

The Ethics of Intelligence Collection

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This is an important issue and one that can take a lot of public as well as professional discussion. I want to talk about three issues directly relation to intelligence broadly and collection more narrowly:

- Ethics and what that means in relation to intelligence;
- Intelligence collection specifically and what that means in relation to ethics; and
- What an ethical collection system would or could look like.

Ethics in relation to intelligence

I should start by saying that I was gratified to have two senior intelligence officers, one from the New Zealand Security Intelligence Service and the other from the Government Communications Security Bureau, tell me last week that of course there were ethical principles at play in their business and that the principles were important, even fundamental. That says something quite positive about the New Zealand system's culture I think - assuming the attitude is widely held.

On the other hand, I can find nothing in the current 'National Security System' paper (published in May 2011) dealing with ethics, although some of the concepts of an ethical system are mentioned. Also, the New Zealand Intelligence Community website does not mention ethics and none of the relevant legislation seems to mention the term, although again some of the components of an ethical system are raised. I hope this is an oversight and that eventually, as well as discussion of what the Intelligence Community does to ensure New Zealand's national security and discussion of the challenges faced by the Community, there will also be sections on the values held by the Community as it conducts its business.

When we talk about ethics and intelligence, some argue that we are entering two separate realms. One the domain of anything goes and the other the domain of rules, and notions of 'right actions'. I should make the point at this stage that attitudes change, sometimes dramatically and that what is considered to be right

today, may well not be in the future. One hundred years ago, even fewer, for example, there were virtually no rules to the intelligence business. If there was a rule, it was 'don't get caught'. Otherwise, lying, forgery, murder, or breaking and entering were part of the daily life - especially during wartime when the hunter component dominated. During the First World War 'C', the head of the Secret Intelligence Service, Mansfield Cumming, is reputed to have suggested that a 'sword stick' was a useful piece of kit for an intelligence officer and that the intelligence business itself was a 'capital sport'. No more I suspect.

Might I suggest that ethics as a concept is about human conduct and is closely related to the notion of doing right by people. The Kantian imperative, 'treat people as subjects not objects' is useful shorthand here. That talks to the cosmopolitan world view that individuals are of equal moral standing. That is, in other words, that individual human rights are indivisible, regardless of national borders or of nationality. In this view of the world and how it should operate, the individual is supreme rather than any other actor.

You will note that I have introduced the concept of nation and nationality. And, although the nation or its political incarnation the state demands loyalty of the citizen and asserts the right to act in the citizen's name, that assertion is increasingly being challenged by the idea that individual rights are superior to the state's rights in many circumstances. That in turn raises significant questions about the relationship between a concept that is deeply rooted in the statist world of the national intelligence system and the individuated world of human rights.

We know that that the individual cannot be sovereign in the international realm in practice (although some would disagree with that assertion), but we also know that there is a continuing tension between the rights held by an individual as a human or as a citizen, and the needs of the state. An understanding of ethical principles helps us police the border between the concepts.

There is an additional question as well. In New Zealand the intelligence community, narrowly defined, has its own legislation and the wider intelligence system works under legislation aimed at their own sectoral activity - be that border surveillance or in terms of gathering information about communicable diseases. It is an argument, perhaps, to say that if it's legal then that's good enough. But is that the case I wonder? I suspect not. There are activities that may well be legal (and indeed perhaps justified by the state in terms of protecting us all) but which would not be accepted by the public at large as legitimate. A perceived lack of

legitimacy might come about because the state is considered to be acting unfairly, or because it is using the sledgehammer of 'national security needs' against the walnut of individual or group dissent, or for a range of other reasons. What turns a legal activity into a legitimate one is the recognition that the activity is being conducted ethically. And ethical behaviour leads to trust, which is the basis of the relationship between government and citizens.

But how does the public know that the activity is not only legal, but also ethical and thus legitimate. Stansfield Turner, former Director of Central Intelligence wrote in the mid-1980s that: 'there is one overall test of the ethics of human intelligence activities. That is whether those approving them feel they could defend their activities before the public if the actions became public'. Those of you who have been in the policy world will recognise that this test is one used for any policy action. Useful perhaps, but in the intelligence world how does the public find out? Do we leave it to chance, or do we need a somewhat more systematic approach to gaining legitimacy. The latter I think and I'll come back to that.

Intelligence Collection and its relationship with Ethics

I'd like to turn now to the question of 'Collection' and its relationship with ethics. There are many ways we can think about collection . I'll raise a few here to make the points I want to make. No doubt many of you will think of additional ones. I suspect they will mostly, if not all, come back to the same basic point.

We can think of collection perhaps in terms of systems related to the use of people and systems to the use of technology in all its forms. But technology is often aimed at people, and it is developed, owned and operated by people. There are other ways of slicing this pie. We could, for example, and do, differentiate between collection in the domestic sphere and in the international sphere. Again there are different legal factors at play. Or we could differentiate between collection in public spaces and in private. And indeed we do. Or we might differentiate between active forms of collection (an interrogation perhaps) and more passive ones such as surveillance. Or we could differentiate between the targets: citizens and non-citizens, for example, or their assumed degrees of culpability: potential terrorists and not potential terrorists and with a judgement as to whether they as targets are worthy of ethical consideration or not worthy. Slightly different legal rules apply to each, and indeed within each form I've mentioned, sometimes for good reason and sometimes for historical reasons and sometimes inexplicitly. I will consider shortly whether the ethical rules should also

differ. Indeed, you might like to start thinking whether the term 'rules' is appropriate when applied to ethics.

