Chapter 10
Intelligence Accountability in a Globalizing World. Towards an Instrument of Measuring Effectiveness

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Abstract This chapter discusses the 'accountability gap' with regard to international intelligence cooperation. As a result of globalisation, and especially after 9/11, this cooperation has become vital for national security. But as mechanisms of oversight and accountability are national only, they have had trouble keeping track of these developments. The chapter discusses the reasons why intelligence accountability is problematic, and proposes an innovative analytical instrument for closing this gap.

Keywords Accountability · Globalisation · Historical research

Contents

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10.1 Introduction

Democracies are embedded in the rule of law and in the principle of transparency. Security and intelligence agencies[1] often require exemptions from domestic law, and a substantial amount of operational secrecy. This exceptionalism risks isolating intelligence agencies from the political, public and legal realm. Moreover, as we know that power may corrupt its holder, the isolated and inward-looking environment of intelligence agencies further increases the risk of corruption. Democracies need oversight or review instruments, which increase the political and public accountability of intelligence. Oversight and review instruments assume the task of keeping intelligence under democratic control when transparency conflicts with intelligence capability to the extent of thwarting intelligence work. The resulting accountability serves three purposes: first, it enables citizens to control and monitor government conduct. Second, it prevents executive abuse. And three, it enhances effectiveness and a learning capacity with the executive branch.[2]

However, the marked increase in international intelligence cooperation after 9/11 has contributed to disengagement of the intelligence sector from existing accountability mechanisms, which remain mostly nationally oriented. Intelligence laws in Europe are often more demanding concerning agencies' activities within the national borders, while the collection of intelligence abroad is not regulated with the same rigor. Cooperation between agencies could well serve to circumvent domestic legislation. Citizens increasingly display mistrust about the effects of globalisation both on security and on intelligence agencies. Some argue that in insecure times privacy needs to come second, whereas others fear a Big Brother-type apparatus that needs to be curtailed and controlled.

We argue that the ensuing accountability deficit is partly due to the large transnational variations in degrees of intelligence accountability. In this chapter we develop an instrument to systematically assess the effectiveness of intelligence accountability mechanisms. By 'effective' accountability mechanisms we mean those that are concerned with the requirements of both intelligence agencies, which tend toward greater secrecy, and democratic institutions, which tend toward greater openness. Our instrument will facilitate transnational comparisons and contribute to a smaller accountability deficit.

We first analyse obstacles to intelligence accountability and how the 9/11 attacks outpaced the development since the 1970s towards firmer accountability mechanisms. We then develop an instrument for systematically assessing effective intelligence accountability, drawing on criteria in the fields of internal oversight and review (control), which focuses on the executive, and external oversight and review, which regards external actors.

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[1] Henceforward, we will refer to 'intelligence agencies', meaning both security and intelligence agencies.

[2] Aucoin and Heintzman 2000, pp. 244–245.

Within internal oversight and review instruments we distinguish the relevance of (a) a clear ministerial responsibility for the intelligence community, (b) ministerial expertise regarding intelligence issues, (c) internal historical research as a means of providing accountability in retrospect, (d) contractual academic research, and (e) the declassification of archives that allows others to draw conclusions on the agencies' past.

Within external oversight and review instruments we stress the relevance of (a) sufficient powers and independence of external oversight and review committees, (b) their professional attitude vis-à-vis secrecy, and (c) a proactive stance of committee members.

This model contributes to a rationalization of the debate on intelligence accountability, transcending more common and popular debates on accountability overloads and deficits. It facilitates comparisons of national accountability mechanisms and suggests how to deal with these national variations, by proposing a number of requirements of effective intelligence accountability. The innovative character of this chapter is twofold: first, it focuses on both external actors outside the executive and the executive itself, as players who can both contribute to making intelligence agencies more accountable. Surprisingly, the share of the executive in making itself accountable is largely glossed over in the existing literature on intelligence accountability.[3] Second, this chapter proposes to look beyond the traditional and current judicial character of oversight and review instruments, and explore the merits of historical research as a form of accountability in retrospect with temporally and thematically broader perspectives than the judicial approach.

The morally high reputation of the concept of accountability makes us believe that accountability is a worthy goal to pursue no matter what.[4] However, accountability, in the field of intelligence more particularly, has both advantages and disadvantages. Rendering an agency accountable increases the political trust in its functioning and strengthens its political legitimacy.[5] Political 'outsiders' will arguably feel more involved in intelligence matters, developing a sense of ownership regarding the topic. Lastly, greater accountability may also lead to less corruption and incompetency, as it renders malfunctioning more transparent. However, accountability mechanisms, especially in the field of intelligence, may be expensive. Means for secure communication, security clearances, and investment in joint technological equipment are costly and may hamper effectiveness.

Critics refer to a growing 'accountability industry' and an 'accountability overload', paralyzing the effectiveness of organisations and, in the intelligence sector, reducing the operational clout. As Bovens, Schillemans and 't Hart note

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[3] Born and Leigh 2007; Eskens et al. 2015; Ott 2003; Phythian 2007.

