amendment), the right to a fair trial (Fifth and Sixth Amendments), the right to a public trial (Sixth Amendment), and individual privacy against unreasonable searches and seizures by the government (Fourth Amendment).

It is noteworthy that these protections for individual rights against the power of the government contained in the Bill of Rights are written in absolute terms. The Bill of Rights, unlike some international human rights treaties, makes no exception for national security.

The writers of the Constitution explicitly intended that the three branches of government – the executive, headed by the President, the legislature, and the judiciary – would act as a check and balance on each other in order to protect individual liberties. This constitutional system of institutional controls works to ensure that the security services operate in accordance with the laws regulating their activities. These checks and balances include the right to effective judicial remedies for violations of individual liberties and legislative oversight.

But it was many years after the adoption of the Constitution before there was a general recognition that intelligence agencies must be subject to the same rule of law and constitutional checks and balances as all other parts of the government. Not until 1976 did the Congress confront and document how weaknesses in the system of accountability had permitted widespread intelligence abuses by the CIA, the FBI and military intelligence services. To paraphrase their conclusions:

The writers of the U.S. Constitution foresaw excess as the inevitable consequence of granting any part of government unchecked power. They tried to set up a system in which the country would place its trust in laws, and not solely in men. But intelligence activities were not placed within the constitutional

scheme for controlling government power, with the result that “too often, constitutional principles were subordinated to a pragmatic course of permitting desired ends to dictate and justify improper means.”

From US Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church committee report), Final Report, Book II at III.¹³

2.1 Accountability of the Intelligence Agencies to the President

While there was a long-standing public perception that the CIA, especially in carrying out covert actions during the Cold War, acted as a “rogue elephant” operating on its own to overthrow governments, history has made clear that it has always acted with the authority and at the direction of the President. Prior to the reforms of the 1970s however, that direction was frequently given in a way that allowed the President “plausible deniability”: it left him free to give the impression that the agency had in fact acted on its own and not at his direction.

Since the tightening of the provisions for legislative oversight, there has also been a regularisation of Executive Branch accountability. The structure of intelligence agency accountability is set forth in an extensive and public Executive Order of the President. President Ford issued the first such order in 1976. The current order was issued by President Reagan in 1981 – Executive Order 12333 of United States Intelligence Activities, (Dec. 4, 1981 46 Fed. Register 59941). This outlines the respective roles and responsibilities of the intelligence agencies and sets up a structure for carrying out foreign intelligence activities. Such activities include the collection, analysis and dissemination of all foreign intelligence and the carrying out of covert activities abroad. It puts the Director of Central Intelligence in charge of all foreign intelligence activities and sets up a structure for co-ordination between the various agencies.

It also establishes some substantive restrictions on intelligence activities, mostly having to do with collection of information about US citizens and legal residents. These substantive limits, however, do not give rise to any enforceable legal rights on the part of any who might be harmed by activities in violation of such limits, unless the particular limit is simply a restatement of legal rules already existing in statute or the

¹³ This report, which resulted in substantial and effective reforms, is perhaps still the most comprehensive treatment of the many issues of intelligence oversight and accountability from a constitutional and legal perspective and a practical one.

Constitution. This executive order also contains the prohibition on assassination by the intelligence agencies. The order may be revised at any time by the President, who can also grant a waiver or exception for a particular activity. It is arguable that he may do so in secret, although even in that case the many intelligence agency lawyers are sure to insist that such a waiver be in writing.

The President has also established an Intelligence Oversight Board, which is supposed to provide him with independent advice and oversight concerning intelligence activities. It is made up of prominent persons from outside the government (many formerly with the government) who, at the direction of the President, are empowered to carry out investigations of particular activities and in doing so review relevant documents, as well as to provide advice to the President more generally. President Clinton tasked the Board with conducting an investigation of CIA activities and human rights abuses in Central America and in Guatemala in particular in the early 1990s. The Board issued an unprecedented public report outlining CIA involvement with individuals responsible for gross human rights abuses and the agency's failures to keep the Congress fully informed of its activities.

2.2 Internal oversight mechanisms in the agencies

There is an office in the Department of Justice called the Office of Intelligence Policy Review which is responsible for reviewing national security surveillance of individuals inside the United States and other sensitive foreign intelligence matters mostly arising in the U.S. There is an extensive series of laws and regulations governing the collection of foreign intelligence inside the U.S. and the lawyers in this office are responsible for interpreting those laws.

The Department of Defense also has an Office for Intelligence Oversight, whose web site contains an interesting explanation of the origin of the office.

‘The perceived need for a Department of Defense (DoD) Intelligence Oversight (IO) program came about as a result of certain activities conducted by DoD intelligence and counter-intelligence units against U.S. persons involved in the Civil Rights and anti-Vietnam War movements. During the 1960s and 1970s, the United States experienced significant civil demonstrations from protesters associated with these movements. Some of these demonstrations were believed to be beyond the ability of civilian authorities to control, and military forces were used to assist in the restoration of order. Units

deploying for this purpose discovered they needed basic pre-deployment intelligence to perform their missions. The Army, designated as executive agent for providing aid to civilian authorities, requested assistance from the Federal Bureau of Investigation (FBI). When the FBI was unable to provide the information needed, the Army began collecting it. Over time, this collection mushroomed and led to abuse of the Constitutional rights of our citizens. Eventually, DoD intelligence personnel were using inappropriate clandestine and intrusive means to collect information on the legitimate political positions and expressions of U.S. persons, accumulating that information in a nation-wide data bank, and sharing that information with law enforcement authorities.’

...

‘In the early and mid 1970s several Congressional committees, including the Church, Pike, and Ervin committees, conducted investigations and public hearings. After three and a half years of investigation, these committees determined that what had occurred was a classic example of what we would today call “mission creep.” What had begun as a simple requirement to provide basic intelligence to commanders charged with assisting in the maintenance and restoration of order, had become a monumentally intrusive effort. This resulted in the monitoring of activities of innocent persons involved in the constitutionally protected expression of their views on civil rights or anti-war activities. The information collected on the persons targeted by Defense intelligence personnel was entered into a national data bank and made available to civilian law enforcement authorities. This produced a chilling effect on political expression by those who were legally working for political change in domestic and foreign policies.’

U.S. Department of Defense web site, Office of the Assistant to the Secretary of Defense (Intelligence Oversight) <http://www.dtic.mil/atstdio/mission.html>.

There are also Inspector Generals in most agencies, who are specifically charged with receiving and investigating complaints of misconduct. Similarly, there are lawyers in every intelligence agency, in an Office of General Counsel, who play a key role in reviewing whether intelligence activities are being carried out within the law.

2.3 Accountability to the Legislature

The Congress has constitutional responsibility both to authorise the activities of the intelligence agencies and to oversee their actual operations. It exercises control over intelligence agency activities in four different ways:

First, the Congress as a whole votes to authorise the activities of the intelligence agencies, to fund existing agencies, and to authorise the creation of any new agencies. It has the sole authority to create, abolish, and reorganise the intelligence agencies. It also has the authority to assign or reassign functions to specific agencies. This authority stems from the Constitutional grant of the Congress to “make all laws.”

Second, Congress must appropriate all monies spent by intelligence agencies. Congress enacts yearly funding measures, in which it can define the exact purposes for which money may be spent and may prohibit expenditures for other purposes.¹⁴

Third, Congress must confirm the President’s appointment of the heads of the intelligence agencies. The head of the CIA, who also acts as director of the entire intelligence community, is nominated by the President and must be approved by the Senate, pursuant to Art. II, sec. 2 of the Constitution. The Senate must also approve the Deputy Director, General Counsel and Inspector General of the CIA. The CIA Director and these other officials serve at the pleasure of the President; the CIA Director reports to the President directly. The Constitution also gives the Congress the power of impeachment, a process by which Congress can remove from office Executive Branch officials. The Senate Intelligence committee usually holds an open hearing on a nomination by the President, then votes on the nomination. If the committee vote is favourable, the nomination is then sent to the entire Senate for a vote. These confirmation hearings serve an important role in determining a nominee’s vision for the agency and in probing his or her past. They are also used to obtain a commitment from a nominee to respect the congressional oversight process itself.

There is a similar process for Senate approval of the nomination of the head of the FBI, who is also appointed by the President. Unlike the CIA Director, however, the FBI Director’s term is limited by statute to ten years and a Director may not serve more than one term. This law was adopted to prevent another J. Edgar Hoover, who ran the FBI as his own personal fiefdom for almost 50 years. The FBI Director may be fired by

¹⁴ The Constitution vests the authority to spend money in the Congress. Art. I sec. 9 provides: “No money shall be drawn from the Treasury...”

the President, but the tradition has developed that the Director is not replaced by a new President: there could be serious political fallout if a new president sought to remove an FBI Director just to appoint someone of his own choice. The FBI Director reports to and is under the control of the Attorney General.

Fourth, Congress has the power to oversee and to investigate specific activities by the intelligence agencies. In the case of the CIA and other foreign intelligence agencies, there are two committees in the Congress charged with overseeing their activities: the Permanent Select Committee on Intelligence of the House of Representatives and the Senate Select Committee on Intelligence. They were established in the mid-1970s by Congress itself as part of the package of intelligence reforms mentioned earlier. Other committees in the Congress also have concurrent authority to oversee certain activities of the intelligence agencies' activities, including the Appropriations Committees, the Armed Services Committees, the Judiciary Committees, and the Foreign Relations Committees (in the Senate) and the International Relations Committees (in the House of Representatives).

The Intelligence Committees operate both publicly and in secret. Witnesses from the intelligence agencies or other parts of the Executive Branch sometimes testify in open public hearings and sometimes secretly. Representatives of NGOs and others testify in public. Sometime, the written record of a closed hearing is later declassified and made public. Committee meetings to discuss and vote on legislation are frequently closed, although the legislation itself is public and the committee's report on the legislation is also public. The only exception to this is the legislation detailing the amounts of money being appropriated for the different agencies and activities, which is secret. The basic rule is that if classified information is being discussed, the committee proceedings will be closed. Otherwise, they will be open.

In addition to legislative work, the Intelligence Committees are authorised to conduct investigations regarding intelligence activities. These investigations may be triggered by anything from confidential disclosures from employees or former employees of intelligence agencies to rumours and reports in the news media. The Committee's final action in such investigations is to publish a comprehensive report, which often leads to legislative or administrative reforms.

The Intelligence Oversight Act of 1980 requires that the President and the Director of Central Intelligence keep these committees fully and currently informed of all intelligence activities, including significant

anticipated intelligence activities. The Intelligence Oversight Act has been amended several times in the past two decades to clarify and strengthen the requirement that intelligence agencies report to the Congress. The Act currently provides in part:

"Section 501. (a)(1) The President shall ensure that the intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.

* * *

"(b) The President shall ensure that any illegal intelligence activity is reported promptly to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.

* * *

"(d) The House of Representatives and the Senate shall each establish, by rule or resolution of such House, procedures to protect from unauthorised disclosure all classified information, and all information relating to intelligence sources and methods, that is furnished to the intelligence committees or to Members of Congress under this title.

* * *

Section 502. To the extent consistent with due regard for the protection of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central intelligence and the heads of all departments, agencies and other entities of the United States Government involved in intelligence activities shall --

(2) Furnish the intelligence committees any information or material concerning intelligence activities, other than covert actions, which is in their custody or control and which is requested by either of the intelligence committees in order to carry out its authorised responsibilities."

The Oversight Act also specifically requires the Director of Central Intelligence to inform the intelligence committees in advance, in most cases, of any contemplated covert action. Covert actions do not include classic espionage; rather, they are secret operations designed to influence events overseas without the role of the United States becoming known.

In practice, classified information on some subjects may be more readily made available to the Congress than information on other subjects. For example, classified information concerning weapons

programs, diplomatic matters, finished intelligence analyses, or covert actions is routinely furnished to Congress. The Executive Branch is most adamant in protecting the identities of informants and covert intelligence agents, and the details of pending criminal investigations.

In addition, the Executive Branch claims, and the courts have agreed, that there is an "executive privilege" protecting documents relating to presidential deliberations. The exact scope of this privilege has never been defined, although it no doubt covers at least memos reflecting deliberations within the President's personal office. Such information may be classified if it concerns national security matters, but is not necessarily classified.

In addition to specific regular reporting requirements imposed on the Executive Branch, and provisions for specific requests by Congress, additional steps have been taken to ensure that Congress is fully informed. Sometimes, the Executive Branch may withhold information and Congress may not even know what information to ask for. If the Executive Branch is hiding information, there may be individual career employees in the Executive Branch who want to expose the problem or the abuses that are being covered up, by providing the information to Congress. Such Executive Branch employees are protected from retaliation for providing information to Congress. (It is important to note that any Executive Branch employee who discloses classified information to the public, rather than to the Congress, may be fired from his job for doing so.)

The laws protecting these "whistleblowers" from retaliation are intended to protect Congress' interest in receiving accurate and timely information about the agencies and operations it is charged with overseeing. A law adopted early in this century provides that the right of employees to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied. Another law, known as the "whistleblower protection act" prohibits supervisors and commanders from restricting members of the armed forces from communicating with a Member of Congress. The law specifically provides that no person may dismiss or demote (or threaten to dismiss or demote) or withhold (or threaten to withhold) a promotion, as a reprisal against a member of the armed forces for providing information to a Member of Congress. (A somewhat less explicit statute covers whistleblowers in civilian agencies.)

Congress recently amended the law governing the authority of the Inspector General at the CIA to further protect CIA whistleblowers who wish to disclose classified information to the Congress.

The Oversight Act is based on a reading of the Constitution that Congress has equal right to classified national security information as the Executive, both because it needs the information to perform its constitutional responsibilities of legislating and overseeing Executive Branch activities and because the Constitution vests shared responsibilities in the Congress and the President for making decisions about national security and foreign policy matters. This view is reflected in the House and Senate Rules governing the intelligence committees, which set up a procedure whereby, after giving the President an opportunity to register his disagreement and state his views, the House or the Senate as a whole may vote to declassify and publicly release classified information. In practice, the Congress and the President have reached agreement on disclosures.

There is unresolved disagreement between the Congress and the President as well as among constitutional scholars about whether Congress is in fact entitled to all national security information or whether the President has the right to withhold anything other than information concerning his personal deliberations with his personal advisors. Usually such theoretical disagreements are resolved through a practical process of accommodation and negotiation between the branches.

2.4 Accountability to the Judiciary and to Individuals for Violations of Rights

The courts play an important role in ensuring that the intelligence agencies are subject to the rule of law. First, they oversee prosecutions of employees of intelligence agencies charged with violating the law. In doing so, they review classified information to determine its relevance to the trial and make the final decision about what information must be disclosed either to the defence or to the public in order for the trial to go forward.

Second, under the Freedom of Information Act, the courts have independent authority to order classified information declassified and made public. And finally, the courts adjudicate claims by individuals that the intelligence agencies have violated their rights.

Judicial Authority to Declassify Information Relating to Intelligence Agencies

When an individual requests information from an intelligence agency under the Freedom of Information Act, courts have the authority to declassify information and release it to the public, if they determine that the information is not “properly classified.” Congress enacted this provision over the veto of President Ford, who objected that it unconstitutionally infringed on presidential prerogatives. Since then, the courts routinely consider whether information should be publicly released under the Freedom of Information Act and the Supreme Court has never addressed the theoretical objection by the Executive Branch to this authority being exercised by the federal judiciary. In fact, the courts rarely order disclosure of classified information over the objection of the government and no case has yet resulted in an absolute conflict between the two branches. Instead, with encouragement or pressure from the Court, the government usually voluntarily agrees to disclose more information than it had been willing to disclose prior to being sued. (In contrast, the right of the judiciary to read and review relevant classified information is uncontroversial.)