All of these previous examples involve people as targets or as the controllers of the collection effort. In the case of clandestine collection, we also have to consider the ethical issues surrounding the case officer involved in clandestine human collection. The case officer is living a lie. The relationship he or she has with the source is a lie and often (perhaps normally or always) the relationship the case officer has with non-targets, with friends and family, is also a lie.

A senior colleague tells of his experience as a young man during the Vietnam war, which he opposed as an active member of the peace movement, when he discovered long after the events that a long-term friend and associate in a range of social activities was a member of the Security Intelligence Service. Was my colleague just a source? Was he being used to reach a source? Was it a coincidence? He doesn't know and today doesn't want to know. What he knows and I understand is that the government has attracted a long-term opponent to all forms of intelligence activity. 'Don't get caught' is not an ethical solution, no matter how pragmatic it might be.

All the cases I have considered have people at their heart. And if people are at the heart of the matter, then so too must be ideas of ethics, ethical systems and ethical safeguards

Towards an ethical collection system

There are a number of principles that must be, I think, considered whenever a collection system or a collection plan is being considered, especially when the collection involves people. These have been well rehearsed in the scholarly literature and also, I venture to suspect, in in-house training and professional development. Nonetheless it's worth making some of the principles explicit.

There is one overarching trade-off that a utilitarian would always consider. That is, the relationship between the public good and the rights of the individual. It's a big question with no easy answer, but we should beware the temptation always to assume that we are acting with right on our side and for the greater good. It is always a temptation to assume that our collection activities are for the public good, to keep the country and its citizens secure. But is that always so? Are collection activities ever, for example, for institutional convenience or carried out because

we can rather than because we must? Certainly, on ethical grounds, individual rights should always trump institutional convenience. Other cases may be more difficult.

I've already mentioned the basic ethical rule: Treat people as subjects, as moral and ethical beings, rather than as objects to be moved around the chess board of life. This is always difficult and is a counsel of perfection. But perfection is rarely achievable, so we need something to guide us in practice.

David Omand, whose name should be familiar to everyone in the room has suggested some bullet-point headings to guide an ethical system:

- There must be sufficient sustainable cause to justify the use of secret intelligence processes. Sustainable is an important word here. This is a long-term business and it's not just about getting the immediate advantage or of doing something merely because we can;
- There must be integrity of purpose. Our motives must be pure and be seen to be pure;
- The methods we choose to use must be proportionate to the seriousness of the harm to be prevented. We should use the minimum intrusion necessary into people's affairs;
- We must have proper authority to act and there must be accountability for our actions throughout the command and control chain. As well as accountability, there must be independent oversight of the accountability systems to answer the question *quis custodiet ipsos custodies*, who then shall watch the guardians themselves, and to ensure that citizens have an independent voice if they believe they have been wronged or disadvantaged by the system;
- There must be a reasonable prospect of success. If we can't be quite sure our actions will be effective we probably should look again. We should also be considering risk management here as a brilliantly conceived collection activity, if discovered, can have serious political, policy and professional consequences. We have seen recent examples in New Zealand.
- Secret measures should be a last resort. We should use less harmful or less intrusive measures before choosing tougher measures.

Omand's prescriptions are sensible, but not necessarily the last word and certainly not the only one. Other authorities would generally agree with a listing such as this, but might well add for example: 'intention', where the means should be used for the intended intelligence purpose and not for some other political, economic or social objective; and 'discrimination' between legitimate and illegitimate targets. Perhaps these can be deduced from Omand's prescription, perhaps they need to be made explicit. Either way, there is room for principles such as these.

Yet other authorities seek to draw a parallel between theories of just war, *jus ad bellum* and *jus in bello*, with theories of 'just intelligence' and there is a continuing debate whether the analogy between warfare and intelligence work can be sustained. The debate on that may still be open but it is sufficiently vigorous to have its own theory, its own association (the International Intelligence Ethics Association) and its own journal, *The International Journal of Intelligence Ethics*.

Broadly, 'just intelligence' theory seeks to explain and prescribe justifications for engaging in clandestine intelligence activity (*Jus ad intelligentium*) and to set limits to ensure intelligence activities are conducted justly (*jus in intelligentia*). Michael Quinlan, formerly UK Secretary of Defence and a prolific user of secret intelligence, who was probably the first into this field notes that both the decisions to engage in clandestine activity and the methods one chooses to use are difficult and ones over which reasonable people may well be able to disagree. But more importantly, he argues that we need a wider and more systematic understanding of the principles that should govern the decisions to use clandestine means and the ways we limit them, or choose not to limit them.

Conclusion

I don't have the time to go into these issues in any more detail at all. They are the subject of serious books and debates between senior scholars and practitioners. The answers aren't complete, but as a guide to the working intelligence officer and manager I would offer some takeaway points that should always be in one's mind. Always within a context of legality and authorisation, they would be:

- necessity, which includes concepts of public need and integrity of purpose versus private rights and of the lack of alternative where the need overrides the rights;

- proportionality, which dictates that the means used must be relevant to the ends desired; and
- effectiveness. If it's not likely to work it shouldn't be used at all. Whatever 'it is'.

Over all of this is the idea of public acceptability. You have to be able to explain your activities in ways that the public find acceptable; and that will undoubtedly be related to ethical considerations to some extent at least. If you can't explain your activities in both national good and in ethical terms you will lose legitimacy in the eyes not only of the public, but also of your political masters. And that would be bad not only for the intelligence system, but much more importantly, for the country.

Thank you very much.