[4] Bovens 2010.

[5] On the relationship between trust and acceptance from a socio-psychological perspective, see: Malone and Fiske 2013; Terwel et al. 2011.

regarding public accountability arrangements in general, both supporters and critics of intelligence accountability are largely driven by impressions and incidents.[6] In the field of intelligence the significance of impressions and incidents may be even greater due to the secrecy involved. From the public and legislative perspective, secrecy may lead to irritation, suspicion, distrust and curiosity vis-à-vis those who have the secret, instigating calls for transparency and accountability.[7]

From the perspective of intelligence agencies, public challenges to their use of secrecy may lead to reactions of feeling misunderstood and underestimated, widening the rift with 'politics' and society, and strengthening a feeling of indignation and resistance regarding the principle of accountability.[8]

Some have tried to overcome this ideal-typical divide of supporters and critics of intelligence accountability, by proposing requirements of effective intelligence accountability on the basis of specific (national) case studies. Ott departs from the US system of intelligence oversight by Congress. He concludes by briefly suggesting that 'the intelligence community must be ready and willing to support, not resist, oversight.' His other suggestions concern four criteria that relate to the role of Congress.[9] Phythian focuses on the British parliamentary Intelligence and Security Committee and, as Ott, he concludes with suggestions to strengthen the Committee.[10] Born and Leigh follow Ott and Phythian in putting the large burden for improved intelligence accountability with those external actors who exert oversight.[11] This chapter draws upon this first step towards a more integrated division of responsibilities of both those who control the agencies and the agencies themselves.

10.2   Obstacles to Intelligence Accountability

The 1970s intelligence accountability mechanisms in most Western democracies have made great progress and brought agencies closer to 'politics' and society. The 'transparent' 1990s have further accelerated this process. Since 9/11, however, accountability mechanisms face several obstacles: international intelligence cooperation has become more complex, involving more actors and more diffuse threats; a changing perception of transparency has facilitated agencies' justification of secrecy; international intelligence cooperation tends to thrive in deep secrecy, and intelligence accountability mechanisms show strong transnational variations. These

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[6] Bovens et al. 2008, p. 226.

[7] See further Braat 2016b, pp. 534–538.

[8] Braat 2012, pp. 185–201.

[9] Ott 2003.

[10] Phythian 2007.

[11] Born and Leigh 2007.

obstacles strengthen the need for a more rational approach to the effectiveness of intelligence accountability mechanisms.

Control over the activities of intelligence and security services had long been the exclusive domain of the head of service or his political or military bosses. The intelligence accountability revolution in the 1970s has been a result of growing public distrust toward security and intelligence agencies, and the rise of the human rights paradigm.[12] This led to public and national introspection regarding violations of human rights at home. The decades running up to 9/11 saw a rise in formal legislation that placed these services on a statutory footing that allowed at least a modicum of external control, be it parliamentary, judicial or extra-parliamentary. This development can be seen in Western democracies and in a number of post-authoritarian states. As regards the Western democracies, Gill proposes to connect this development with a number of scandals that prompted inquiry and subsequently led to a desire to curtail excessive powers of the executive and protect the privacy and constitutional rights of citizens.[13] In the United States, the Watergate scandal and the outrage over the suspected involvement of the CIA in the 1973 coup d'état in Chile led to the establishment by the Senate of the Church Committee. A number of Western states, such as Canada and Australia, faced similar inquiries, which resulted in mechanisms of oversight and review being put in place. Faced with these developments in key partner states, and fearing a domestic backlash resulting from these inquiries, the United Kingdom's Secret Service began pressing for formal legislation that would shield it from accusations of wantonness. Its leadership argued that a statutory footing would in fact enhance the effectiveness and efficiency of the service, since such a footing would delineate the formal boundaries of what was admissible and what was not. The old 'royal prerogative' could not.[14]

Elsewhere, in countries where dictatorships gave way to democratic forms of government, the key instruments of repression—the security services—became the object of public scrutiny. Cases in point are Spain, South Africa, Brazil, and the former communist states in Central and Eastern Europe.[15] Here too, the focus was on increasing legality, even if the outcome was not straightforward in each case. Hungary, the first of the Soviet satellites to rid itself of communist rule, found it difficult to force the former regime's security apparatus into submission. Initial legislation put privacy of security apparatus personnel first and it was left to the agency to decide on what to declassify. From 2003, there was more stress on public accountability but the agency retained the right to decide on declassification, which undermined accountability. The Czech Republic by contrast followed a different trajectory and undertook a process of lustration that, it was hoped, would ensure the loyalty of its security apparatus to the new democratic order. It banned all former

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[12] Baudet 2011; Baudet 2016; cf. Eckel 2014.

[13] Gill 2003, p. 1.

[14] Lander 2004, pp. 484–485. Cf. Gill 2003, p. 2.