Judicial Remedies for Violations of Rights by Intelligence Agencies

Individual rights can be enforced in federal courts. A person whose rights have been violated by the actions of the FBI or another intelligence agency can sue both the responsible individual officials and the agency in a civil lawsuit. Money damages to compensate for past wrongs and court injunctions to prohibit future misconduct are available, although judicial interpretations of constitutional guarantees allow agencies a certain latitude.

Judicial remedies are available to protest against the intelligence agencies using national security as a justification for violating individual liberties. Foremost among these are freedom of speech, which protects individuals against government surveillance or harassment because of their political or religious activities, and the right of privacy, which protects people against unreasonable searches or seizures by the government, including electronic surveillance.

The activities of the FBI, which is the main domestic intelligence agency likely to target Americans, are limited by many laws and Department of Justice and FBI regulations. Such laws and regulations apply to three major areas of concern: 1) the criteria for opening an investigation of an individual or group; 2) controls on the use of

particular investigative techniques, including electronic surveillance; and 3) restrictions on what information the FBI may keep about individuals and in particular their First-Amendment-protect activities. Each is elaborated below.

1. Standards for opening FBI investigations

Currently, guidelines issued by the Attorney General detail what kinds of information the FBI needs before it may open an investigation of a particular individual or group. There are two separate sets of guidelines, mirroring the distinction between law enforcement and foreign intelligence discussed earlier: one set of guidelines governs investigations of general crimes, the other covers foreign intelligence investigations.

These guidelines specifically address the problem of initiating and conducting investigations involving political activities. A recent example of this would be the question of whether to investigate groups advocating making abortion illegal in connection with bombings and killings of doctors at abortion clinics. Many civil libertarians believe that the current guidelines do not adequately protect against FBI abuses. There has been a long, not yet successful, effort to make *all* FBI activities subject to a criminal standard, meaning that the FBI could not open an investigation unless there was specific reason to believe that a crime had been, was being, or was about to be committed. Provided that criminal statutes are narrowly drafted, this would be the best protection against political spying by the FBI.

2. Controls on investigative techniques, including wiretapping

In addition to rules regarding when investigations may be opened, there is a large body of law about when specific investigative techniques may be used. Many such techniques are governed by the constitutional requirements in the Fourth Amendment outlawing unreasonable searches and seizures. Thus, electronic surveillance (telephone taps, microphones, and e-mail interceptions), physical searches of houses and offices, video surveillance when there is a reasonable expectation of privacy, and opening mail is all prohibited, unless the government obtains a judicial warrant – a court order – based on a finding that there is probable cause to believe that an individual is committing, has committed, or is about to commit a crime. (Searches and surveillance conducted in order to gather foreign intelligence, rather than to investigate crimes, require slightly less restrictive standards.)

The most important protection is found in the laws restricting wiretapping. There are three separate statutes: one governing electronic surveillance, including telephone tapping and bugging for law enforcement purposes; a second governing surveillance of e-mail and internet communications; and a third governing surveillance done in order to obtain foreign intelligence. All require that a federal judge issue an order approving the surveillance in advance, based on a finding of probable cause.

In general, after the surveillance is finished, individuals are entitled to know whether their conversations have been listened to, although there are exceptions to this requirement for foreign intelligence wiretaps. (Those exceptions are in fact too broad to adequately protect civil liberties.) Individuals whose rights have been violated under these laws are also entitled to sue in court. Perhaps most importantly, government officials who wiretap individuals in violation of these laws without obtaining a court order are guilty of a crime and are quite likely to be prosecuted and jailed.

Perhaps largely for this reason, there is no evidence that the FBI or the CIA is illegally tapping conversations within the United States without obtaining a warrant under one of these statutes. There are cases, however, where the court should not have authorised the surveillance, but that is a different type of violation than simply tapping a phone without judicial approval.

3. Restrictions on FBI and CIA files on individuals

Individuals are also entitled to see files that the CIA or the FBI maintains on them, again with some exceptions. Indeed, as a general matter, the CIA is not supposed to have files on Americans, other than those people who work for the agency. In addition, the Privacy Act restricts government files on an individual's First Amendment activities: speech, associations, political, or religious activities.

2.5 Accountability and Transparency to the Public

Representative democracy, in which elected representatives act with the consent of the people, depends upon an informed electorate. As most famously put by James Madison, one author of the United States Constitution, "Openness is an essential part of democracy because knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."

Thus, a key element of the system of accountability is legal protections for freedom of speech and public access to information about the intelligence agencies. Indeed, I would argue that the effectiveness of all other controls on intelligence activities depends in large measure on the existence of checks against excessive secrecy. Public access to information has generated the public debate and pressure by NGOs and others, which have fuelled all the important reforms of the last 25 years or so.

There are multiple checks on excessive secrecy, including laws like the Freedom of Information Act, the Intelligence Oversight Act requiring that Congress must be kept fully informed concerning all intelligence activities, and free speech protections for journalists and government officials writing and speaking about national security matters. As a result of these laws, an enormous amount of information is publicly disclosed by the agencies and discussed in the Congress concerning intelligence objectives, methods, successes, and failures. And, there is general recognition that national security secrecy must not be allowed to shield information about government violations of human rights, civil liberties or other laws. The key checks on excessive secrecy are outlined below.

Freedom of Information Act

The Freedom of Information Act applies to the CIA, the FBI and other intelligence agencies in the same way that it applies to the Department of Health and Human Services. It requires the intelligence agencies to search for information requested by anyone and to provide a detailed statement of reasons if the agency withholds the information. Only information that meets the standards for classification under a presidential order may be withheld. The Freedom of Information Act itself incorporates institutional checks and balances by providing for independent judicial review. Anyone who makes a request for information under the law may go to court, and the court must determine whether the information is in fact properly classified. In deciding, the judge is entitled to look at the classified documents, outside the presence of the lawyer for the requester.

Researchers, journalists, historians, and NGOs like the Center for National Security Studies and the National Security Archive use the Freedom of Information Act very successfully to obtain important information from the CIA and other agencies. For example, these NGOs recently forced the CIA to release an internal report prepared by the CIA Inspector General on the disastrous attempted invasion of Cuba at the

Bay of Pigs in 1961. They also sued the CIA and forced release of the amount of the intelligence budget for two consecutive years. However, as of this writing, the CIA is again resisting disclosure of the amount of the 1999 budget, and the court has not yet decided the question.

Classification standards

The rules for classifying national security information are not made by the security services themselves, but are public and set forth in an Executive Order signed by the President. When President Clinton was elected, civil liberties groups like the Center for National Security Studies urged him to revise the outdated Cold War secrecy policies of the earlier administrations and proposed a draft of a new order setting classification standards. There was then extensive public debate in the Congress, the press, and the public interest community about new classification standards and the administration circulated several drafts of a proposed order to Congress and NGOs for their comments. The President signed a new order in 1995 incorporating some, but not all, of the recommendations made by the NGO and journalist community.

Classification standards only work to protect against excessive secrecy if they are narrowly and specifically written to define what may be kept secret and what constitutes harm to national security. It is also important to have an internal administrative process for reviewing classification decisions.

The current executive order signed by President Clinton in April 1995 reflects these principles to some degree. It provides that only information in the possession or control of government agencies may be classified. In order for information to be classified, its disclosure must reasonably be expected to result in harm to the national defence or foreign relations of the United States and the official making that determination must be "able to identify or describe the damage." The Executive Order directs that "if there is significant doubt about the need to classify information, it shall not be classified." Information may not be considered for classification unless it concerns specific designated subjects, including military plans, weapons systems, or operations, foreign government information, or intelligence activities. Most information must be declassified within 10 years of its original classification marking unless its disclosure would cause a more narrowly defined kind of damage. All information is to be automatically declassified after 25 years unless the head of the agency, for example the

Secretary of Defense, determines that its release would cause specific kinds of listed harm.

In connection with adoption of the current classification order, there was a great debate over whether classification and declassification decisions should explicitly weigh the potential national security harm from disclosure against the public interest in knowing the information. President Carter's Executive Order had required such consideration in making declassification decisions and many public interest groups urged the adoption of such a standard as the only meaningful way to ensure protection of the public's right to know, and to curb the excessive secrecy that had arisen during the Cold War. Such balancing best protects the interests on both sides: the public interest in disclosure will depend upon the relevance of the classified information to public policy debates; and the harm from disclosure must be evaluated in terms of the specific information at issue, the specific dangers posed by openness and the likelihood and magnitude of the harm. While President Clinton's order refers to consideration of the public interest in disclosure when deciding whether to declassify documents, it nowhere requires such consideration. This important requirement was omitted from the final order (although contained in an earlier draft) because the Executive branch wanted to avoid courts balancing national security harm and the public interest in deciding whether information was properly classified under the Freedom of Information Act. In 1997 and 1998, legislation was introduced in Congress to amend the Freedom of Information Act to require the courts to weigh the public interest in disclosure against the national security harm.

Free Speech protections

Another check against excessive secrecy is the constitutional protection for free speech. The First Amendment of the Constitution protects both journalists or other private individuals who write about national security matters and government officials who speak to the press, even when it is charged that they provided classified information to the press.

Most scholars believe that an "Official Secrets Act" would violate the First Amendment and Congress has consistently refused to enact a law to criminalise the release of non-public government information. Congress has, however, criminalised the release of certain narrow categories of information, taking into account the public interest in knowing such information as well as the harm from disclosure. For

example, the Intelligence Identities Protection Act of 1982 makes it a crime for persons who, having learned the names of intelligence agents through their government employment, publicly disclose such names. That statute was supported by civil liberties groups because it was deemed appropriately narrowly drawn, provided adequate notice to employees of what was covered, and applied only to information whose disclosure would be likely to cause concrete harm and is not important to public policy debates.

At the same time, civil liberties groups, including the Center for National Security Studies, defended a civilian Navy official who was criminally charged with having given the press a classified satellite photograph of a Soviet submarine. We urged that the official's First Amendment rights had been violated because no law specifically stated that disclosing such information is criminal, and even if there had been such a law it would have been unconstitutionally overbroad. The First Amendment prohibits making disclosure of all classified information a crime because doing so would stifle public debate and choke off the flow of information necessary for democratic accountability and democratic decision-making about national security and foreign policy matters. While the court in that particular case rejected the free speech arguments, no other court has approved them, and there has only been one such prosecution for "leaking" classified information to the public in the last 20 years.

Another major constitutional protection is the rule that the news media may publish information free from any prior restraint. The Supreme Court has repeatedly said that prior restraints, such as court orders not to publish certain information, are presumptively unconstitutional. This principle was strongly affirmed in the 1971 "Pentagon Papers" case in the Supreme Court. In that case, the Supreme Court unanimously affirmed that the government could not obtain a prior restraint, enjoining publication of classified information during wartime. The *New York Times* and *Washington Post* newspapers were free to publish a classified Defense Department study on Vietnam, clandestinely given to the newspapers in the midst of the Vietnam War. The Supreme Court justices wrote that the government had not proved that disclosure of the classified information "will surely result in direct, immediate and irreparable damage to our Nation or its people." The government is unlikely to ever be able to meet that legal standard, and as a practical matter, if the government were to try to censor publication of classified information, such an attempt would simply ensure that the secret

information was printed and distributed even more widely than it would have been in the absence of the attempted censorship.

3. Changes since September 11

In the wake of the September 11 attacks, the United States is in the midst of the most massive restructuring of its intelligence agencies since the 1970s. Unfortunately, it is not clear that such restructuring is taking place with the requisite deliberation and thoughtfulness needed to ensure both an effective anti-terrorism capability and to protect basic civil liberties.

In June 2002, President Bush announced plans to form a new Department of Homeland Security, by consolidating and reorganising more than 20 federal agencies. The President had been opposing congressional proposals for such a Department, but now urged the Congress to pass the necessary legislation. [The new Department now exists, but the following paragraphs – written in the second quarter of 2002 – highlight the issues raised by its creation – Editors]

The President has proposed that the new Department should include the Immigration and Naturalisation Service (INS), now housed in the Department of Justice, which has responsibility for collecting information about not only the hundreds of millions of foreign visitors, but also the millions of immigrants to the U.S. It is not yet decided what kind of intelligence capability the new department would have. The Administration has proposed, with little explanatory detail, that it have an analytic capability, but no collection capability. (But it has failed to explain how the INS functions would affect this.) However, many Senators and others have called for a much greater intelligence collecting capacity in the Department and even for the creation of a new domestic Internal Security Agency, citing the model of the UK's MI5.

At the same time, the House and Senate Intelligence Committees are conducting a joint investigation into the September 11 intelligence failures and expect to issue a report by the end of 2002 with comprehensive recommendations for intelligence reforms. At present, there seems to be tentative agreement between the Congress and the President not to undertake any massive restructuring of the FBI or the CIA in the meantime before the report is finished.

However, many changes have already been adopted, some by the agencies themselves, others by Congress, which will have long-lasting and fundamental effects on intelligence agency authorities to operate

inside the U.S. The FBI, for example, has announced that it will concentrate many more resources on counter-terrorism, rather than on its traditional responsibilities for enforcing federal criminal laws, e.g., against organised crime.

Perhaps the most troubling aspect of many of the changes has been the effort simply to tear down the walls between law enforcement and intelligence activities. While the attacks dramatised the long-running problem of lack of co-ordination between the CIA and the FBI, what has been missing has been any careful approach to that problem.

Distinctions between Intelligence and Law Enforcement

When Congress created the CIA in the 1947 National Security Act, it drew the lines very sharply between the agency and the FBI in order to protect civil liberties. Thus, it prohibited the CIA from exercising any “police, subpoena, law-enforcement powers, or internal security functions.” After Congress found that both the CIA and the FBI had engaged in massive political spying on Americans, one of the key reforms of the 1970s was the attempt to enforce the original intent of the National Security Act: to create a wall between law enforcement and intelligence agencies and to eject the CIA from domestic activities.

That wall has been most visible in the statutory authorities for eavesdropping: one law governs wiretapping in the investigation of crimes and the 1978 Foreign Intelligence Surveillance Act (FISA) governs wiretapping of agents of a foreign power inside the United States for the purpose of gathering foreign intelligence. The distinction is also mirrored in the Attorney General Guidelines which, in the absence of any statutory charter for FBI investigations, set out the rules for FBI activities. Those guidelines provide one set of rules for criminal investigations and another for gathering foreign intelligence relating to espionage or international terrorism inside the United States. The rules for gathering foreign intelligence allow the government much wider latitude to gather information about Americans and keep it secret than are allowed under the criminal investigation rules.

Perhaps most importantly, different functions have been assigned to the CIA and the FBI. The CIA has been confined to gathering foreign intelligence abroad regarding the intentions and capabilities of foreign powers for use by government policymakers. The FBI has been responsible for law enforcement and for counter-intelligence activities

inside the U.S., both counter-espionage and the conduct of international terrorism investigations.¹⁵

Terrorism, of course, like espionage and to a lesser extent international narcotics trafficking, is both a law enforcement and intelligence matter. Individuals like Osama bin Laden, while under indictment for the embassy bombings in East Africa, have acted in ways that fit more easily into traditional notions of state rather than individual power. As such, terrorism poses difficult analytical problems concerning the standards for investigation and the protection of intelligence sources and methods consistent with the requirements of due process. Terrorism investigations also stand at the intersection of First and Fourth Amendments concerns. It is crucial to distinguish between those engaged in criminal terrorist activity and those who may share the religious or political beliefs or the ethnic backgrounds of the terrorists but do *not* engage in criminal activity.

