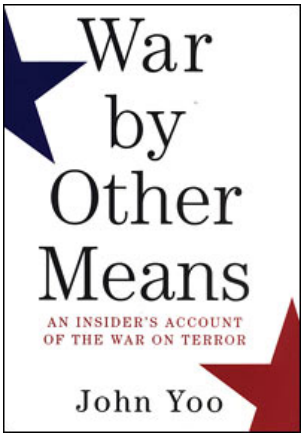

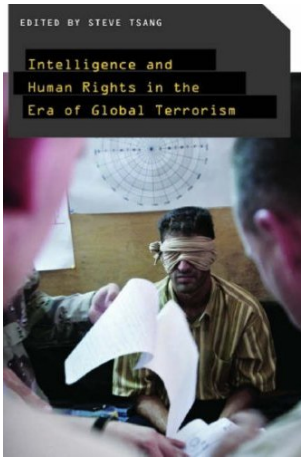

Intelligence and Human Rights: A View from Venus

By Peter Gill

Intelligence and Human Rights in the Era of Global Terrorism. By Steve Tsang (ed.). Westport, Connecticut: Praeger Security International, 2007.

War by Other Means: An Insider's Account of the War on Terror. By John Yoo. New York: Atlantic Monthly Press, 2006.

Intelligence *versus* Rights?

"Intelligence" may well be the final frontier insofar as human rights are concerned. It represents a range of activities that have been carried out by rulers since time immemorial—spies have been characterized as the "second oldest profession" (Knightley 1987)—and, even when organized more formally in state bureaucracies from the nineteenth century onwards, intelligence is normally carried out in complete secrecy. A range of factors have modified this position in the last thirty years: in "older" liberal democracies, a series of scandals such as those giving rise to the "year of intelligence" in the U.S. Congress in 1975; elsewhere, the process of democratization in former authoritarian regimes in Latin America and Eastern Europe is a contributing factor. Most of these countries have amended their architectures of intelligence to include a statute authorizing the existence of agencies, identifying their special legal powers and setting up some form of oversight, often by a legislative committee. In line with these changes, and partly because of them, we now know much more about intelligence agencies than we did as more countries have released more historical files into public archives. Recent intelligence "failures" such as before 9/11 and the Iraq "weapons of mass

destruction" fiasco have prompted a series of inquiries that have told us yet more about intelligence, though by no means everything.

Consequently we now have a much sharper appreciation of the challenge intelligence activities represent to human rights, but while the challenges are clear, the solutions are less obvious. Any secret state activity apparently negates the democratic requirement for transparency; when that activity not only *requires* secrecy, but is also predicated on the infringement of what are otherwise considered human rights, then the problem is manifest. Threats to rights occur throughout the various stages of what is described as the intelligence process. For example, profiling is one technique for deciding who is to be targeted for surveillance, which, if based on ethnicity or religious affiliation rather than behavior, is discriminatory. Information gathering is the stage at which the threat to rights is most obvious. Most of the information gathered by intelligence agencies actually comes from open or published sources, but the agencies' particular skill is in obtaining information covertly, and it is this that constitutes the greatest infringement of rights. Agencies gather information both through technical means—telephone taps, interception of Internet communications, and satellite and photographic surveillance—and "human" means—informers or agents.

How are these activities to be controlled in the interests of advancing rather than curtailing democracy? As argued in a 1981 report into the wrongdoings of the Royal Canadian Mounted Police during the 1970s, if states believe it is necessary, in the interest of public security, to employ secret agencies to carry out acts such as burglary and bugging that would otherwise be illegal, then they must provide for those special powers in law. Otherwise, those states are simply organized hypocrisies that damage the democratic regime, not only by infringing the human rights of those targeted, but also corrupting the agencies (McDonald 1981). The laws passed in Canada, and in many other countries in the last thirty years, have sought to rectify this by establishing legal regimes that take the first necessary step towards democratic intelligence.

At a formal level, all these statutes and associated codes of practice or guidelines issued by ministers acknowledge the significance of human rights. Specifically, they lay out authorization procedures that must be followed if agencies are to infringe on rights; for example, obtaining a warrant issued by a judge or in some cases a minister. Normally, the final brick in all of these new legal structures is some mechanism for oversight or review of intelligence agencies and their activities, often including a legislative committee but sometimes including other bodies such as inspector generals and committees of "wise persons" appointed by the legislature (Born & Leigh 2005 discuss "best practice" and give many examples).