[15] Gimenez-Salinas 2002; Rzeplinski 2002.

officials from politics and other positions of influence.[16] The complexities of re-forming the security sector in post-communist states stimulated commitment on the part of a number of Western European security services to engage in promoting Western professional standards, including democratic accountability. Somewhat later, Security Sector Reform was included as one of the foci of NATO's Partnership for Peace Programme.

In many cases, the new statutes and legislation stipulated that their security apparatus, as part of the wider state apparatus, should have to conform to the European Convention of Human Rights. This had symbolic meaning as much as practical. In symbolic terms it reaffirmed the commitment of the European states to a human rights-based identity: in the 1950s the signatories of the ECHR proclaimed the Convention was a statement to the totalitarian countries on the continent that 'Europe' was a community of states built on human rights and the rule of law. The accession of new member states implied (or at least suggested) they too adopted this notion. Back in the 1950s some signatory states, such as Italy and West Germany, had believed that the ECHR itself could function as a bulwark against totalitarianism and help them establish a functioning democracy. It may well be that after the Cold War, accession helped cement new democracies as well. In practical terms, the ECHR forced signatories to uphold certain standards, and through its First Additional Protocol granted the right to individual application to inhabitants of signatory states. This allowed external review by the European Court of Human Rights of a signatory state's actions.[17] The court still plays an important role as a watchdog and so does the Council of Europe that sponsored the ECHR.

The relaxation of Cold War tensions in the late 1980s and the ensuing evaporation of familiar bipolar threats problematized the rationale behind the need for intelligence agencies and bolstered political demands for greater accountability. During the 'decade of openness' of the 1990s the general push towards greater transparency in public administration further strengthened incentives both from the executive and the legislative perspective to make the intelligence sector more accountable.[18] Social movements' demands for more open, democratic and responsive governments were largely successful. For example, in the 1990s twenty-six countries introduced freedom of information acts that recognized their citizens' right of access to government information, creating a new norm for any government to be considered a democracy.[19] Former Russian President Boris Yeltsin opened a part of the Soviet archives; the UK formally acknowledged the existence of its Security Service (1989) and the CIA launched its 'openness project'. In The Netherlands the Dutch Security Service and its successor, the General Intelligence and Security Service, commissioned an official history with an unprecedented amount of operational details. Under President Clinton the American

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[16] Stan 2009, pp. 8, 116–123.

[17] Baudet 2011. Cf. Cameron 2005, pp. 34–56.

[18] Blanton 2009; idem 2003.

[19] Blanton 2002, pp. 50–58.

government declassified many more government documents, dating from the First World War to the Vietnam War.[20]

Since 9/11 the accountability mechanisms that Western democracies had built between the 1970s and 2001 face new obstacles. The changing pace and nature of intelligence cooperation has challenged existing systems of intelligence accountability. First, international intelligence cooperation has become more complex, including more actors and more diverse threats. While international intelligence cooperation during the Cold War was primarily a matter of external intelligence services and their liaisons, in the beginning of the 21st century it has come to include domestic security services, police and other actors. Differences blur between domestic and foreign security threats, between intelligence and investigation.[21] Threats have become as diverse as jihadi terrorism, cyber espionage and war, the proliferation of weapons of mass destruction, radicalization, and extremism. The process of globalisation since the 1990s and the terrorist attacks in September 2001 have increased bilateral, multilateral and supranational intelligence cooperation. Agencies exchange nationally owned intelligence products and/or produce intelligence jointly, mostly based on reciprocity. Examples in Europe include the Club de Berne, the Middle European Conference, the Counter Terrorism Group, and the Situation Centre of the EU (SITCEN).

A second obstacle is the changing concept of transparency in public administration. Fung et al. distinguish three generations of transparency. The rise of freedom of information acts around the world in the 1990s belongs to the first generation of transparency. This generation focused on the right to know and the need to make information available without, however, the ambition to change government or companies' behaviour. By contrast, the second generation did aim at changing behaviour through 'targeted transparency', which is characterized by mandatory disclosure of standardized information to serve a specific public interest. The third and current generation of transparency is 'collaborative' in the sense that the internet (i.e., social media) serves as a 'marketplace' of information.[22] Characteristic of this present generation of transparency is that government institutions do not necessarily play a role in the process of publicity and have moved to the background as providers of information. Instead, citizens have assumed a more important role in providing and disclosing information.[23] This shows that transparency does not automatically lead to greater degrees of accountability and

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[20] Blanton 2003, pp. 51–52.

[21] Aldrich 2011, pp. 18–41.

[22] Fung et al. 2007, pp. 6, 24–25; Braat 2016a, p. 394.