The need for reconciling law enforcement requirements and intelligence concerns had increased, even before September 11, as the U.S. Congress expanded the extraterritorial reach of the U.S. criminal code (without, however, ensuring that constitutional protections accompanied the expansion of US police power).

But instead of carefully considering how to increase the necessary Cupertino and collaboration between foreign and domestic, foreign intelligence and local law enforcement, there are many efforts to simply eliminate the distinction. They began before September 11. In 1996, Congress amended the 1947 National Security Act to assign the CIA law enforcement responsibilities for the first time, authorising the CIA to undertake the illegal collection of information overseas for the sole purpose of making a criminal case against a foreigner in a U.S. court.

Since the September 11 attacks, there has been a seismic shift in responsibilities between law enforcement and intelligence agencies.

¹⁵ This difference in functions has been mirrored in the difference in agency methods. The CIA acts overseas and in secret, those activities are frequently illegal, and it collects information without considering individual privacy, rights against self-incrimination or evidence admissibility requirements. It is tasked not just with collecting information, but also with covert disruption and prevention. The agency gives the highest priority to protection of its sources and methods. In contrast, the FBI's law enforcement efforts involve the collection of information for use as evidence at trial, and its methods and informants are quite likely to be publicly identified. Perhaps most significantly, and unlike intelligence agencies, law enforcement agencies must *always* operate within the law of whatever jurisdiction they are operating in.

The USA Patriot Act

The new anti-terrorism law, the USA Patriot Act, passed in October 2001, first expanded the secret surveillance authorities under the Foreign Intelligence Surveillance Act (FISA). The Patriot Act turned the premise of FISA upside down and eliminated the constitutionally mandated requirement that these extraordinary powers be used only for foreign intelligence purposes, not when the government is seeking to make a criminal case. It then put the Director of Central Intelligence in charge of identifying which Americans to target for these wiretaps and secret searches.

In addition, the Patriot Act requires the Attorney General to turn over to the Director of Central Intelligence all “foreign intelligence information” obtained in any criminal investigation, including grand jury information and wiretap intercepts. The need for law enforcement and intelligence agencies to co-operate and exchange information on terrorism is clear; however, this mandatory sharing is not limited to information related to international terrorism. Instead, the Act requires the Justice Department to give the CIA *all* information relating to any foreigner or to any American’s contacts or activities involving any foreign government, organization, or individual without setting any standards or safeguards for using the information. Finally, the Patriot Act simply expanded the definition of terrorism, instead of carefully defining those criminal acts of international terrorism where the CIA usefully could be involved.

Since the enactment of the Patriot Act, the administration has undertaken a series of steps that taken together suggest a deliberate decision to abandon the law enforcement paradigm for government investigations of individuals in the U.S. and to substitute an intelligence paradigm that seeks to gather secretly all information that might turn out to be useful. There is now reason to worry that the intelligence notion of covert disruption – as distinct from criminal investigation -- will again be applied to individuals and groups inside the United States.

In May 2002, the Attorney General amended the guidelines governing FBI criminal investigations inside the U.S to eliminate the requirement that before the FBI may collect information on the lawful political or religious activities of Americans, it must be investigating a past or planned crime or criminal conspiracy. (This requirement had not applied to FBI investigations to collect “foreign intelligence.”) The May changes basically authorise widespread “intelligence” collection of publicly available information in place of criminal investigations. The

changes are especially troubling because the guidelines contained only limited safeguards against abuse, even before the changes.

The administration has consistently justified its anti-terrorism measures as an intelligence operation designed to prevent further attacks not to prosecute criminal violations. It has argued that the secret arrests of hundreds of individuals without probable cause and their indefinite detention when charged only with minor immigration violations are an essential piece of a larger intelligence “mosaic.” The Justice Department has similarly defended its new policy of eavesdropping on the attorney-client communications of detainees as necessary to obtain intelligence information that would not be used in criminal proceedings against the detainee. Additionally, one of the key justifications for the President’s extraordinary order authorising secret military detention and trial of aliens arrested in the U.S. is the need to protect intelligence sources and methods.

These changes have been made with no public discussion of whether this fundamental shift to an intelligence rather than law enforcement model will in fact be effective in the fight against terrorism. It is not obvious that a dragnet approach to detaining individuals or an intelligence effort to collect *all* information, relevant or not, will be as effective as a focused law enforcement investigation aimed at identifying, surveilling and arresting those involved in criminal activity.

CHAPTER X

ACCOUNTABILITY

Most of the basic topics in debate on accountability and transparency in the running of security-sector organisations are variations on the theme of Juvenal's celebrated question: *quis custodiet ipsos custodes?* Who will guard the guardians themselves? As noted in the Introduction to this study, democratic theory's answer is the legitimate government of the state (or region or municipality), which is itself answerable to an elected chamber or chambers, whose members – as representatives of the people – in turn serve at the will of the people, as expressed formally in free and fair ballots regularly held and informally through the activities of interest groups and other civil society institutions.

On the evidence of our sample survey of seven states' practice, provision for the accountability of non-military organisations – law enforcement bodies and intelligence agencies – varies considerably. Arrangements for executive direction differ in the extent of centralisation and in the attention to detail the authorities exercise. The legislature may rely more or less exclusively on holding responsible ministers to account, or elected representatives may engage in – or try to engage in – more intimate and intrusive oversight. In matters of *operational* accountability, where checks on the possible abuse of power by institutions or individuals are important, the courts, human rights commissioners and Ombudspersons may play important roles. Alternatively, there may be heavy reliance on service codes of practice and self-regulation (often backed, in police forces, by investigative squads of 'internal affairs' officers). Here the main external safeguards may be provided by 'civil society' watchdogs: the print and broadcast media, activists attentive to matters of human rights and freedoms, and so on.

This diversity is apparent from the following paragraphs of commentary on what Part Two's country profiles have to say about accountability in its various forms and at different levels. (Observations on transparency follow in Chapter XI, and on 'other issues' in Chapter XII.)

Executive

In *Bulgaria* the executive, and particularly the Minister of Interior, has effective control over law enforcement bodies and intelligence agencies. The government determines the amount of their funding, determines the number of personnel working for the services, controls appointments and the dismissal of individual officers, and has access to all the information generated by the services including that related to individual operations. There have been cases where heads of services have been more independent of the Minister of Interior and the Council of Ministers, but in these instances they typically had the support of the President, where the President was backed by a political party different from the party in government. Even in such cases, however, a newly-elected government has been able to replace the heads of services who openly disobeyed. Concerning the security services the powers of the Presidency function as a balance between the executive and the parliament and between different political parties. This is particularly important, because of the complete lack of effective parliamentary control.

Arrangements in *France* give maximum autonomy to the executive and the greatest amount of political responsibility to the Prime Minister. The President is not a key actor. The Prime Minister is the only person politically accountable for possible faults or mismanagement, even those originating in the lowest ranks of the administration. Such a concentration and political conception of accountability reduces the probability of effective evaluation of the Prime Minister's responsibility for what his individual ministers do. As a result, the Prime Minister can always terminate the appointments of his ministers and of the central directors. However, such orders have to be countersigned by the President, a requirement that may lead to some tensions in the case of 'cohabitation' (President and Prime Minister from different political groups). As for financial accountability, this is well secured in France. Every expense of the police and gendarmerie must be part of the annual finance law. Finance ministers evaluate the needs and resources of these forces. The Ministry of Finance delegates a permanent commissioner to every ministry, to control the way resources are spent and to make sure that the way resources are spent conforms to the provisions of the annual finance law. The ministry also leads the (formally) independent finance inspectors who can inquire at any time about financial control within every public administration.

Matters are rather more complicated in *Italy*. Here all law enforcement bodies except for the carabinieri and the financial police are under the Ministry of Interior – the two exceptions falling respectively under the Ministries of Defence and Finance. That said, when this pair are engaged in helping safeguard public order, they too act under the authority of the Ministry of Interior. The internal and the military intelligence agencies are responsible respectively to the Ministers of Interior and Defence, both of whom can conduct investigations and inquiries. However, the Prime Minister is responsible for the (co-ordination of) activities of the intelligence agencies. The Court of Auditors controls all budgets for the law enforcement and intelligence services, except for some so-called reserved expenses for the intelligence services (decided by the Prime Minister).

All services in *Poland* are formally subordinated to the Prime Minister, who appoints the heads of formations. Law enforcement bodies are subordinated to the Minister of Internal Affairs and reviewed by the parliamentary Committee for Administration and Internal Affairs. The intelligence agencies report directly to the Premier. Their activities are co-ordinated by a Security Services Council attached to the Council of Ministers and overseen by a parliamentary Security Services Committee. The state prosecutor supervises and commissions investigations by the police and the internal security agency. The Ministry of Finance controls the budget of the police, whereas the Ministry of Internal Affairs controls the budgets of the other law enforcement agencies. Finally, a highly effective mechanism is the Supreme Board of Audit, which is responsible for not only inspection of budget expenditure but also for its expediency and effectiveness. The problem is that most reports provided by the Board's inspectors are secret.

In *Sweden* the police and security service answer to the Ministry of Justice. There is no system of ministerial responsibility, so the services are accountable to the government as a whole. The government also assigns all the chief positions within the legal system. It can also create special commissions of inquiry, consisting of MPs and/or lawyers. These have however not been valuable in the past. Formally the Security Police falls under the National Police Board (NPB). However it operates with a degree of autonomy, apparently because members of the NPB lack the time and expertise to investigate the service's activities. It is therefore easy for individual members of the Security Police to evade governmental control and oversight.

In the *United Kingdom* the modality of executive accountability is informal. The heads of the security services and intelligence agencies meet regularly with their political masters, and there is frequent contact between agency officials and civil servants in relevant departments. As the UK has no written constitution, all authority over these organisations and their roles and responsibilities is statutory. In what we have called the ‘operational accountability’ area a peculiarity of British practice is that permission for surveillance – warrants for phone-tapping, ‘bugging’ of premises and so on – is granted not by the courts but by the Home Office (formally by the minister in charge, the Home Secretary). All services are subject to a very tight financial control by the Treasury. Although this has no specific statutory basis, it is in fact the key instrument of executive accountability. In addition, much depends on the personality and priorities of the Home Secretary. Regarding the (decentralised) police, central executive control has been enhanced by the Police Reform Act 2002 which gives the Home Secretary additional powers, including the right to order the removal of a Chief Constable. Police officers have interpreted this law as an intrusion of central government into the business of operational direction.

In the *United States* the intelligence agencies are accountable to the President, as laid down in an Executive Order that outlines their structure, roles and responsibilities, as well as restrictions on their activities (which, however, do not give rise to any enforceable legal rights on the part of anyone who might be harmed). The President also has the services of an Intelligence Oversight Board, which gives him independent advice and nominally supervises all intelligence activities. The President can empower the Board to conduct investigations. The FBI falls under the authority of, and reports to, the Attorney General within the Department of Justice.

To sum up on non-military security-sector organisations’ accountability to national governments in the seven countries surveyed, it is clear that differences greatly outweigh similarities. Picking-up a phrase from an earlier chapter, considerations of ‘constitution, culture and custom’ provide the obvious explanation. What can be said, though, is that all the states in our sample recognise that there have to be *some* arrangements for civil executive direction of these bodies. The possibility that police forces, other (internal) security services and intelligence agencies might become, or might already have become, a ‘law unto themselves’ is one that has to be guarded against under any model of democratic governance.

Legislature

Diversity is evident also in national arrangements for legislative oversight of the security-sector organisations covered in Part Two's country profiles.

They are very weak in *Bulgaria*. There are no special rules or procedures specifically dealing with parliamentary oversight of the security services. To the extent that anything resembling 'democratic control' is exercised it is as part of the general powers of the National Assembly to hold the executive to account. There is a permanent Internal Security Committee (ISC), but the regulations on its structure and activities are confidential and not accessible to the public. From a purely legal standpoint – based on the constitution and the rules of the elected chamber – the committee should be able to gain access to any document or information. It even should be able to investigate any particular case in which it is interested. However, the commission is not an effective watchdog, because of its set-up and Bulgarian party politics. The majority in parliament not only forms the government – which, as explained earlier, directs the security services – but also has a majority in every parliamentary committee. This is almost certainly what accounts for the ISC's apparently passive behaviour. It meets behind closed doors, and makes public very little of what transpires. If it does exercise influence, the results of its interventions do not become known. Furthermore, as long as the services have the support of the executive, for all practical purposes they can evade other attempts at 'control'.

There are very few formal and constitutional provisions for exercising oversight in *France* either, so it is not surprising that here too detailed parliamentary scrutiny of non-military security-sector organisations is virtually non-existent. (This is, of course, a country where no administrative organ is directly responsible to the legislature.) The Senate or National Assembly can create a special commission to inquire about misconduct within the police forces and report. However only the Prime Minister can impose sanctions. In both houses there is a defence committee and a law committee (of which the latter has oversight powers over certain police areas), but these only supervise the executive in a general way (in connection with legislation rather than policy and operations). As for financial accountability, deputies can exert some control over resources and spending in the course of preparation and discussion of the annual finance law. For example, they can put questions to a minister or one of his officials in order to obtain better

information concerning the resources and needs of the administration. In addition both legislative chambers have finance committees that can do specific audits on the forces. These committees can also ask the Audit Court to investigate specific financial matters.

In *Italy* the police forces are indirectly controlled and answerable through the legislature's oversight of the executive. The Interior Ministry's Department of Public Security presents an annual report on the activities of all law enforcement agencies, and a report on the situation of organised crime, but these submissions do not have to be approved by elected representatives. The intelligence agencies are accountable only to the Ministers of Interior or Defence. There is a parliamentary Committee of Intelligence Services and National Secrets. However, it is not allowed to receive documents directly or to conduct inquiries. It can only ask the Prime Minister for general information on activities; and the Premier can refuse a request by citing reasons of state secrecy. Nor does the committee possess any powers of budgetary control. In fact the only material provided to parliament is a periodic information paper prepared by the government.

Accountability to the legislature in *Poland* is largely pro forma. There was no parliamentary oversight of the security services at all before 1995. In that year a Committee for Security Services (CSS) was established. There is also a Committee for Administration and Internal Affairs (CAIA) that supervises, among other things, the law enforcement organisations. The CSS has nine members – six coalition deputies and three opposition deputies – and is chaired by a representative from the opposition. It comments on the co-operation between different agencies and reviews their budgets and annual reports. It does not perform effective scrutiny, principally because the ruling parties regard all oversight as an unwarranted intrusion into a particularly sensitive part of their domain. So far, all motions for investigation submitted by the committee's opposition deputies have been voted down by the majority. Within the CAIA the position is much the same: in fact both the opposition and especially the coalition deputies in practice act as a lobby for the law enforcement bodies. They believe that the three agencies deserve extended powers, in the interest of better crime control. Most members lack the competence to perform critical parliamentary oversight; and the committee's experts are former police officers or scholars institutionally dependent on the police.

In *Sweden* there are two standing parliamentary committees that have the competence to investigate the police, including the Security Police.

These are the Committee on the Administration of Justice and the Committee on the Constitution. Neither consists of experts in security affairs, their staff resources are limited and they have limited time to devote to inquiries on security matters. Moreover, neither can take evidence under oath. Still, both have on occasion looked at the activities of the state's Security Police – the special interest of our Swedish contributing author. To illustrate the committees' inadequacy as tools of legislative accountability, he cites the fact that the security vetting system has been investigated on a number of occasions without bringing to light the extensive practice of improper registration of lawful political activity.