[23] A striking example is the Dutch private foundation Argus. On the basis of the Dutch freedom of information act it files requests and collects information on 'secret' organisations with the intention of making this information accessible to the public and encouraging new research. See http://www.stichtingargus.nl (last visited 6 December 2016).

democracy and that the current notion of transparency can run parallel to growing governmental secrecy. The paradox facilitates intelligence's justification of secrecy, but it will likely not moderate public responses to secrecy.[24]

A third obstacle to intelligence accountability is the secretive nature of international intelligence cooperation. The tendency towards greater secrecy increases as agencies cooperate with their foreign counterparts, which puts international intelligence cooperation—bilateral, multilateral or supranational—largely outside the realm of public accountability. 'Bureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can', Max Weber states. Moreover, there is a natural tendency to think that what is withheld from the many has a special value,[25] especially under norms of transparency where the secret appears an exception. This tendency towards secrecy extends far beyond the areas of functionally motivated secrecy.[26] It is difficult to avert and easy to encourage. We therefore assume that secrecy in the field of international intelligence cooperation may risk leading to greater operational secrecy in general, which in turn can easily spread over to (unnecessary) secrecy in the policy domain.

We add a last, more structural reason for the current challenge to systems of intelligence accountability, namely the international variations in oversight mechanisms. International intelligence cooperation tends to thrive in deep secrecy because foreign counterparts are generally not keen on making their information available to foreign national oversight and review committees they are unfamiliar with. As such, they may sense drawbacks to cooperate with intelligence and security services that are subjected to robust accountability mechanisms. This, in turn, may restrain national intelligence agencies in sharing information with review committees regarding their cooperation with foreign partners. Consequently, transnational differences in the quality of national accountability mechanisms present a significant obstacle to intelligence accountability. Supranational bodies are not likely to be the answer as agencies cooperate not as friends but as parties that share an interest. As interests change, agencies will not readily submit to supranational review. Non-specialized bodies such as the Council of Europe or the European Court of Human Rights may step in, and indeed have done so, at times sharply criticizing state practice, but it is difficult to ascertain (a) whether their involvement is incident-driven, and (b) whether their criticisms are taken to heart. Likewise, although the ruling, on 21 December 2016, of the European Court of Justice in Luxembourg on data retention is binding, it is conceivable that agencies from EU member states will obtain data they can no longer amass themselves from non-EU state agencies.

As new technologies both generated the need for real-time intelligence, and for the first time offered real opportunities in this respect, these developments

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[24] Braat 2016a, pp. 394–395.

[25] Simmel 1906, p. 464.

[26] Weber 2013, p. 992.

combined to create a situation in which 'the institutional mechanisms that were designed to provide accountability and oversight (…) were outpaced'.[27] Aldrich, who is quoted here, is hardly alone in this judgment. Others refer to an 'oversight gap' or deficit. Such terms suggest that oversight and accountability of international intelligence cooperation is highly problematic yet necessary. Why is this so? If it is admissible to explain by analogy, then a key reason must be popular distrust, fed, no doubt, by revelations about such programs as Echelon and PRISM. The detention without trial of suspected terrorists in Guantánamo Bay may well have contributed to this, and so may the CIA-run renditions program in which a number of European services acted as accomplices.[28]

A number of remarks must be made here. The outcry does not seem to focus on the fact that there is international liaison between services. In an average Western country, about 80% of the intelligence that is produced stems from liaison with other, mostly foreign services.[29] Rather, people seem to take issue with the fact that there is a form of cooperation, such as renditions in which torture is used to get detainees to talk, that run counter to Western democratic values and human rights ideology. Added to this, there is concern over privacy issues resulting from the indiscriminate collection and sharing of bulk data. Whether or not the assessment that cooperation between services as such is largely acceptable to the general public, is correct, the revelations about indiscriminate interception of communications, and torture, produced significant outcry in Europe and elsewhere in the Western world, and calls for improved oversight.

Interestingly enough, this concern about faltering oversight of intelligence liaison seems to be virtually absent with most intelligence and security services that feel that current oversight mechanisms—in their widest sense—function satisfactorily. According to some personnel of the Dutch Intelligence and Security Service, the first Law on Intelligence and Security Services (1987)[30] led, to 'over-regulation' of daily work. Mandatory approval by the legal department diminished creativity and freedom in operational work, according to some.[31] Some current Dutch intelligence personnel for instance stated that they spend much time discussing with their service's legal advisors about issues of proportionality and legality, which in their view paralyzes their organization. Others affirm that they frequently discuss with the legal advisors and claim this ensures the legality of what they are doing, and contributed to their service's efficiency as well as its effectiveness.[32] Some inside and outside of Britain's foreign policy elite have argued that the current oversight arrangements are so restrictive as to hamper the effectiveness of British

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[27] Aldrich 2011, p. 133.

[28] See Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe 2006.

[29] Personal communication by a high-ranking Dutch intelligence official.

[30] The Wet op de Inlichtingen- en Veiligheidsdiensten (WIV).

[31] Braat 2012, p. 190.

[32] Personal communications to the authors by Dutch intelligence personnel.

services. Proponents of Brexit claim that their country would be safer if its intelligence and security services were freed from limitations imposed by the ECHR.[33] If there is any truth in these statements, this would indeed suggest that current oversight mechanisms function effectively. The question of course remains who will be the judge of that.

10.3 Towards an Instrument for Effective Intelligence Accountability

The secretive working environment of intelligence and the relatively weak politicization of intelligence, particularly prior to 9/11, may foster the misleading belief within agencies that they are 'immune from the plague of politics'.[34] However, secrecy provides only a fragile shield against this plague of politics as it protects agencies from both public criticism and public support. Accordingly, it leaves much leeway to the public perception of whether intelligence agencies function effectively, efficiently, and legally. Intelligence accountability has an important role to play in mitigating the significance of such volatile public perceptions and normalizing the power base of intelligence agencies.

In order to measure the extent of intelligence accountability, we propose a number of criteria that relate to the requirements of both internal and external oversight mechanisms. This model allows for transnational comparisons of oversight mechanisms and, consequently, contributes to a better understanding of the 'accountability deficit' of international intelligence cooperation (Fig. 10.1).

Figure 10.1 Requirements for effective intelligence accountability

Internal	Ministerial responsibility
	Ministerial expertise
	Internal historical research
	Contractual academic research
	Declassification of archives
External	Sufficient powers and independence
	Professional attitude vis-à-vis secrecy
	Proactive stance of committee members

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[33] Technically speaking this is not true. For the UK to be freed from obligations stemming from the ECHR it would not only need to leave the EU, but the Council of Europe, the actual sponsor of the Convention, as well.

[34] Long 1949, p. 257.

10.4   Internal Oversight (Control)

Well-functioning internal oversight is a precondition for effective external oversight and accountable intelligence agencies; if internal control does not function properly,[35] external oversight committees will have a hard time getting a grip on the chain of events within the agency. Though hardly visible to citizens and their representatives, internal oversight mechanisms are better informed on day-to-day practices with the agencies than external oversight committees. As criteria of effective intelligence accountability we distinguish clear ministerial responsibility and expertise, the structural practice of internal historical research, the willingness to engage in contractual academic research, and the declassification of archives.

10.4.1   Ministerial Responsibility

Accountability mechanisms and their instruments of oversight and review should ideally be structured simply enough for the non-initiated to understand them at a glance. However, the confidentiality involved in oversight of the intelligence sector complicates the related accountability 'industry' and blurs its clarity. For example, parliamentary oversight committees may meet secretly and report sporadically, obscuring their presence and role in monitoring the agencies. Likewise, the differences in powers and function with independent oversight committees and, say, an Ombudsman may be not easy to grasp by the majority of people.

We, therefore, consider it democratically beneficial if the ultimate responsibility for agencies' conduct lies clearly with the responsible minister(s) for the agencies. Although the minister's personality will impact his or her ability to control the agency, this is no different with other government agencies. A possible proliferation of oversight and review committees risks overruling the position of the minister, thereby depriving the electorate of a clearly responsible individual for the agencies' conduct. For example, a recent proposal for a revision of the Dutch Intelligence and Security Services Act (WIV) introduces a new Review Committee on the Use of Special Powers (TIB). It would consist of two former judges and a 'technical expert' and it would independently verify the legal use of the recently expanded powers of the Dutch agencies, each time the agencies make use of their new powers. Despite the undeniable advantages of independent oversight, the new committee would have the power to lapse previously made decisions by the minister on the use of special

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[35] For example, a well functioning internal documentation system which archives all internal documents, including emails; a legal department that oversees all operational activities and the use of special powers; managers who assume responsibility over their departments, etc.

powers, thereby blurring and complicating his responsibilities for the agencies and fragmenting the entire intelligence accountability mechanism.[36]

10.4.2   Ministerial Expertise

A responsible minister should be an equal partner to a head of service, on whom he depends for his information on the agency. Even if the minister has the right to know everything regarding operational activities of his agency, he finds himself in a disadvantaged position because he may not know what information to ask for, for two reasons. First, regarding most topics he depends entirely on what his head of service decides to tell him. The historical context and organisational culture of an agency decide whether the minister is considered a fellow insider, with whom much is confided without second thoughts, or rather an outsider, whose knowledge of operational work and priorities is considered of secondary importance. Second, the intelligence sector and operational work are complex matters most people are not acquainted with. Most probably, the responsible minister is not an expert in intelligence matters. Thus, if he should be an equal partner to the head of service, he will greatly benefit from support staff with an expertise in intelligence matters, independent of the agencies themselves.

10.4.3   Internal Historical Research

Historical research on intelligence and security services is a type of accountability in retrospect.[37] Consequently, it is a valuable addition to oversight committees, which focus on the present, and review committees, which focus on the near past. Its added value derives from both its temporal and methodological focus. Historians do not merely collect facts, but they interpret and analyse them. Their (written or oral) sources provide information on, for example, operational, legal, socio-cultural, financial and ethical aspects of agencies' histories. As such, their scope is much broader than common oversight and review committees, which usually have members with a legal background.[38]

The end of the Cold War saw a growing interest with intelligence agencies to recruit in-house historians or strengthen their historical staff. Examples are CIA's Center for the Study of Intelligence and the Dutch Intelligence and Security

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[36] See also the advice of the Dutch Council of State on the new law and the TIB in particular: Raad van State 2016, Advies W04.16.0097/I, Kamerstukken II 2016/2017, 34 588, nr. 4, 21 September 2016.