In the *United Kingdom* there was no legislative accountability for the intelligence services at all until 1994. In that year the Intelligence Services Act established the Intelligence and Security Committee (ISC). While this body has only limited oversight powers, it has shed useful light on how the intelligence community works and how intelligence is used (and misused) by ministers, especially in a recent report on how the material about Saddam Hussein's 'weapons of mass destruction' was prepared and presented in the run-up to the invasion of Iraq (2003). However, the House of Commons' main financial watchdog, the Committee of Public Accounts, has never had access to information about the internal workings of these services. So far as the police are concerned, the Home Affairs Select Committee exercises general oversight of the country's regional constabularies (which are also locally accountable, of course). There is no specific parliamentary accountability for the National Criminal Intelligence Service. Clearly legislative oversight could be improved, since the statutory limits to lawmakers' powers are severe.

Policing is a regional- and city-level business in the *United States*, with local legislative oversight. At the federal level the Congress has far-reaching powers. It has constitutional responsibilities with respect to the intelligence agencies. These are exercised as follows.

First, the Congress as a whole votes to authorise the activities of the agencies, to finance existing ones, and to authorise the creation of any new organisations.

Second, the Congress controls funding. It enacts yearly appropriations, in which it can define the exact purposes for which money may be spent and prohibit expenditures for other purposes.

Third, it must confirm the President's nominations for top appointments.

Fourth, it has the power to oversee and investigate the agencies' activities.

The Central Intelligence Agency (CIA) and other 'foreign intelligence' organisations are under the scrutiny of two Congressional committees: the permanent Select Committee on Intelligence of the House of Representatives and a similarly-named body in the Senate. Other committees in the Congress also have concurrent authority to concern themselves with certain activities: namely the Appropriations Committees, the Armed Services Committees, the Judiciary Committees, and the Foreign Relations Committee (in the Senate) and the International Relations Committee (in the House of Representatives). The Intelligence Committees hold both open and closed hearings. Committee meetings to discuss and vote on legislation are frequently held in private, although the legislation itself is public and the committee's report on the legislation is also public. The basic rule is that if classified information is being discussed, the committee proceedings will be closed; otherwise they will be open. In addition to legislative work, the Intelligence Committees are authorised to conduct investigations regarding agencies' activities. The Committee's final action in such inquiries is to publish a comprehensive report, which often leads to legislative or administrative reforms.

Summing-up on our sample countries' arrangements for accountability to elected representatives, it is clear that only the US comes close to practising what the good governance textbooks preach. Elsewhere, from 'feudal' democracies to so-called 'transition' states, the legislative oversight of security services and intelligence is often little more than nominal.

Judiciary

What, then, of the courts? In particular, what part do they have in regulating how non-military security-sector organisations do what they do – requiring operational accountability?

In *Bulgaria* they have played only a limited role in controlling the services. Only recently were procedural rules changed, to require prior judicial approval of searches, seizures and surveillance. Otherwise the law makes any administrative decision related to 'national security' exempt from judicial review; and, since the services have full discretion about defining what impinges on 'national security', they can avoid the

judiciary's scrutiny. Furthermore, police officers' criminal responsibility – e.g. for the unlawful use of physical force or firearms – does not function efficiently. Court hearings in cases of disciplined officers are often held behind closed doors. The Prosecution Office, despite the fact that it is fully independent of the executive, also plays no meaningful role in holding the services to account. Indeed, in a widely-reported episode involving allegations of illegal wiretapping, it was assumed that the Chief Prosecutor himself was among the victims. On top of that, not so long ago the Justice Minister accused the Prosecutor-General of political bias, a further indication that the executive neither respects nor trusts the independence of the judiciary.

The position in *France* is that in relation to police forces – but not intelligence agencies – the courts are key instruments of operational accountability, together with internal boards. Every complaint levelled at the police is examined by the public prosecutor and can lead to a criminal law procedure. The police officers in charge of crime control (OPJs) are answerable to the public prosecutor as well as their own superiors. They are assigned by him and work under his supervision or under examining magistrates. In financial matters the Audit Court monitors the use of resources. The arrangements are not without their problems. The structural dependence of justice on the 'criminal police' is one. Another is the loading of responsibilities on prosecutors, who are more and more independent of the executive branch but have fewer resources for dealing with their daily tasks. This leads to two difficulties: a lack of time to exert their competences in the field of controlling the police; and greater dependence on OPJs for the daily administration of (criminal) justice.

In *Italy* the judiciary is an important instrument of operational accountability. Most basically, in the exercise of his powers each member of the police forces is subject to the law just like any other citizen. More significant, though, is the role of the public prosecution service in determining how inquiries are conducted. For instance investigation of criminal cases by law enforcement agencies is carried out under the judicial control and supervision of this service. In terms of accountability, the hierarchical set-up places the lowest ranking official within the public prosecution service above the highest-ranking official within the police forces acting as judicial police. At the same time the service has an ambivalent position: on the one hand it belongs to the judiciary (which is autonomous and independent), on the other hand it controls the application of the law and the administration of justice (for

which it is answerable to the Minister of Justice). This is controversial, as is a proposed criminal justice reform law which says that if defendants have legitimate suspicion of bias on the part of the judge conducting their trial, it may be shifted to another city under a different judge. That would represent another kind of erosion of the independence of the judiciary.

As in Italy (and elsewhere), so in *Poland*: a member of a police force who commits an offence falls under the jurisdiction of the criminal court. Breaches of service discipline are dealt with by provincial commanders as well as the Chief Commander of the Police, an offender having the right of appeal to the Supreme Administrative Court against any decision on punishment. The principal problem with judicial power in relation to police forces, security services and (especially) intelligence agencies generally is that courts have no access to classified papers: agencies simply refuse to release such material. Moreover there are hardly any cases where the judiciary has pro-actively exercised genuine oversight over the legality of police actions. Practically all cases in which the prosecutor decides to indict an officer are cases where the victim of abuse of power has obtained assistance from an NGO.

In *Sweden* it has been officially acknowledged that scrutiny by the Chancellor of Justice of the activities of the Security Police is inadequate. Judicial control over Security Police methods particularly pertains to telephone tapping and search and seizure. The requirement to involve a prosecutor in such matters is itself a safeguard. The main problem here is that the group of judges to whom warrants are submitted is very small and they have operated in total isolation from supervision. At least in the past, some of these judges have shown themselves capable of renewing authorisations for very long periods. Furthermore, an official investigation concluded that it rarely happens that a request for telephone tapping is denied by the court. Therefore, transparency is the only reliable guarantee against abuse.

Unusually, in the *United Kingdom* the courts are excluded from looking at security institutions and hence play virtually no part in the service of accountability.

It is quite different in the *United States*, where the courts play an important role, notably in ensuring that the numerous intelligence agencies are subject to the rule of law. Employees of intelligence agencies may be – and are – charged, prosecuted and punished for violations. Also the courts support transparency because, under the Freedom of Information Act, they have independent authority to order classified information declassified and made public. The very existence

of this power is effective. When challenged under the legislation, the executive branch usually agrees voluntarily to disclose more information than it had been willing to disclose prior to being sued. (The right of the judiciary itself to read and review relevant classified information is uncontroversial.) More generally, the courts judge claims by individuals that the intelligence agencies have violated their rights. There are numerous judicial instruments available to protest against the intelligence agencies using national security as a justification for violating individual liberties (including controls on investigative techniques and guidelines for opening investigations on individuals or groups).

Internal boards (internal accountability)

The recurring theme in this commentary is that ‘constitution, culture and custom’ determine the pattern of external regulation of police forces and other law enforcement bodies, security services and intelligence agencies; and the result is great diversity of policy and practice. Where there is common ground across countries is in the recognition that non-military security-sector organisations need to have machinery for self-regulation – provision for internal accountability – to deter abuse of powers by individual officers or in particular operations.

In *Bulgaria* the Inspectorate of the Ministry of Interior fulfils this function so far as law enforcement agencies are concerned. It reports directly to the Minister of Interior. How it functions is, however, totally non-transparent. The Inspectorate’s findings are not public and even when a procedure is started on the basis of a complaint by an individual that person will not be informed of the outcome. Only the decision to discipline or not to discipline an officer is communicated to the complainant. For this reason, among others, the general public does not trust the system of internal control. (Nor is there popular confidence in self-regulation within the intelligence community.)

France has tried to put in place machinery to deal with police deviance and delinquency. In 1986 a Code of Practice was adopted; and in 2000 a new body for the control of public and private security forces and agents was created, the National Commission for the Ethics of Security (French acronym – CNDS). No significant change can be attributed to either. The country’s police forces are known for a high incidence of abuse cases and for a lack of transparency about methods (as has been concluded several times by the European Committee for the

Prevention of Torture). Operationally they do more or less as they please. (Establishment of the CNDS perhaps represents a belated political recognition that this should not continue.) Internal boards are opaque to the public in two ways. First of all, there is no obligation to publish reports about their activity or inquiries, so that no-one really can evaluate their work. Secondly, they are administrative tribunals, which do not afford procedural justice and equity as the justice system does.

In *Italy* the internal control of police forces is primarily a matter for the chain of command. Superiors are responsible for the actions of their subordinates. The responsible ministers, with the help of their departments, have authority over their respective agents and can impose disciplinary sanctions. The Central Inspection Office is a specialised office within the Ministry of Interior that supports the Head of Police in monitoring all public security offices and police units.

In *Poland* all law enforcement services have internal boards responsible for investigating alleged violations of laws and generally holding officers to account. There are also 'courts of honour' which efficiently support compliance with the rules of professional ethics. (They are not competent if disciplinary proceedings have been initiated against a policeman, or if his action might constitute an offence or transgression.)

Regarding practice in *Sweden*, in the area that is the focus of attention in Chapter VII – the Security Police and, in particular, their record-keeping – the key instrument of 'internal accountability' is the Register Board. This body consists of three lawyers and two MPs (from the two largest parties). In addition, the Parliamentary Ombudsman and the Chancellor of Justice have the power to examine the Security Police, and the Standing Committee of Justice has an annual meeting with the Head of that organisation. None of these, however, has specific powers to order the Security Police to act in a special manner or to overrule an operational decision (and this goes even for the Ministry of Justice).

In the *United Kingdom*, there are arrangements covering both the (decentralised) law enforcement area and intelligence activities. The Police Reform Act 2002 has established machinery for the independent investigation of complaints against the police, namely the Independent Police Complaints Commission. The Act also provides powers to ensure the consistent application of good practice across the country through statutory codes of practice and a power to make other regulations governing policing practices and procedures. Covering the intelligence agencies, there is an Intelligence Services Commissioner, a part-time

official who is normally a senior judge. He has a wide remit to look at the agencies' exercise of their powers and also the conduct of the minister(s) empowered to authorise bugging and other intrusions by these services. In addition, there is a separate Commissioner and Tribunal that specifically deals with telephone tapping by all agencies. The Commissioners are part-timers with very few staff: they cannot do very much. Our British contributor says the Tribunal is useless, being restricted by many limitations both on what it may inquire into and on its powers of gaining evidence. (There has been such a body, in one form or another, for 15 years; but it has never upheld a complaint.)

In the *United States* there are many more institutions engaged on monitoring intelligence activities. The Office of Intelligence Policy Review in the Department of Justice is responsible for reviewing national security surveillance of individuals inside the US and other sensitive foreign intelligence matters. There is an extensive series of laws and regulations governing the collection of foreign intelligence inside the US and the lawyers in this office are responsible for interpreting those laws. The Department of Defense also has an Office for Intelligence Oversight. There are also Inspectors-General in most agencies that are specifically charged with receiving and investigating complaints of misconduct. Similarly, lawyers in every intelligence agency play a key role in reviewing whether the organisation's activities are being carried out within the law.

The bottom-line on self-regulation is that disciplinary boards – plus special officers and commissions functioning as, and perceived as, internal to the national system of law, order, and the administration of justice – can be useful accountability instruments, but they labour under the suspicion that their conscientiousness and objectivity may not always be as claimed. Many countries have therefore set up institutions expressly charged with safeguarding citizens' rights. These merit separate commentary.

Human rights commissioners, Ombudspersons

There is no human rights commissioner or other Ombudsman-type institution in *Bulgaria* with a remit that encompasses security services and intelligence agencies. Individuals who believe that they have been improperly treated by such organisations may, however, complain to the

Inspectorate of the Ministry of Interior, or, where there is sufficient evidence that a crime may have been committed, to the prosecutor.

In *France* human rights commissioners do not have any institutionalised powers in relation to police forces, security services or intelligence agencies. As noted earlier, though, the CNDS now exists to monitor police activities; but only the Prime Minister or an elected representative can refer a matter to this commission. The CNDS has investigative powers, it can organise hearings and direct inquiries (and its remit extends to embrace private security agencies). It makes recommendations and issues an annual report. There is an Ombudsman-like office in the country – the Médiateur de la République – but the role of this institution regarding inquiries into the abuse of powers by the police or gendarmerie is quite limited. There is also a national commission on the control of phone-tapping, which authorises requests for taps. However, its official and transparent procedure does not apply to matters of national security and the prevention of terrorism or surveillance related to drug trafficking and organised crime.

Italy has no official institution empowered to receive and investigate complaints by citizens. Alleged abuses must be brought to the attention of the judiciary with a view to criminal investigation. In *Poland*, on the other hand, the work of all public bodies is reviewed by the Commissioner for Civil Rights Protection (Ombudsman) whose office has a separate department for oversight of civil servants. However, this is staffed mostly with retired officials about whose objectivity opinions differ. There is a Parliamentary Ombudsman in *Sweden* also, with a jurisdiction that extends to the police, including the Security Police. In fact the Ombudsman has criticised the Security Police on occasion, but usually refrains from investigating operational decisions. The office suffers from a lack of expertise. Also, like the Chancellor of Justice, while the Ombudsman can examine a case, make critical observations and even prosecute, he cannot correct abuses.

The *United Kingdom* has an Ombudsman to whom citizens have recourse when in dispute with officialdom about the application of laws and regulations generally, but no human rights commission that concerns itself with their treatment at the hands of security-sector institutions. From 1985 to 2002 a Police Complaints Authority (PCA) existed to handle public complaints against officers of the country's 50-plus police forces. Having lost a case before the European Court in Strasbourg, which held the PCA not sufficiently independent, the British recently set

up in its place an Independent Police Complaints Commission (under the Police Reform Act 2002).

Several amendments in the *United States* Constitution secure human rights: individual freedom of speech and public access to information (First Amendment), the right to due process of law before being deprived of life, liberty or property (Fifth Amendment), the right to a fair trial (Fifth and Sixth Amendments), the right to a public trial (Sixth Amendment), and individual privacy against unreasonable searches and seizures by the government (Fourth Amendment). These protections of individual rights against the power of the government, contained in the Bill of Rights, are written in absolute terms. The Bill of Rights makes no exception for national security.

Obviously, in the US and elsewhere, ensuring that ‘rights’ are respected is what matters. In this regard, human rights and civil liberties NGOs play an important role in the majority of countries covered in this study. Their continuous scrutiny of how law enforcement bodies and intelligence agencies treat citizens (and others) – and how well executive direction and oversight work – is an indispensable element in accountability arrangements.

Media and society-at-large (including ‘whistle-blowers’)

Potentially significant too are the part that the print and broadcast media can play in drawing attention to the misuse of powers, and the contribution that concerned citizens can make in this connection – especially responsible persons within law enforcement and intelligence organisations (‘whistle blowers’ in popular parlance). In our sample survey, however, there are only one or two countries where the cause of accountability is decently served in these ways.

For instance in *Bulgaria* ‘whistle-blowers’ are most likely to face disciplinary action, and possibly criminal charges, for “disclosing state secrets”. Anyone with official access to state secrets would risk a jail term, if he/she were to reveal these to another person. Not only a person with official access to classified documents but also any other person may be held liable for publicising state secrets. A journalist cannot refuse to testify under criminal law, and thus cannot protect his source or sources (even though *Bulgaria* has subscribed to relevant international conventions on this). It is somewhat different in *France*. Here individual citizens have the right to ask the government questions, though law

enforcement bodies are not obliged to answer them. However, journalists can and do unearth information; and they cannot be obliged to reveal its origin or the identity of possible 'whistle-blowers'. In *Italy* also the right of journalists to protect their sources is recognised in legislation. Only the presiding judge (not the public prosecutors) can request journalists to reveal their sources, and then only in extremis.

As a general rule reporters in *Poland* too can protect their sources. In this country, however, our contributing expert says the role of NGOs merits special emphasis. They serve accountability by conducting inquiries of their own and demanding explanations from various structures. In matters of malpractice or abuse of powers, they inform the prosecutor's office about offences, assist victims in legal proceedings, draw up applications to the European Court of Human Rights, inform the media, and publish reports based on their monitoring of violations. In *Sweden*, though, one finds a situation less like that of near-neighbour Poland, more like that of Bulgaria. The authorities acknowledge the right of journalists to protect their sources, except for questions regarding national security. To be a 'whistle-blower' is a crime; and sentencing here, our national expert thinks, has probably sent a clear signal to employees working with the police and security services that they should not forget that.

In the *United Kingdom* all of the four national services dealt with in Chapter VIII – and any other function that is officially labelled 'national security' – are entirely exempt from the requirements of freedom of information legislation. This has not prevented airings of alleged irregularities in the press, and legal proceedings. Nevertheless, the courts tend to be reasonably protective of journalists' rights to protect sources and there is a statute requiring that a special procedure be followed before any journalistic material can be seized by the police. As for 'whistle-blowing', there is an official called the Staff Counsellor – a retired senior civil servant – who is supposed to receive complaints from serving personnel. However there is no evidence that he has ever been used for anything serious.

If the executive in the *United States* is suspected of wrongdoing or hiding information, individual career employees who want to expose the problem or abuses can bring the matter to the attention of the Congress. Such employees are protected from official retaliation. The relevant legislation here exists to safeguard the Congressional interest in receiving accurate and timely information about the agencies and operations it is charged with overseeing. Another law, known as the

'whistleblower protection act' prohibits supervisors and commanders from restricting members of the armed forces from communicating with an elected representative. Similar provisions protect CIA employees who wish to disclose classified information to the Congress. Thanks to the Freedom of Information Act campaigning NGOs and journalists can obtain plenty of material about non-military security-sector organisations' workings.

Regarding media coverage of these organisations, in all the countries under review a division can be made between 'sensational' and 'serious' media. Concentrating on the latter, the evidence from *Bulgaria* is that the papers have failed to report on the activities of the services in a meaningful way. Coverage is often limited to whatever information the different organisations themselves are willing to provide about their activities (depending on the public exposure of a service); and some have developed good skills in feeding the media, leading to treatment showing a certain bias in their favour. Structural concerns and issues of oversight and democratic accountability are rarely addressed. In *France* the media can serve as a kind of independent inquiry commission in bringing some specific affairs to public notice. However, there is not much sustained interest in police affairs *per se*, except where politics and politicians are involved. Similarly in *Italy* there is no thorough coverage of police forces' and secret service activity, or of security-sector issues generally. The media do not appear to acknowledge a duty to inform their readers and viewers.

In *Poland*, though, there are several dailies and weeklies that 'thrive' on crime and scandals. This may well result from specific 'co-operation' between journalists and the police, or even from information obtained from officials of individual services. Nor is treatment wholly sensational. The independent inquiries carried out by serious national dailies and weeklies – into cases of abuse of power and corruption, for example – provide important oversight of security-sector services. In *Sweden* too media coverage of this area is rather good, even though there are only a few competent journalists.

In the *United Kingdom* the broadsheets cover the police reasonably well, but are seriously constrained by the laws of defamation (which, to plaintiffs, are the most favourable in the Western world). The tabloids tend to be more interested in crime stories than in investigating police malpractice. Only a couple of 'heavy' papers offer serious coverage of the intelligence agencies. Much the same might be said of the *United States*.

International codes and conventions

There is an international dimension to the accountability of non-military security-sector organisations. For the most part it resides in politically-binding obligations to which governments have subscribed. These may or may not be honoured; and they may or may not be acknowledged by incorporation in domestic legislation.

Nominally *Bulgaria* subscribes to all the principal codes and conventions in our area of interest. It has not, however, fully implemented them; and, at the time of this writing, the issue of non-compliance was a matter of current concern because of challenges to the expulsion of foreigners on 'national security' grounds and the denial of access to judicial review in cases where basic rights are infringed. The country's own Constitutional Court has to consider possible violations of the Constitution and international human rights law. Pending a decision, the statutory ban on review stays, and the executive retains discretion in defining 'national security' grounds. Several cases of deported foreigners are before the European Court awaiting judgement on the basis of the European Convention on Human Rights. In June 2002 the Court's first ruling found that Bulgarian legislation with respect to expulsion of foreigners on grounds of national security does not meet the requirements of the Convention, and that the lack of judicial review is in violation of the Convention.

France has also signed-up to all the main international codes and conventions, but these do not seem to have had any impact on accountability arrangements. The same applies to *Italy*; but international co-operation has had its effects, as in creation of the EUROPOL national unit and the SIRENE bureau (involving among other things standardisation of the collection and processing of data, and the control of such data by the National Data Protection Board).

Even though *Poland* for the most part observes its international obligations, what leaves much to be desired is the practice of relatively frequent violation by the police of Article 3 of the European Convention on Human Rights, which deals with humiliating treatment or punishment. However, as a general practice, prosecutors tend to discontinue such cases. International conventions are mainly respected in *Sweden*, but not internalised. This is one of those countries where international conventions are to be regarded as binding on organisations only to the extent that they have been transformed into domestic law. Police co-operation mainly takes place through EUROPOL, with no

specific national oversight. All agencies' extra-territorial operations escape scrutiny, as they fall outside national supervision. The Swedish authorities are aware of this fact, but have decided they can live with it.

Like Sweden, the *United Kingdom* is a dualist state: international law is not automatically part of domestic law. As a result its requirements are regarded as of minimal significance, and relatively few people know much about them. So far as the effects of international co-operation on domestic accountability are concerned, the big contemporary issue is the UK/US-led collaboration on electronic surveillance (the Echelon system). There is serious concern that agencies involved in this arrangement could, for example, operate within the UK in ways that domestic organisations are prevented from doing by statute.

Yet for all the ambiguities surrounding the relationship between politically-binding international obligations and domestic practice – including the incorporation (or non-incorporation) of codes and conventions into national legislation – one development cannot be neglected. For subscribers to the European Convention on Human Rights and members of the Council of Europe, the European Court and the Council's European Committee for the Prevention of Torture are becoming factors to be taken into account more and more in the regulation of police and other agencies' business. Europeanisation is leading to harmonisation – and may eventually produce standardisation – of modalities for control of non-military security-sector institutions. Within the EU, the growing influence of community law has clearly resulted in a Europeanisation of vast areas of national law.¹

¹ For an extensive analysis of the backgrounds of the present situation in the EU, see: J. Schwarze, 'Judicial Review in EC Law – Some Reflections on the Origins and the Actual Legal Situation', *International & Comparative Law Quarterly* 51 (January 2002), 17-33.

CHAPTER XI

TRANSPARENCY

Turning now to transparency – the essential guarantor of accountability – in the conduct of non-military security-sector organisations' affairs, our commentary is divided into three parts: first, observations on domestic practice in general; secondly, remarks on publications; and, thirdly, brief words on international obligations and constraints.

Domestic dimensions

In *Bulgaria* a definite 'secrecy culture' prevails; and there has been no pressure from opposition parties, the public or the media to make oversight of police forces, security services and intelligence agencies more effective and their business more transparent. Issues like the budget, the number of staff, and the priorities of the services are rarely discussed in public, thus preserving their opacity. Budgets are included in the total budget of the supervising ministries, so separate information is not available. There is no requirement for annual or other periodic reports by organisations to the parliamentary Internal Security Committee. Nor is the committee obliged to publish the results of its oversight activities. In fact, there is very little the public gets to know about the activities of the committee.

In *France* transparency is simply 'not an issue': apparently nobody asks questions about it. The services examined do communicate with the outside world, but not because of any pressure to be transparent. There are no constitutional or statutory obligations to practise openness. That said, the internet is being used increasingly by different services to disseminate information and documentation, at their own initiative. Moreover, elected representatives at least can find things out if they want to. Thus the police are not obliged to volunteer information to parliament (except for annual budgetary submissions), but the forces cannot refuse to answer a deputy's request for information and the elected chamber can always create an inquiry commission to probe a particular issue.

In *Italy* a lot of relevant information is available to the public and the media – on the websites of the Ministries of Interior and Defence. Here parliamentarians and public can find material on, among other things, the general guidelines governing specific operations. They are also provided with basic statistical information: time-series data on the nature of main crimes committed, the prison population, the nationality of convicted offenders, and so on.

In *Poland* the parliamentary committees receive data on the organisational structure of the law enforcement bodies and intelligence agencies. The public has access only to such data about the police. Information about the budget of individual services and agencies can be obtained from general categories of the Budget Law, with details available to members of competent bodies such as the Budget and Finance Committees.

Categorising *Sweden* under this heading is problematical. On the one hand the country has a well-earned reputation for transparency, for example in terms of the availability of official material to parliamentary committees (as befits a nation that is a stable democracy where the rule of law is secured, with low corruption and a generally good respect for human rights). On the other hand, in the field of intelligence and policing, this is probably one of the most closed countries among the western democracies. The official budget is publicly known as it is specified in the annual bill on the budget submitted to parliament, but no details are given (only the total costs of the services). On all other matters, though, information often emerges first in the media or the work of academics, only to appear later in the outcome of official investigations. Our national correspondent notes that the acronym which best describes the Swedish ‘model’ in our area of interest is COPS: Claim Openness, Practise Secrecy.

In the *United Kingdom*, apart from material called for by the Intelligence Services Committee, none of the agencies is obliged to make available any information to the legislature, and would refuse to do so unless ordered to by the responsible minister. There is no statutory obligation to inform; and, in the absence of a positive duty to supply detailed facts and figures, they are withheld. What is publicly available is the authorities’ sanitised material: the Cabinet Office produces a document called ‘National Intelligence Machinery’ that gives a broad picture of the intelligence agencies (and their overall budgets), the Security Service (MI5) produces a booklet about itself, revised every four years.

In the *United States* the Intelligence Oversight Act of 1980 stipulates that the Congress has the same right to classified national security information as the executive, both because it needs the information to perform its constitutional responsibilities of legislating and overseeing the executive and because the Constitution distributes shared responsibilities to the Congress and the President for decision-making on national security and foreign policy matters. This view is reflected in the House and Senate rules governing the intelligence committees. There is a procedure whereby, after giving the President an opportunity to register his disagreement and state his views, the House or the Senate as a whole may vote to declassify and publicly release classified information. In practice, the Congress and the President are usually able to reach agreement on disclosures.

Domestic publications

A noteworthy feature of the foregoing paragraphs is that, where police forces, security services and intelligence agencies are concerned, elected representatives' (and the public's) *right to know* about the conduct of government business is a notion to which many states pay little more than lip-service. Even the one or two that do more than this make getting access to facts and figures something of an obstacle course and offer few insights into decision-making processes – as opposed to policy, financial and operational outcomes – invoking stringent *need to know* restrictions wherever they think they can. Where a real 'secrecy culture' prevails, of course, such restrictions are so pervasive that they render the affairs of internal security and intelligence organs virtually opaque. These characteristics show up starkly when one examines what official publications states issue and what sort of public information effort they mount.

Thus it is no surprise to learn that in *Bulgaria* there is no practice of issuing regular policy statements or releasing detailed financial data. Nor do the various services produce comprehensive reports. The media are informed about important cases; and the Ministry of Interior issues regular press releases describing crime incidents or offering summary statistics. In a phrase, the organisations do public relations (PR) but not public information.

In *France* there is no obligation to publish information about the police regularly (except for financial matters). However, the police and

gendarmerie issue crime statistics, publish research journals and put out PR material. Practice in *Italy* has been touched on in the preceding section. Basic information – but only basic information – is published electronically (on the law enforcement agencies' and government departments' websites). On the Italian government's site there is a section dedicated to the intelligence agencies. It contains material on their organisation and on the legislation and other provisions underpinning intelligence policy.

In *Poland* reports on security-sector organisations' activity may appear occasionally but are not published on a regular basis. The police and the frontier guard make quite a lot of statistical data available. The intelligence services do not publish their figures. In *Sweden* all services publish regular reports of activities. That from the Security Police, however, is very brief and lacking in substance. The exception is the section on the vetting system.

There are only a few relevant publications in the *United Kingdom*. There is an annual report by the parliamentary Intelligence Services Committee, published in redacted form. Apart from periodic revisions of the 'National Intelligence Machinery' text and MI5's handbook about itself, there is nothing else. There is not much more in the *United States*. The President and the Director of Central Intelligence keep the relevant Congressional committees fully informed of all current intelligence activities and possible future operations. The Director of Central Intelligence should also, in most cases, inform the intelligence committees in advance of any contemplated covert action. In practice, classified information may be made available more readily on some subjects than others. However, although the committees issue reports, much material does not get into the public domain.

International obligations

The final transparency-related topic that we asked our contributing authors to consider was whether international codes and conventions or international co-operation arrangements carried transparency obligations or, perhaps, raised obstacles to transparency. Our experts had very little to say on this. Whatever obligations and obstacles do arise clearly receive little attention in the seven states of our sample or simply do not amount to much. However, a couple of comments are in order.

First, countries clearly sign-up to international conventions without necessarily feeling duty bound to take them seriously. Failure to incorporate politically-binding obligations in domestic law is one manifestation of this attitude. Flagrant or careless disregard is another. Among 'our' seven states, *Bulgaria* and *Poland* appear to represent cases where the first applies; in at least one signal instance *Sweden* clearly put itself in the second category (the Leander affair), as did the *United Kingdom* (over the set-up of the pre-2002 Police Complaints Authority).

Secondly, there do appear to be circumstances where international co-operation – among both law enforcement bodies and intelligence agencies – might be inimical to domestic transparency arrangements. Information-sharing in EUROPOL is an example. Collaborative intelligence operations like Echelon are another. It is also generally supposed that information which might be released if relating to domestic policing (for instance) can be, and often is, withheld when other national forces and/or extra-territorial operations are involved.

CHAPTER XII

ISSUES

Security-sector institutions whose responsibilities are wholly or largely domestic wrestle with a permanent dilemma. It is one that arises in everyday policing – upholding the law, maintaining public order and contributing to the administration of justice – *and* in conducting passive or active operations against persons or organisations within the state who are declared or undeclared enemies of the state. Essentially, the challenge is:

- how to deter, prevent or forestall unlawful behaviour – from petty theft to grand larceny, from minor trespassing on private property or simple assault on a person to inflicting massive physical damage on structures and causing multiple deaths and injuries – *without* the use of methods that infringe fundamental human rights and restrict basic personal freedoms, or entail gross disruption and inconvenience to businesses and persons in the normal conduct of their lawful business;

and

- how to gather evidence about offences – or a clear intent to offend – and how to identify, arrest and prosecute offenders *without* such methods and consequences, and *without* resort to unwarranted intrusions on privacy, inhumane treatment of detainees, unacceptable intimidation, irregular judicial process, and so on?