[37] Blom 2013, pp. 94–98. Cf. De Baets 2009.

[38] Both in public administration and in academia there is much support for the continuing important role of lawyers in intelligence accountability. For example, see Eskens et al. 2015.

Service's recruitment of an internal historian in 1990.[39] These two examples have led to significant publications. However, most internal historical research remains classified and of less democratic, academic and practical use than published work. Historical research within the agencies—'internal historical research'—faces both more opportunities and obstacles than historical research on the agencies done by outsiders.[40] In-house historians have broader access to the agencies' archives and (former) personnel but they often lack institutional protection of their academic integrity. As their topic of research concerns their own employer they may easily find themselves in an uncomfortable position: important academic criteria may clash with norms in public administration and political incentives of the agencies. For example, academic independence does not naturally match with the principle of ministerial responsibility, the isolated environment of intelligence hampers the required openness in academic research (publication of research results and peer-review), and agencies' general distrust of the media does not correspond to academics' view of the media as a vehicle of stimulating historical debate beyond peers. Another reason for the possibly thorny position of an in-house historian is the difference in perception of the purpose of historical research and of its method-ological challenges. Whereas academic historians usually seek to engender debate on past events, public administration usually seeks 'lessons learned' from the past. In other words, whereas the former seeks to diversify and clarify our knowledge of the past, the latter prefers clear-cut conclusions that are straightforward to apply to the present. This preference is visible in the establishment of committees of inquiry. For actors in public administration, historical research often has a morally high connotation, proving their eagerness to face past mistakes and learn from them. Their expectations of historical research, however, do not often correspond with what academic historical research has to offer. Arguably, this may subject (parts of the) publication of internal historical research to political preferences or sensitivities on the part of the agency. It is similar with military establishments.[41]

Even if the two parties need to find ways to come closer to one another, aca-demic standards of historical research have important benefits to intelligence agencies. Of course, there are limits to academic independence: in-house historians and the agencies' management will inevitably need to agree on the topic of research, historians need to respect a minimum of operational secrecy regarding human sources and methods, and historians cannot decide independently on the publication of their research. However, academic criteria make agencies publicly accountable for their past actions, far beyond the reach of oversight and review committees. Moreover, the publication of historical research may increase public understanding of the intelligence sector and the working circumstances of agencies.

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[39] The first in-house historian of the Dutch Intelligence and Security Service, Dick Engelen, published two significant operational histories of the service: Engelen 1995, and Engelen 2007. His successor, Eleni Braat, published a socio-cultural history of the service: Braat 2012.

[40] De Jong 2015.

[41] Cf. Baudet 2013.

And finally, agencies can participate in the academic and political debate on their own history.[42]

Consequently, if intelligence agencies choose to make internal historical research into an asset, both from the lessons-learned perspective and from the perspective of public accountability, they need to offer their in-house historians strong institutional protection in order to conduct their work according to academic standards. Such protection should, from the political perspective, ideally reach until the ministerial level and, from the academic perspective, include an independent academic supervisory committee with unrestricted access to the agencies' archives.[43]

10.4.4 Contractual Academic Research

Since the end of the Cold War intelligence agencies have increasingly engaged with the academic world in the form of contractual research. In such cases an independent researcher, affiliated to an academic institution and thus not a member of the agency, conducts research on behalf of the intelligence agency. Contrary to internal historical research, this type of research usually gets published, as most academics do not have an interest in conducting classified research. The best-known cases concern historical research. Examples are the official histories of the Norwegian Security Service, the Politiets Sikkerhetstjeneste (PST), and the Danish Security Service, the Politiets Efterretningstjeneste (PET) at the end of the 1990s, the research group for the history of the German foreign intelligence service 'Geschichte des Bundesnachrichtendienstes' (BND) since 2011, a comparable research group for the history of the German security service Bundesamt für Verfassungsschutz (BfV), the official histories of MI5 and MI6 in 2009 and 2010 respectively,[44] and three volumes on the history of the Australian Security Intelligence Service (ASIO) in 2014, 2015 and 2016.[45]

To both agencies and citizens and their representatives, contractual academic research has many of the same merits as internal historical research. It makes agencies more accountable for their actions, it increases public knowledge and understanding of the intelligence sector, and it allows agencies to better participate in academic and political debates on intelligence. More so than internal historical

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[42] The CIA is a good example of an agency which actively and structurally participates in the (academic) debate on its own history, for example through publications, conference papers, and education.

[43] Such was the case with Dick Engelen, the first official in-house historian of the Dutch Security Service and one of the first worldwide to publish his work. The responsible minister of the Interior supported his academic independence and an academic supervisory committee had full access to the entire archive.

[44] Andrew 2009; Jeffery 2010.