Put simply, it is how to police a country and safeguard the internal security of the state without resort to the practices associated with countries that have earned the designation ‘police state’ – with all this phrase connotes.

The ‘police state’ reference here is, of course, extreme: certainly none of the seven countries in our sample survey could be so described. Still, from the incidence of evident inadequacies of democratic accountability arrangements and conspicuous lack of transparency about internal security services’ and intelligence agencies’ affairs, it is clear that none has resolved the dilemma in a way that conforms to the ‘ideal type’ formulae of the good governance textbooks or satisfies fully the

standards to which serious civil rights advocates think states should aspire.

All this is apposite because the challenge outlined here has been the object of much attention lately, in the aftermath of the events of 11 September 2001 in the United States and the actions of the American (and other) governments in response to them.

Consequences of 11 September 2001

Following the terrorist attacks on New York and Washington of '9/11' many governments proved eager to pass new legislation extending the powers of law enforcement and intelligence agencies; and, generally, parliaments have been willing to back executive actions taken in the name of provision for the 'war on terrorism'. Overall, responses have been of the sort that, on the face of it (a) make internal security organisations themselves less accountable and their conduct less transparent, and (b) make it easier for police forces, security services and intelligence agencies to ride roughshod over civil liberties. Two pieces of far-reaching legislation illustrative of the reaction are the United Kingdom's Anti-Terrorism Crime and Security Act 2001 and the United States' Patriot Act (on which more presently).

Questions pertinent to this study include: have the other countries in the sample survey followed the American and British lead; has scrutiny of new measures been adequate; will implementation be appropriately monitored; and to what extent will enhanced international co-operation in the 'war on terrorism' impinge on domestic accountability and transparency?

While the '9/11' attacks certainly put international terrorism on top of the agenda for governments, law enforcement bodies and intelligence agencies, prompting change, the events also reinforced some developments started earlier.

- Increased inter-agency co-operation and co-ordination (given major impetus in the US, leading to creation of the Department of Homeland Security).
- Extension of the powers of institutions involved in countering money-laundering (boosted by the decision to target the financial resources at the disposal of organisations like Al-Qaeda).

- Assumption of law enforcement functions by institutions not always considered part of the security sector (e.g. customs and immigration services).
- Widening of law enforcement and intelligence agencies' surveillance powers, especially over telecommunications traffic.
- Increasing trans-national co-operation, including not only information-sharing but also extra-territorial operations that may escape scrutiny (for example the interrogation by CIA agents of terrorist suspects in other countries).

Yet, somewhat to our surprise, several country correspondents could not give a definite answer as to whether the terrorist attacks on New York and Washington (and their aftermath) had led to clear consequences for accountability and transparency arrangements. Most said that it was too early to make an assessment (in mid-2002).

There was 'no change' in *Poland*, apparently, nor in *Bulgaria* – except in the latter case for some calls to revise the National Security Concept (since heeded). In *Italy* there were no announced changes to normal practice, but there may have been undeclared ones and there was certainly an increase in the rigour of personal and documentary controls at the country's airports. There was no knee-jerk reaction in *Sweden* either, but here the events of 11 September 2001 may have increased the likelihood of integration of the work of the Security Police with that of the ordinary police, specifically the unification of the National Criminal Investigation Division (CID) and the Security Police (which was an option under examination when our profile on the country was drafted).

However, *France* was one of the countries where politicians were clearly disposed to enhance the powers of law enforcement and intelligence agencies, without much attention to the impact on transparency and accountability arrangements. A new statute on the organisation and means of the police became law in mid-2002. Among provisions bearing the stamp of '9/11' are: facilitation and extension of stop and search abilities, including the exercise of powers in private and semi-public places; extension of some of the search powers of private security operatives; and facilitation of search and inquiry powers in relation to postal, phone, and electronic communication. Earlier, the country's police forces had obtained greater discretion in the exercise of existing powers under a Law about Daily Security (of 15 November 2001).

In the *United Kingdom* there was prompt action in the passing of the wide-ranging Anti-Terrorism, Crime and Security Act 2001. Among

other things this statute allows indefinite detention without trial of foreigners suspected of terrorism who cannot be deported because of restrictions under the European Convention on Human Rights. That is to say, respect for Articles 5 and 14 of the ECHR – respectively the right to liberty and security and the prohibition of discrimination) – has in effect been suspended. The Act also authorises much more sharing of information between governmental bodies. It is not clear how the statute's implementation can be overseen by the legislature.

In the *United States* the surprise attacks on New York and Washington impelled a (non-military) security-sector shake-up that has taken place at a speed giving rise to serious concerns about appropriate oversight. A prominent worry is the virtual elimination of the distinctions between law enforcement and intelligence (erosion having begun before 11 September 2001) when enhancement of co-operation and co-ordination between organisations in the two areas would have been preferable. Three Presidential initiatives are noteworthy: (1) the USA Patriot Act of October 2001, (2) the post-9/11 decision to create a Department for Homeland Security, and (3) the latest National Security Strategy. None has been the subject of thorough public or Congressional discussion and none has served the cause of (non-military) security-sector transparency.

- The USA Patriot Act simply set aside past safeguards in widening the capacity, capability, authority and rights of intelligence agencies to collect information and conduct investigations, to the detriment of oversight, accountability, transparency and civil liberties. The extensive widening of the powers of law enforcement agencies gives rise to similar concerns. For example, FBI agents are now allowed to spy on and investigate political groups and religious organisations without the prior consent of their superiors; and hundreds of 'terrorist suspects' – primarily of Arabic origin – have been arrested without charge in the US, and remain in custody with little prospect of a proper trial.
- The Department for Homeland Security – a 'super ministry' hosting around 20 federal entities – should be more accountable to Congress than the intelligence agencies ever have been. However, doubts have been expressed about the likely effectiveness of scrutiny over developments such as the expansion of existing extradition authorities, the review authority for military assistance in domestic security, the revival of the

President's reorganisation authority, the provision of substantial management flexibility for the department, and the intensification of international law enforcement co-operation. Also, it is not clear how – or whether – the new department will contribute to better CIA-FBI co-ordination.

- In the latest National Security Strategy the President states his determination to transform existing US intelligence capabilities, build new ones, and improve links with defence and law enforcement systems. Further, he says the authority of the Director of Central Intelligence has to be strengthened. As with the Department for Homeland Security, it is unclear how legislative oversight of these developments will be assured.

The shock to the American psyche that '9/11' inflicted was bound to have far-reaching consequences in the country. It is ironic, though, that one of them has been *de facto* abrogation of some of the principles of good governance to which the nation's leaders have long claimed attachment.

Other areas of concern

The analysis of the effectiveness of existing arrangements for accountability and transparency in the countries selected for study here has incidentally touched on other issues besides the 'free society/safe society' dilemma outlined earlier. Three of these merit further comment: (1) evolutions in post-communist states, bearing in mind that the two in our sample – Bulgaria and Poland – are advanced 'transition' countries, unlike (for example) the now-independent countries of pre-1990s Yugoslavia; (2) the growth of security provision by private enterprises, a new phenomenon everywhere and one with obvious implications for accountability; and (3) the development of trans-national, including pan-European, connections among law enforcement and intelligence agencies, also impinging on these organisations' accountability (and transparency in the conduct of their business).

(1) Evolutions in post-communist states

Post-1989 regime changes across Central and Eastern Europe brought commitment to transition from authoritarian party rule to democratic politics and from 'command' economies with state ownership to market systems and private entrepreneurship. However, political and

economic transformation – not to mention social and psychological adjustment – could not be instantaneous. These things take time.

Regarding police forces, security services and intelligence agencies the challenges were to domesticate (breaking free from Soviet influence), to democratise, and to demilitarise these organisations *and* to establish accountability mechanisms – in the form of civilian executive direction and legislative oversight – under the rule of law and civil society scrutiny. The police had to change from being reactive and strictly coercive, centralised and militarised towards being proactive and generally benign, decentralised and demilitarised. Legislation was enacted that embodied pledges to international norms and standards. According to Imre Kertesz and Istvan Szikinger, the reform agenda rested on three principles: adoption of a democratic command style (participative management with room for personal initiative), attention to responsiveness (to public needs and preferences), and acceptance of external accountability (through the legislature and the judiciary, independent ombudsmen and the media, civil and human rights organisations).¹

The problems are manifold. First of all, autocratic command structures – the control of police forces, security services and intelligence agencies by the *nomenklatura* – have to be dismantled and executive direction by accountable politicians and officials put in place. Secondly, far-reaching reforms have to be implemented throughout the internal security apparatus, including the high command and top-level bureaucracy of *ancien regime* loyalists. Thirdly, organisations must be not only clearly subordinated to the executive authority but, since governments could misuse their powers in this respect, made subject to effective legislative oversight. Moreover, effectiveness here presupposes specialist committees of able deputies, with specialist staff, in which – to guard against ‘rubber-stamping’ by majority-party members – there is adequate representation of opposition parties.

Progress, though, depends also on the administrative capacity to design and implement reforms. In our area of interest the greatest potential for successful transformation is when there is a combination of strong internal dynamics (especially political will) and well-organised outside support (in the form of financial and technical assistance).

The study group ‘Comparative Police Reform in Central and Eastern Europe’ organised by the Geneva Centre for Democratic Control of the

¹ I. Kertesz and I. Szikinger, ‘Police in a Society of Transition’, *European Journal on Criminal Policy and Research* (8, 2000) 282-284.

Armed Forces (DCAF) is analysing the progress of the past decade. It has presented several conclusions underlining that reforms are only slowly taking place and often lack coherence.

Furthermore, there has not yet been significant change towards a 'public service' mentality, policing by consent and acceptance of public accountability. Police forces across the region are often still highly centralised, and sometimes still militarised (or were until very recently). There are still deficiencies in accountability and ineffective or non-existent oversight mechanisms. Where sound formal structures are in place, they are not always working effectively (which also applies to the judiciary). As a result, police violence persists (as noted in our profile on *Poland*) and too often goes unpunished (especially when practised against unpopular ethnic minority groups). Also, widespread corruption and the pervasiveness of organised crime are having a negative impact on the morale of police officers, and at the same time fuel public demands for prioritising public safety rather than democratic policing. Finally, the drive for accession to NATO and the EU is affecting reform agendas, as the focus lies on combatting organised crime, especially trans-national organised crime, which in turn leads to fewer resources for mainstream police tasks.²

(2) Private security bodies and their accountability

In many states the government's inability – or in some cases, perhaps, unwillingness – to offer satisfactory police protection of persons and property has prompted private provision, and called into being enterprises offering security services on a commercial basis. The question is: how to control these firms? Established constitutional constraints on the exercise of legal powers often do not apply to private guards but only to restrain 'governmental action'. Hence it has become necessary to find ways to frame counterpart provisions to cover the activities of privately-employed security personnel (e.g. in policing mass business properties such as shopping malls or exhibition sites). The principal mechanisms through which private 'police' are held accountable are the following: state regulations on organisations and operatives (which can be vague); industry self-regulation (which is voluntary in character); criminal liability (under the laws of the jurisdictions in which they operate); civil liability for torts and delicts; labour and employment legislation; contractual liability; and

² M. Caparini, 'Police Reform: Issues and Experiences', presented at the 5th International Security Forum, Zürich, 14-16 October 2002.

accountability through the market. In short, private 'police' are accountable in a variety of ways; and it has been argued that, while these differ from those by which the regular public police are held to account, they may be no less effective.³

That is a suspect argument, for many reasons that need not be recounted here. Suffice it to say that words like 'vague' and 'voluntary' sound warning notes, and there is interest in more stringent regulation. Two ideas appear in our set of country profiles. In his essay on *France*, author Fabien Jobard notes that the remit of the "Commission nationale de déontologie de la sécurité" (CNDS) – the national committee for the ethics of security, created in 2000 – covers both public and private security forces. In his piece on *Sweden*, Dennis Töllborg points out that the ECHR articles that deal with protection against abuse by a 'public authority' (e.g. article 8) might be applied to private security companies, presumably through a licensing system in which acknowledging this would be a condition of award. The state is responsible not only for its own actions (i.e. conducted under its own authority) but also bears responsibility for the activities conducted by private security organisations that operate on its territory and who have derived their 'powers' from the state's legal authority.

(3) Internationalisation and 'Europeanisation'

Concern about the growth of trans-national organised crime – especially since the beginning of the 1990s and especially in Europe – has led to recognition that there should be greater co-operation among national law enforcement bodies to cope with it, perhaps even an international force. The debate about this raises important transparency and accountability issues.

The established global body for police co-operation is Interpol. This organisation has very limited instruments at its disposal; and so it has not appealed to European countries – six of the seven in our sample – as the body through which to deal together with either this new threat on the security agenda or the newest threat that international terrorism poses. For the record, though, no representative structure governs the management and operations of Interpol. No international oversight mechanism exists for the association, and it is accountable to no-one.⁴

³ P. Stenning, 'Powers and Accountability of Private Police', *European Journal on Criminal Policy and Research* (8, 2000) 331, 338-345.

⁴ C. Fijnaut, *The Internationalisation of Police Co-operation in Western Europe* (Kluwer Law and Taxation Publishers, Deventer and Boston 1993) 10-12.

The Europeans' preferred medium of collaboration is Europol, an organisation with more resources at its disposal and considered better equipped to accommodate extended co-operation among law enforcement (and some intelligence agencies) in Europe. Part of the 'third pillar' of the EU, Europol's core business is police co-operation for the purposes of preventing and combatting trans-national organised crime and international terrorism. The Europol Convention of 1995 enumerates the following functions: support for national criminal investigation and security authorities; creation of databases; central analysis and assessment of information; collation and analysis of national prevention programmes, measures relating to further training, research, forensic matters and criminal records departments. The text gave Europol no executive power to carry out law enforcement tasks.⁵

In recent years, however, EU member states have been eager to enhance Europol's legal, financial and technical resources, and its powers. In 2001 its budget was increased by almost 50 per cent. No less important, the Europol Convention has been rewritten to give the organisation operational powers and a much wider remit. It is already the largest clearinghouse for bilateral and multilateral exchanges of information and hosts the central EU intelligence database. The plans are that it will cease to be a purely co-ordinating body, but will also participate in joint inquiries and even initiate criminal investigations in member states.⁶ In sum, EU members are progressively making of Europol a *force*. (Other recent developments that underline the 'Europeanisation' of law enforcement and (criminal) intelligence are the agreements among EU member states to set up a joint arrest warrant, to adopt a common definition of terrorism, and to define a common list of terrorist organisations. There are also plans for European governments to be able to access personal electronic information held in data banks.)

However, there is still minimal political supervision and a lack of independent scrutiny of the Europol set-up. The European Parliament is on the margins of the decision-making process; and the Council of the European Union has proposed that future amendments of the Europol Convention should no longer require ratification by national parliaments, but only unanimous agreement in the Council of Ministers. Europol's enormous database exists, and the ground is being prepared for the organisation to assume an operational personality – all without provision

⁵ Fijnaut, 15.