[45] Horner 2014; Blaxland 2015; Blaxland and Crawley 2016.

research, independent academics are institutionally better protected against possible consequences of 'inconvenient findings', such as refraining from publication.

10.4.5   Declassification of Archives

Intelligence agencies tend to suffer from a 'secrecy reflex', regarding both the present and the past.[46] By 'secrecy reflex' we mean a tendency to excessively classify or insufficiently declassify information. The right to access government information is essential to participation in the democratic process, trust in the executive power, and informed decision-making by citizens and their representatives.[47] Intelligence agencies can make themselves more accountable by conducting a generous policy of declassification of their documents, transferring them to their respective national archives, and allowing independent historians to do research on their past.[48]

Naturally, (the identity of) sources and working methods, and current operationally relevant knowledge need to remain classified if an intelligence agency needs to properly do its job. For example, Christopher Andrew's official history of MI5 becomes particularly succinct as his research period approaches the present. However, as the two main criteria for operational classification—the protection of sources and methods—recede to the past, they should logically become less strict. Even if the American Freedom of Information Act (FOIA) and comparable acts in other countries spell out some mandatory disclosure procedures, intelligence agencies still have some leeway in deciding for themselves when to disclose historical material. For example, in 2015 the Dutch Intelligence and Security Service (AIVD) transferred its archives between 1946 and 1949 to the Dutch National Archives. No historical material of subsequent years has yet been transferred, despite the presence of a freedom of information act. Some Western democracies such as Belgium do not even have a freedom of information act.

How can we explain this secrecy reflex? First, from a practical point of view, declassification, the processing of an archive and its transfer to the national archives require trained staff. The operational, hands-on organizational culture of intelligence agencies does generally not prioritize the labour-intensive and long-term process and benefits of preparing an archive to be transferred to the national archives.[49] Second, classification of information is a contagious process. It rarely limits itself to its merely functional aspects, and easily spreads over to policy

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[46] Blom 2013, pp. 94–98.

[47] Jaeger and Bertot 2010.

[48] As the British government introduced the Intelligence Service Act in 1993 it committed itself to more openness. It subsequently transferred a considerable amount of declassified documents to the British National Archives. Aldrich 2010 made use of this move towards greater openness.

[49] Braat 2012, pp. 107–128, 151–158.

matters and other matters that do not deserve to be classified. Third, fear of publicity and scandals: intelligence agencies are in a difficult position to defend themselves and are generally not very comfortable with publicity.

10.5 External Oversight

Most academic attention on intelligence accountability has focused on external oversight. By external oversight we mean oversight or review committees outside the executive realm, such as parliamentary committees and independent committees. As we restrict ourselves in this chapter to structural accountability mechanisms, we do not take into account the role of the media, important as it may be in its contribution to rendering intelligence agencies more transparent and making them more accountable.

10.5.1 Sufficient Powers and Independence

Most literature on intelligence accountability concentrates on the powers of external oversight committees. Without sufficient powers, oversight and review committees will be less inclined to assume responsibility and the quality of intelligence accountability will diminish.[50] Significant powers comprise, first, full access to agencies' documentation system and archives. This means committee members should ideally be allowed to search themselves for relevant documents instead of depend on the information the agencies provide them with. As such they significantly strengthen their investigatory capability. However, such a privilege is particularly rare and usually only reserved to independent oversight committees. Second, committees should have the right to call for meetings with the agencies and their ministers instead of depending on when the executive deems a meeting necessary. The case of the British Intelligence and Security Committee shows the paralyzing effects of the lack of such a right.[51] Third, a significant criterion of institutional independence is the appointment of committee members without any influence from the executive. Again, the case of the British Intelligence and Security Committee shows how damaging appointments by the executive can be to the committees' independence and power.

Sufficient powers strengthen committees' independence and self-confidence. The main benefit is that it makes them into a more equal partner to intelligence agencies. An equal relationship may encourage intelligence agencies to consider external oversight committees as an asset rather than as a rival or a legal requirement.

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[50] See also Sect. 10.5.3 on 'a proactive stance of committee members'.
[51] Phythian 2007, pp. 75–99.

10.5.2   Professional Attitude vis-à-vis Secrecy

Besides specific powers, the effectiveness of external oversight and review committees depends on the professional attitude of its members vis-à-vis secrecy. The relative secret environment in which committee members become involved risks sensationalizing members' stance vis-à-vis intelligence. This sensationalism of secrecy leads to three distinctive patterns of behaviour.[52]

First, it may lead to an overly critical attitude, which usually results from suspicion, irritation, speculation, curiosity and distrust regarding the secrecy that surrounds the agencies. Second, committee members may show a particular attachment to the agency and its need for secrecy. There is a tendency to wonder what can be so horrific, vital or wonderful that specific secrets cannot be revealed. Accordingly, they tend to view the agencies as superior and exceptional. They trust them almost blindly and idealize their efficiency and power. In oversight and review committees such 'loyal' committee members may actively defend the use of secrecy and accept that they, as relative outsiders, have limited knowledge on intelligence issues. A final pattern of behaviour amounts to active defeatism. Such committee members actively and cynically defend the futility of trying to disclose information. According to them, 'that's just the way things are'.

None of these three patterns of behaviour leads to a constructive debating sphere that allows committee members to effectively monitor intelligence agencies. Secrecy creates a rift between those who know—the agencies and their ministers—and those who know less—the committee members. Other research has shown that the most constructive debating sphere on intelligence amounts to a mixture of both distrust and trust (the first and second patterns of behaviour) in combination with agencies' initiatives to provide openness.[53] We suggest that this mixture equals a professional attitude towards secrecy.

10.5.3   A Proactive Stance of Committee Members

External oversight benefits from a structurally proactive stance of committee members instead of a primarily passive one. Even if this may sound self-evident, committee members have a strong tendency to mostly listen and put themselves on the receiving end of what the agencies are saying. A passive stance is a particularly common problem in parliamentary oversight committees, which consist of politicians. Politicians need publicity as oxygen. For them, worse than responsibility with power is power without responsibility. Thus, two problems arise: there is a strong lack of willingness to invest in something that does not pay off politically, and parliamentary committee members have a strong incentive to remain ignorant

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[52] Braat 2016b, pp. 534–538.
[53] Idem.

on important issues if they cannot act upon them. As Senator Leverett Saltonstall, leading member of the American Armed Services Committee of the Senate between 1945 and 1967, responded to the fact that his committee met so rarely:

> It is not a question of reluctance on the part of CIA officials to speak to us. It is a question of our reluctance, if you will, to seek information and knowledge on subjects which I personally, as a member of Congress and as a citizen, would rather not have.[54]

As such, parliamentary committees may perform a 'ritual dance' rather than actively monitor the agencies.[55] Consequently, the isolated environment of such committees tends to make their members less active than they would be in the open environment of parliament. This tendency may be countered with two possible solutions: first, the threshold to refer intelligence issues to the closed environment of parliamentary oversight committees should be high; agencies and their ministers would preferably be accountable, as much as possible, to the open environment of parliament. Second, parliamentary committee members are often high-level politicians with busy agendas and little time to prepare themselves for the meetings. Even if this provides parliamentary committees with more status and political support, it could be more beneficial to prioritize party members with a specialisation in intelligence. They would have more time to invest in the committee, and face less risk of political damage. Committees would be less politicized and inspire more trust with the agencies.

We did not discuss the possibility of a court review of agencies' activities. Courts may perform a useful role in exercising *ex ante* oversight: before agencies embark on a certain course of action a court decision on its legality is sought. But such an arrangement has a better chance of regulating agencies' activities on the domestic scene than it has of regulating international cooperation. And even there, *ex ante* oversight does not preclude deliberate violations. As most national courts can claim only limited jurisdiction, services tend to resort to outsourcing collection efforts in order to evade domestic regulations. We do not believe that a multinational or international court will be given the possibility to review agencies' actions, let alone sanction them as this implies disclosure of collection capabilities and policy priorities to a third party. Cooperation between national oversight bodies looks far more promising even though they too are bound by national regulations not to exchange information. It is for this reason that we feel that a compound instrument may help ensure a satisfactory level of accountability. As said, historical research may fill the void, although this comes at a price, as the review will always be long after the event. Nonetheless, the certainty that such a review will take place might mitigate agencies' actions.

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[54] Quoted in Ott 2003, p. 74.

[55] Hijzen 2014, pp. 227–238; Hijzen 2016.

10.6   Conclusions

We have developed an instrument to systematically assess the effectiveness of intelligence accountability mechanisms, moving beyond our dependence on impressionistic and incidental assessments of accountability deficits or overloads. It innovatively places the burden for providing intelligence accountability with both the executive and external actors, and it proposes to consider historical research an important complement to the traditional judicial oversight. Not only does historical research extend the time period that ensures accountability, it also broadens the methodological perspective of accountability.

Our intelligence accountability instrument can be used in both a qualitative and quantitative manner. Each criterion in this model can be rated with a grade, resulting in an average grade, applied to several national accountability mechanisms. In this way, we can arrive at a balanced overall appreciation of the degree of intelligence accountability in a national environment. Our instrument thus allows for transnational comparisons of intelligence accountability mechanisms and, as such, may facilitate to overcome some difficulties regarding international intelligence cooperation and its public accountability.

The model may need additional refinement in that some criteria may be difficult to assess and would require considerable research. One such criterion is 'professional attitude toward secrecy' that, however, is a vital element in many external oversight mechanisms. Further research could include incidental oversight and review instruments, notably the press. It paved the way for the initial wave of legislation and also disclosed unsavoury practices such as the rendition programme. But at the same time it is incident-driven and dependent on sales figures.[56] Its precise relation—complementary or preliminary—to historical research for one deserves additional inquiry.

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[56] For a discussion, see Hillebrand 2012.

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