⁶ 'More power to Europol', 13 June 2002, www.euobserver.com/index.phtml?aid=6602&sid=9.

for accountability to judicial mechanisms, national parliaments or the European Parliament.⁷

Nor is Europol the only context in which there is talk of 'Europeanisation' of police work. The enlargement of the EU could impart a new momentum to inter-state police co-operation. Perhaps stimulated by concerns over widespread organised crime in today's candidate countries, at the end of October 2002 Germany even suggested creation of a common police force, able to operate across all member states and under supranational control. Other voices urge deepening European-level co-operation in criminal justice – perhaps leading to establishment of a European Prosecutor – and wider intra-European information-sharing (giving Europol access to the Schengen Information System, for instance).

There is silence, though, on how to assure democratic accountability and transparency of developments, and on how to ensure that they do not erode civil liberties and citizens' rights. Yet the ability of national parliaments to scrutinise institutional innovation is quite limited. The driving element is intergovernmental – the Justice and Home Affairs European Council – and dominated by nations' executives. There is neither judicial nor legislative oversight (national or European). The remedy here might be broadening the competence of the European Parliament and strengthening its co-operation with national parliaments; and engaging the European Court of Justice and the European Court of Human Rights – because Europol should be fully integrated into the community system.⁸

In addition to the increasing 'Europeanisation' of law enforcement and intelligence services, relations between police agencies from the EU and the US have also become more intimate as formal relationships proliferate and informal ties deepen. Intelligence and counter-intelligence agencies are increasingly focusing on trans-national criminality. The domain of international criminal law enforcement is including a growing number of criminal matters, many of which are being handled on an informal, transgovernmental and essentially apolitical basis. The key problems that arise are ambiguities concerning (a) the legality, illegality and extra-legality of international law enforcement actions as well as the

⁷ www.statewatch.org/news/2002/feb/01eufbi.htm

⁸ This is also one of the conclusions of an EULEC project on integrated security in Europe that ended in 2001, see: www.eulec.org

extent to which criminal law violators are dealt with by criminal justice institutions; and (b) issues of extraterritoriality and jurisdiction.⁹

These are not theoretical ambiguities. Consider the increased co-operation on law enforcement and justice that has been developing among EU member states and with the US since '9/11'. In September 2002 a proposal was discussed with the US Attorney General aimed at increasing the exchange of information between the European and American authorities, setting-up joint investigation teams and simplifying rules for extradition. Two basic concerns are, first, that EU governments appear to be willing to drop or modify a number of fundamental rights and protections built into EU legislation and protected by the European Convention of Human Rights; and, secondly, that the agreement may be – may already have been – negotiated and agreed in secret, without reference to European national legislatures or the European Parliament.¹⁰

Consider also the collaborative surveillance system set up by the US, the UK and some 'old (British) Commonwealth' countries – the system known as Echelon. According to reports this exists to intercept (and filter and process) volumes of satellite, microwave, cellular and fibre-optic traffic, mainly communications to and from North America. It operates with little or no oversight; and the agencies that are purportedly running it have provided few details on legal guidelines.¹¹ The 'war on terrorism' could lead to an expansion of this and similar systems, and to instructions that operators extend and/or intensify surveillance – all without appropriate legislative and judicial scrutiny and authorisation.

Conclusion

This internationalisation and 'Europeanisation' tendency is proceeding with scant attention to what is implied for the accountability of the non-military security-sector organisations involved. The growth of private enterprises offering security services on a commercial basis is likewise taking place with a disquieting neglect of the need for regulation and oversight on a par with that to which official services are subject. In post-communist societies the extent and pace of reform of internal security institutions, especially with respect to the promotion of transparency and

⁹ E. Nadelmann, 'US Police Activities in Europe', in: Fijnaut, 152-153, 137.

¹⁰ www.statewatch.org/news/2002/jul/11Auseu.htm

¹¹ See: www.echelonwatch.org

the consolidation of accountability in the conduct of their affairs, generally lags behind that achieved in the transformation of these states' regular armed forces. In more mature democracies – the United States, the United Kingdom, France – a consequence of the events of 11 September 2001 has been extension of law enforcement and intelligence gathering powers (and a blurring of the distinction between the two) plus erosion of once-cherished safeguards of civil liberties (regarding what is justifiable detention and permissible surveillance, for example); and the effect here has been to lessen the overall accountability of police forces, security services and intelligence agencies.

Observations on these issues have been included here, complementing the two previous Chapters' commentary on our study's country profiles, for a straightforward reason. Even in a limited and exploratory inquiry such as this, it is pertinent to register the currents running in the area of interest. In looking at the effectiveness of states' accountability 'arrangements' with respect to non-military security-sector organisations, and the attention countries pay to transparency in this context, an important consideration is the dynamic nature of the institutional environment. At the very least we should recognise that what makes sound policy and practice in this field is not only appropriateness in the here and now but also the capacity to accommodate what may be to come.

CHAPTER XIII

EVALUATION

It will bear repeating that this text reports on an investigation that was exploratory in nature and limited in scope. Material on transparency and accountability in running non-military security-sector organisations was solicited from just seven states. These countries – Bulgaria, France, Italy, Poland, Sweden, the United Kingdom and the United States – were selected to yield information on policy and practice in a sample of Euro-Atlantic nations. The purpose of the exercise was to gain insight into

- the nature and effectiveness of provision for executive direction, and for legislative, judicial and societal oversight – plus self-regulation – of police forces, other internal security services and intelligence agencies in a cross-section of countries (the *accountability* aspect of the inquiry);

and

- the institutional arrangements and current practice in the chosen states on provision of information – to elected representatives and civil society generally – about these forces, services and agencies (the *transparency* aspect).

As a starting-point it was necessary, of course, to ask our national experts simply to enumerate the non-military security-sector organisations in their country, so as to establish the *coverage* of each individual contribution.

Diversity: implications for evaluation

The first point to note in these concluding observations on the inquiry is that this initial enumeration was not at all simple in some countries: just look at the list of police forces and units that *Italy* has. More important, what is abundantly clear from the national profiles is that – largely for historical reasons and because of differences in political and socio-economic circumstances – each state has its own unique array of non-military security-sector organisations whose structures and tasks conform to no common pattern. Some countries have a multiplicity of services

engaged in maintaining law and order, administering justice, and safeguarding internal security (broadly defined): in others just a few national institutions serve this purpose. In some, there are services that have both domestic policing and 'home defence' roles (e.g. *France* and *Italy*): in others distinguishing between forces for internal and external security is considered vital (e.g. the *United Kingdom*, where the police 'keep the Queen's peace' and the military deal with 'the Queen's enemies' and only in very exceptional circumstances – like the Northern Ireland 'emergency' – do the authorities deploy troops at home, and then under the explicit rubric of 'military aid to the civil power').

Similarly, there is great diversity in provision for (non-military) security-sector accountability among our seven countries and there are widely varying degrees of transparency in the conduct of law enforcement and intelligence bodies' affairs. The states in the sample are, it has been noted, widely differentiated by constitution, culture and custom. This is reflected in disparate *institutional arrangements* for civil executive direction, legislative scrutiny, judicial regulation and general societal oversight of organisations, and for internal 'control' (or self-regulation). It also explains differing *attitudes and approaches* to information and data disclosure and dissemination. On top of that, 'constitution, culture and custom' determine the *perception of issues* concerning accountability and transparency. There are pressures for more participative democracy and more open government in some countries while, in others, authoritarian tendencies persist and a 'secrecy culture' prevails.

The question arises: if the principal conclusion of a study such as this is that, in terms of the structures and processes in the area of interest, each state examined – and by implication any state – is for all practical purposes *sui generis*, what room is there for other conclusions? Is meaningful comparative analysis possible, if contextual differences abound but similarities are few and far between? Can one argue that how one country arranges something merits the designation 'good practice' – with the implication that it might be worth recommending to others – if the specific institutional framework in which the set-up or procedure works is replicated nowhere else?

These are not trivial questions. In our view they dictate an approach to a final evaluation of provision for accountability and attention to transparency in the countries of our sample that is based on examination of each state's practice *ad hoc* by reference to its own facts, against

general criteria derived from – to echo earlier formulations – elementary democratic theory and the ‘good governance’ textbooks.

Before turning to specifics, some remarks are in order on what theory and the textbooks have to say in general about holding (non-military) security-sector organisations to account in law-governed democracies. One clear message is that it is a responsibility engaging

- the executive branch, the legislature and the judiciary (and there is merit in a system of ‘checks and balances’ among them);
- internal mechanisms (self-regulation);
- civil society institutions, like human rights lawyers and NGOs;
- the media and society-at-large.

In addition, international codes and conventions apply (at least in principle).

These mechanisms are both formal (i.e. embodied in laws and statutory instruments) and informal (e.g. interest-group activity and media coverage). It is essential that the executive, the legislature and the judiciary possess adequate *powers* to hold police forces, security services and intelligence agencies to account. The other actors should have essential *rights* – to get information and to make representations, for example. Rights as well as powers should be clearly stipulated in legislation.¹

Of course, not only the application of legal powers and the exercise of citizens’ rights serve accountability and transparency in this area. Political culture, media activity and public opinion are relevant too. Media coverage can be very instrumental, since journalists’ independent inquiries represent an important form of oversight. As for public opinion, there is authoritative testimony to its value, at least in the *United States*. After complaining about the near-fruitless efforts of the Congress to prompt reforms in the intelligence agencies, the vice-chairman of the Senate Select Committee on Intelligence said that Congressmen anno 2002 generally regard public opinion as the only force likely to generate modernisation.

Evaluating states’ policy and practice, against this background, in terms of *appropriate arrangements* in national circumstances is, in our opinion, the more constructive way to proceed.

¹ For a comprehensive approach to the governance of security sector reform, see: I. Leigh, ‘The Legal Norms of the Geneva Centre for the Democratic Control of Armed Forces and Security Sector Reform’, presented at the 5th International Security Forum, 14-16 October 2002, Zurich. Available at: www.isn.ethz.ch/5isf

Accountability

In all the countries covered by our sample survey executive direction by accountable politicians and their appointees is generally well secured, at least formally. However there are great differences in how in practice police force commanders, security service chiefs and intelligence agency heads answer to the political authority. In *Sweden*, direction and supervision are lax, and this has resulted in services being able to evade political control. In *Bulgaria*, control is rigorous to the point of interference prejudicial to key organisations' political neutrality and operational independence; and the 2003 appointment of an old communist-era general to a top 'special services' position obviously raises doubts about the depth of commitment to root-and-branch reform. Furthermore, here as in Europe's post-communist countries generally, incompetence and corruption plague the public administration and the legal system, and there appears to be little that reform-minded individuals and groups can do about it.

Legislative oversight is weak in most of the European countries examined, and especially in *Bulgaria*. It is hampered by committees' limited mandates and restricted powers, a lack of expertise within or at the disposal of relevant committees, and often passive acquiescence to the executive. In *Poland* and the *United Kingdom* parliamentary committees to oversee non-military security-sector organisations did not come into existence until the first half of the 1990s. Only in the *United States* do elected representatives have the authority and the means to exercise effective oversight; and here, in our area of interest, since 11 September 2001 the Congress has not been too critical of executive decision-making.

It is also only in the *United States* – among our sample – that there is judicial oversight machinery that works. In Europe there are countries where the courts are excluded from looking into matters of national security (widely defined): this is the case in the *United Kingdom*, where even authorising intrusive surveillance is an administrative not a judicial matter. That judicial scrutiny of the Security Police is inadequate has been officially acknowledged in *Sweden*. That the administration of justice in *France* depends to the extent that it does on officiers de police judiciaire (investigative police officers) is clearly anomalous, or so the theory and the textbooks would say. In *Italy* the web of relationships in which the law enforcement agencies, the courts and politicians are connected is so intricate as to be almost unintelligible, but certainly shot

through with anomalies also. Moreover, both France and Italy have forces with a military as well as a police personality, with all the ambiguities that brings.

The effectiveness of internal accountability mechanisms – the self-regulation apparatus of disciplinary boards, police ‘internal affairs’ teams and so on – is difficult to assess. In some countries – *Bulgaria*, for example – whether they function, and if so how, is a complete mystery. There have been attempts to improve the machinery in *France*, but with what success is hard to gauge, because here too little is known about how procedures work in practice. In the *United Kingdom* there is a remodelled independent commission that hears complaints against the police, and appears to work; but a stage-army of the superannuated to cover the intelligence agencies, which doesn’t. It is possible, of course, that in time there will be pressure from EU institutions for ‘appropriate arrangements’ – possibly harmonised – in all member-states.

In the meantime, for how they do what they do (non-military) security-sector organisations are most effectively held to account, more or less everywhere, by lawyers, interest-groups and NGOs who make it their business to watch out for human rights abuses and the denial of civil liberties and political freedoms. (They monitor how well others – legislators and the courts – are exercising oversight as well.) Not all the European countries in our sample have made specific institutional arrangements that effectively secure citizens’ rights, or at least provide for appeal against wrongful action, and redress. Some have human rights commissioners or an Ombudsman, but the terms of reference of such officials may be narrowly drawn. In the United States, of course, several amendments to the Constitution are enshrined in the Bill of Rights. Vigilance is necessary even here, though: several provisions of the 2001 USA Patriot Act seriously threaten civil liberties, as do a number of the actions that the country’s new Department of Homeland Security has taken. (Not only American residents are affected by these, incidentally: the access the Department requires to the passenger databases of airlines flying to the United States brings into its ‘dragnet’ anyone travelling to, from or through the ‘Land of the Free’.)

In this area as in others, campaigning interest groups, NGOs and wronged individuals require media coverage of their case and their arguments. This is one way in which the ‘Fourth Estate’ helps hold police forces, other internal security services and intelligence agencies to account. Another is by journalists’ independent inquiries which – especially in post-communist countries, we are told – provide an

important form of oversight. These are the province of the ‘serious’ media (broadsheet newspapers and flagship current affairs broadcasts). There is a role also, however, for the so-called ‘sensational’ media (typically tabloids and programmes that specialise in the exposé). To be sure, these deal in crime stories and scandals. Still, cases of police brutality (and heroism), cases of unauthorised clandestine activity by ‘special services’ or personnel involvement in illegal trafficking and other criminal activity, cases of bribery and corruption in different services – all of the above, at one time or another, in one country or another, have been first brought to light by a reporter motivated not by public duty but by the prospect of a juicy story.

Finally under this heading, what role do international codes and conventions play? Several apply to the operational accountability of the security-sector organisations under review. What they require would seem to be an obvious element in any subscribing state’s ‘appropriate arrangements’ for regulating relevant forces, services and agencies. However, things are not as simple as that. Countries sign-up to international obligations – entering into politically-binding commitments, and often legally-binding ones – but then fail to incorporate them in domestic law (where this is necessary for their enforcement), or simply neglect to honour them, or opt to respect them when it suits and disregard them when it does not. Specific examples have been reported in this study of proven non-compliance by *Bulgaria*, *Poland* and *Sweden*; and deliberate ‘suspension’ of adherence (to the ECHR) by the *United Kingdom*. Obviously this does not mean that the agreements entered into are worthless: on the contrary, findings against a state are evidence that they are in fact doing their job. Still, the conclusion that has to be drawn is that the modalities of international accountability are not, or are not yet, all that they should be.

This formulation can in fact be applied to all forms of provision in ‘our’ seven selected countries for holding non-military security-sector organisations to account – for what they do, for what they spend, and for how they conduct their affairs. Arrangements are not, or are not yet, all that they should be. The purpose of the (exploratory) exercise was ‘to gain insight’. What we see very clearly is a need, more or less everywhere, for corrective action to address in particular slack executive direction, inadequate legislative oversight, plus anomalies and ambiguities in judicial supervision. Overhaul of self-regulation machinery within police forces, other security services and intelligence agencies would not go amiss either.

Transparency

In the meantime the contribution to accountability of campaigning interest-groups and NGOs (with the support of committed lawyers) and diligent investigative journalists (backed by enterprising editors) is obviously of the utmost importance. Equally obviously, effective monitoring and scrutiny here depends crucially on access to *information*, as does the work of legislative oversight committees. What, then, of institutional arrangements and current practice in the chosen states on provision of information – to elected representatives and civil society generally – about police forces, other internal security services and intelligence agencies?

The temptation is to say here, again, that things ‘are not, or are not yet, as they should be’. This is true, but unhelpful. In particular, it begs the question: what ‘should be’ in this context? On the one hand, transparency is the guarantor of accountability; in democracies the people have a presumptive ‘right to know’ how the business of government is being conducted, in the security sector as elsewhere; and these considerations argue for liberal disclosure and dissemination. On the other hand, in the domestic or internal security domain operational imperatives require limits to transparency and the application of ‘need to know’ tests; and these considerations argue for a restrictive approach.

Resolution of this dilemma in the continental European countries surveyed here errs on the side of caution, most heavily so where a ‘secrecy culture’ endures (as it does, for example – albeit for different reasons – in *Bulgaria* and *Sweden*). Nowhere, though, are there constitutional and other statutory provisions explicitly obliging governments and their security organisations to be more open than they are. The commonest requirements are to convey general information to the legislature and to tell elected representatives serving on oversight committees what they need to know for any specific inquiry. Where individual organisations put out more facts and figures than they must, it is invariably because it suits their purpose to do so (to win friends and influence people generally and/or to gain support in budget battles). Broadly speaking, that is how it is in the *United Kingdom* and the *United States*. Such voluntary publication – through print media and especially the internet (web-pages) – may be on the increase. It has certainly caught on in *Italy*.

Turning from the supply side to the demand side of this particular information ‘market’, we have seen that in several countries legislation

exists that secures citizens' rights to access information, though both law enforcement and intelligence organisations are exempt from freedom of information obligations in many. The *United States* has the most accommodating regime in this respect, from the standpoint of the information-seeker. Noteworthy features are (a) the ability of the inquirer to challenge security classifications and (b) the evidence of experience with this arrangement, viz. that under challenge the powers-that-be have consented to release material that they were hitherto determined to withhold.

The 'market' metaphor here suggests a possible model for transparency-*building* with respect to different services that might have general applicability (subject to local variations). The cause of transparency would be well served if

- organisations everywhere were to voluntarily and routinely 'supply' basic descriptive and explanatory material about their organisation, roles and missions; headline statistics about manpower and budgets; and summary figures on core business operations, which in the case of the police would include time-series data on reported crimes, clear-up rates and convictions, and in the case of other services material on numbers detained without charge or 'reasonable cause', frequency of interrogation of airlines' passenger databases, number and value of prohibited substance seizures, and so on;

and

- governments or courts everywhere were to codify the circumstances and purposes permitting a citizen's right to 'demand' (i) access to personal data about him/herself held in administrative databases and (ii) a ruling on the legitimacy or otherwise of denial of access to specified information about other activities conducted by security-sector organisations.

It goes without saying that elected representatives' rights to more detailed material in connection with exercise of their oversight role(s) would not be affected.

Transparency-building *vis à vis* police forces, other security services and intelligence agencies has a value in its own right. More important it facilitates accountability, in all the dimensions discussed earlier. Our commentary on the seven country profiles produced for this study indicates that there is an 'accountability deficit' at present, even in the most advanced of this cross-section of the Euro-Atlantic area's law-

governed democracies. Attention to 'appropriate arrangements' in each country – and others beyond the sample – can narrow this deficit.

New challenges

Effort to narrow the existing 'accountability deficit' in relation to (non-military) security-sector organisations (mid-2002) must, however, also accommodate several developments that have been taking place in the law enforcement and intelligence fields of late. Many of these gained momentum after the terrorist attacks in the United States on 11 September 2001, while the response to '9/11' – and to incidents since, like the Bali bombing of October 2002 – has raised further issues germane to our area of interest.

These new challenges have been described in Chapter XII. It is appropriate, though, to summarise them briefly here.

1. There is a growing interconnectedness of internal and external security, which means that the distinction is becoming blurred. The result has been increasing co-operation between (a) law enforcement bodies and intelligence agencies and (b) the military. This gives rise to concern about the overlap of tasks and produces turf wars between Ministries of Interior and of Defence. On top of that, the transnational and non-state character of terrorism calls into question some of the fundamental premises of security-sector organisations. As Walter Slocombe said at the 5th ISF in Zürich in October 2002, "terrorism challenges this institutional and legal dichotomy, because it combines features of both internal and external threat and because it operates at the uneasy juncture between them".
2. There is an increasing overlap in the tasks falling on law enforcement bodies themselves, blurring service boundaries. The same can be said of relations between law enforcement forces and intelligence agencies. More and more intelligence agencies are expanding their work to policing (e.g. organised crime). Many police forces are conducting intelligence operations (e.g. wiretapping). There should be close inter-agency co-operation and co-ordination, but often there is not. Also, these developments have largely occurred without the active involvement of, and scrutiny by, national parliaments.

3. There are governmental agencies some of whose activities have a law enforcement character – for example, institutions investigating money-laundering, customs and immigration services – but whose accountability for these activities is not clearly defined. Moreover, politicians are willing to extend such agencies' powers, again without proper provision for legislative oversight.
4. Similar arguments apply with respect to widening law enforcement and intelligence agencies' surveillance powers, in which legislators have been content by and large to acquiesce.
5. Private security organisations have mushroomed, complementing and in places even supplanting regular police presences. They are not, however, accountable as 'real' police forces are.
6. Internationalisation and 'Europeanisation' are leading to closer cross-national co-operation among law enforcement bodies and intelligence agencies, to the actual or potential detriment of transparency, and of accountability and authorisation procedures – for instance where extra-territorial operations are involved.

The bottom-line here is that accountability frameworks are inadequate. We have said there is an oversight 'deficit' in relation to the long-established institutions and practices of law enforcement, intelligence gathering and counter-intelligence. There is zero or near-zero monitoring of private security forces and governmental agencies with collateral law enforcement powers. Attention has been paid to neither *ad hoc* nor institutionalised international co-operation among law enforcement or intelligence organisations. This neglect could leave growing areas of activity beyond scrutiny. This in turn affects the legitimacy of the services conducting them, eventually leading to lower public trust in the institutions.

Reinforcing concern here is what has happened since the events of 11 September 2001. In many countries there has been only the most abbreviated critique of executive decision-making on anti-terrorist measures. Major legislation conferring extraordinary powers on security-sector institutions was passed in *France*, the *United Kingdom* and the *United States* without real debate. The Americans' consolidation and amalgamation of services and agencies has likewise gone ahead with minimal discussion of the powers the new department will wield and the rights it will be able to suppress, not to mention the implications of fusing law enforcement and intelligence collection. The dangers are self-evident. One is misuse of powers, including their application not only in

directly tackling the menace that called them into being but to routine cases: the extraordinary becomes the normal pattern. Another is that the implementation of ‘special’ counter-terrorism measures will be as poorly monitored as their introduction was: in this area, the legislature falls down in its duty to hold the executive and its agencies to account. There are others. Whichever way you look at things, good governance is the loser.

Conclusion

The principal argument of this Chapter is simply stated. In our sample countries – and, to the extent that they are broadly representative of Euro-Atlantic law-governed democracies, generally – there is insufficient transparency in the conduct of (non-military) security sector affairs and an ‘accountability deficit’.

It will require all-round effort to correct this condition: attending to slack executive direction, inadequate legislative oversight, anomalies and ambiguities in judicial supervision, flawed self-regulation machinery; and, at the same time, improving information provision, not least to enable elected representatives and civil society institutions to play their role in holding to account *their* police forces, security services and intelligence agencies.

Given the diversity of policy, provision and practice in this area, the most sensible approach to this task is to fashion *appropriate arrangements* country-by-country on the basis of the fundamental principles of democratic governance. There is certainly no one-size-fits-all prescription here. Furthermore, there is no merit in the idea that an individual country can look around at what other states do and, where structures and processes that appear to work successfully are observed, simply adopt these itself: although fashionable, this *best practice* approach is a distraction at best, and at worst a deception.

Although ‘exploratory in nature and limited in scope’ our study has yielded other insights also. One of the most important is that the identified ‘accountability deficit’ is unlikely to narrow, anywhere, unless there *is* all-round effort suitably tailored to local conditions. To be sure, security-sector reformers are at work in Europe’s adolescent democracies whose agenda includes strengthening accountability and improving transparency (as they are in many developing countries and post-conflict states worldwide). There are also attentive publics in the more mature

Euro-Atlantic democracies who realise that the price of good governance is eternal vigilance – plus regular attention to the welfare of parliamentary and public watchdogs. These groups have to contend, however, with the dynamics of the contemporary security environment, notably the ‘new challenges’ to desirable transparency and effective accountability of civil protection affairs that have been enumerated here, including the dispositions that governments made after 11 September 2001 (announced and unannounced).

The developments in question ‘challenge’ present-day accountability arrangements and information provision in a variety of ways, but nowhere more than in the area of legislative oversight. What sort of specialist committee structure should there be to scrutinise policies, programmes and budgets when the dividing line between external and internal security is fuzzy and law enforcement service boundaries are blurred (or porous)? Ought parliamentarians to have a part in monitoring the exercise of the more intrusive surveillance powers that some services have acquired? Should they be taking steps to inform themselves about the private security industry and perhaps setting up machinery to regulate and oversee it? Or are the elected representatives of the people going to allow some aspects of law, public order and the administration of justice to remain ‘beyond scrutiny’? These questions – and many others like them – are pressing questions, or ought to be, for lawmakers everywhere.

Needless to say, there are counterpart questions that ministers and civil servants, prosecutors and judges, police chiefs and other service heads ought to be addressing. At the political level, a fundamental one is: in giving direction to security-sector institutions are we striking the right balance in the ‘free society/safe society’ trade-off? At the law enforcement ‘sharp end’, there should be reflection on: how can our self-regulation be improved and public confidence in it assured; and how can we ensure that what outside bodies require of us in terms of operational accountability is sensible and fair, so that our own officers will respect, understand and support it?

These issues arise, of course, because if we are serious about good governance in the security sector – and the non-military part particularly – transparency *matters* and accountability *matters*. Putting arrangements in place is not a once-for-all job, however, so that ‘when it’s done, it’s done’. Quite the contrary – every generation has to confront afresh, in the light of contemporary circumstances, the timeless question: who will guard the guardians themselves, *and how?*

THE GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES

Mission

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) was established in October 2000 on the initiative of the Swiss government. The Centre's mission is to encourage and support States and non-State governed institutions in their efforts to strengthen democratic and civilian oversight of armed and security forces, and to promote security sector reform commensurate with democratic standards.

To implement its objectives, the Centre:

- **collects information and undertakes research** in order to identify problems, to gather experience from lessons learned, and to propose best practices in the field of democratic governance and reform of the security sector (which includes armed forces, police, paramilitary forces, internal security services, intelligence agencies, border guards, etc., as well as parliamentary and governmental oversight structures, and civil society groups);
- **provides specific expertise and support on the ground** to all interested parties, in particular governments, parliaments, international organisations, non-governmental organisations, and academic circles. Particular emphasis is placed on encouraging and supporting the principle of "self-help" and on rendering the experience of countries that have already gone through transition processes at the disposal of those States which have more recently embarked on the process of reform.

Areas of Expertise and Current Projects

The work of DCAF is primarily aimed at, but not limited to, the Euro-Atlantic region.

DCAF's key areas of analytical work include:

- standards, norms, and good practices in the field of democratic governance of the security sector;
- theory and practice of security sector reform (including defence reform);
- parliamentary and civilian oversight of armed forces, police, internal security forces, intelligence, and border guards;
- the legal aspect of security sector governance (including documenting relevant legislation);
- civil society building as means of strengthening democratic security sector governance;
- security sector reform as a means of ensuring human security, sustainable development, and post-conflict reconstruction;
- challenges of security sector governance in regions beyond the Euro-Atlantic area, including Africa and the Middle East;
- emerging issues in security sector governance (e.g. the treatment of women and children; mechanisms of civilian control of nuclear weapons, etc).

DCAF's key operational projects include:

- providing advice and practical assistance to governments, parliaments and international organisations in the field of security sector reform;
- interacting with parliamentarians and civil servants to promote accountability and effective oversight of the security sector;
- funding and training expert staffers in support of parliamentary oversight structures, such as parliamentary defence and security committees;
- assisting in drafting legislation related to defence and security;
- providing advice and practical guidance to governments on how to organise professional and accountable border security structures;
- providing advice to governments on demobilisation and the retraining of down-sized forces;
- assisting governments in encouraging openness in defence budgeting, procurement, and planning.

Organisational Structure and Budget

DCAF is an international foundation under Swiss law. DCAF's **Foundation Council** is made up of 45 governments including Switzerland, 40 other Euro-Atlantic States, 3 African States, and the Canton of Geneva¹.

DCAF's **International Advisory Board** is composed of a group of over 60 experts in the various fields of DCAF's activity.

DCAF's staff includes some 50 employees representing about 30 different nationalities. The **Think Tank** carries out in-house research and analysis, contracts research projects, engages in joint ventures with partners, and networks existing knowledge, notably through the activities of its working groups. DCAF's **Outreach** and **International Projects Divisions** implement the results of this analysis through practical work programmes on the ground. These divisions are at any given time directing several dozen projects within various transition countries in support of ongoing security sector reform efforts.

The Swiss Federal Department of Defence, Civil Protection, and Sports; and the Federal Departments of Foreign Affairs are the largest contributors to DCAF's budget.

Detailed information on DCAF's organisation and activities can be found at www.dcaf.ch.

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THE CENTRE FOR EUROPEAN SECURITY STUDIES

Located at Groningen in The Netherlands, the Centre for European Security Studies (CESS) is an independent and non-profit research, education and training enterprise. Its declared mission is to help promote and sustain democratic structures and processes in foreign and defence policy-making across the whole of Europe and to encourage informed debate on security matters (broadly defined). In fulfilment of this aim CESS has placed special emphasis on helping nurture and support the institutions and individuals that attaining the stated goals requires. Moreover, the Centre encourages international collaborative effort in all its work, in the interest of fostering mutual understanding in the security field and in the belief that extending and strengthening such understanding is crucial to the evolution of a stable all-European order of law-governed democracies.

Since its establishment in 1993 – by founding Director Peter Volten – CESS has been engaged mainly in the design and delivery of education and training programmes for Central and Eastern Europe. It has acquired considerable expertise and experience in such activity, which have been used to good effect in recent years with activities in South-Eastern Europe (SEE). The 2001-2003 *Democratic Control: Parliament and Parliamentary Staff Education Programme* – involving national workshops in seven SEE countries and two regional meetings – is a case in point.

The Groningen Centre has also organised original research on aspects of the politico-military transition in Central and Eastern Europe, including a number of country monographs on civil-military relations and security policy-making and planning plus major collaborative investigations of ‘shared security’ (1999-2000) and SEE security co-operation (2001-2002) – all published in the Centre’s *Harmonie Papers* series of occasional papers. On top of that, in-house work has been done on aspects of aspirant states’ preparedness for NATO membership (and Euro-Atlantic integration) and on European defence futures generally, while in 2002 CESS completed two special inquiries for the Geneva Centre for the Democratic Control of Armed Forces (DCAF) – a

‘transparency audit’ of South-Eastern Europe defence and an exploratory study of transparency and accountability of police forces, security services and intelligence agencies in seven selected states (the present volume).

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