Steve Tsang's edited collection, Intelligence and Human Rights in the Era of Global Terrorism, developed out of a conference at St Antony's, Oxford in December 2005, includes a series of contributions on oversight in Germany (Christian Heyer), the U.S. (Loch Johnson) and the U.K. (John Morrison) that provide a good overview of the respective systems. However, given the title of the book, they might have considered more explicitly the role of oversight in protecting human rights. Mark Urban comments in his chapter on oversight in the U.K., specifically its lack of credibility or independence, and suggests that the current division in debates about intelligence is between "human rightists" and "reality checkists" (Tsang 2007: 22-25). Whether or not this is the case would have made for an important discussion but, unfortunately, only a few of Tsang's contributors really get to grip with the central nexus of terrorism, intelligence and human rights.

Law in Intelligence

The recent efforts to democratize structures for intelligence leave some way to go in achieving compatibility between rights and intelligence. First, new laws are a necessary condition for democratic control but they are not sufficient. From the point of view of states, the object of law is as much to *empower* its agencies as it is to *limit* their activities in the interests of citizen's rights. For example, in the U.K., the Regulation of Investigatory Powers Act (RIPA) 2000 was enacted simultaneously with the Human Rights Act, actually passed two years earlier, and which essentially incorporated the European Convention of Human Rights (ECHR) into U.K. law. RIPA did not grant any extra surveillance powers to police or security agencies but it did *legalize* their use and, by instituting authorization procedures, sought to "judge-proof" them against human rights challenges. To the extent that this is a general feature of law, it is hardly surprising that government lawyers like John Yoo deploy their skills in interpreting laws in such a way as to maximize the room for maneuver that agencies have, rather than the rights of citizens and others they target.

Second, there is the question of how law is actually translated into policy. Many years ago, Murray Edelman (1964) demonstrated that "legal language" is largely symbolic in that it seeks to reassure people that their concerns are being dealt with while being sufficiently ambiguous to allow space for elites to negotiate what it actually *means* in concrete cases where real costs and benefits are to be distributed. The United States constitutional and political processes, with its sharing of powers, and including so many lawyers, is custom-built to maximize the opportunities for such negotiation. Third, in many policy areas, there is the issue of translating law and policy into practice: a problem for those who seek to manage state agents so that they follow policy and respect rights is that they work beyond immediate surveillance; they are Lipsky's "street-level bureaucrats" (1980). Some, though not all, aspects of intelligence operations consist of activities where high levels of discretion have to be permitted to agents, for example, surveillance operations "in the field." Here, things start to get very murky, in part because there is not the extensive social science research literature on how intelligence officers behave that we have for, say, police. On the basis of research on policing, we can hypothesize that agents' behavior will be determined by a variety of factors including perceptions of prevailing law, policy, and notions of rights. However, governing factors will also include loyalty to colleagues, a belief in the "mission" and stereotyping of targets as "the other" whose rights are unimportant.

A New Perception of Risk

However, the progress made in the late twentieth century in reducing the gap between "law" and "practice" has been threatened since 9/11. Tsang's collection provides a wide-ranging review of contemporary intelligence issues. In the light of what are perceived as major intelligence "failures" regarding 9/11 and Iraq, Isaac Ben-Israel, Jack Caravelli and Peter Wilson discuss how intelligence can perform better in perceiving threats *accurately*, in order to prevent future 9/11s and also future Iraqs, where intelligence saw threats that did not exist. Richard Aldrich provides a welcome counter to the general assumption of so much writing that terrorism is clearly the defining feature of the

security environment and argues that globalization is much more significant. According to Aldrich, intelligence into the greater threats posed by crime, energy shortages, climate change, and pandemics is needed.

But mainstream debate still centers on traditional national security issues and here, compared with the relative stability and calculability of relative capacities for "mutually assured destruction" in the Cold War, there is now a different calculus of risk. Then, the risks were reducible to a set of calculations similar to those practiced in the insurance industry. Today, lesser threats have provoked an increase in the rhetoric of fear and insecurity: we are unclear as to the source, size, and impact of potential attacks. For governments used to quantifying risks and conducting cost/benefit analyses to determine policy, this is a nightmare, and they have responded accordingly—in a panic. The central function of states is to provide for the security and safety of their citizens, and if they cannot reassure people in this respect, then they lose all legitimacy. Now, the gap between government rhetoric and their ability to actually implement security policies threatens to become so large that it will swallow notions of reasoned proportionality explicit in human rights discourse.

This gap has been typified as the "one percent doctrine" attributed to U.S. Vice President Dick Cheney in which the uncertain yet potentially catastrophic nature of the terrorist threat must be "prevented" or "pre-empted" even if there is only a one percent chance of it occurring (Suskind 2007). Put another way, a combination of Rumsfeld's "unknown unknowns," (2002) and governments' need to reassure and prove their competence effectively, disables traditional calculations of risk. Authorities' need to "be seen to do something" (often by way of legislation) results in policies that, in attempting to deal with threats that are themselves highly uncertain, may not even be implemented, or have no measurable impact in terms of increasing security. Doing "something" may be counterproductive, for instance if it provokes "blowback" from targeted populations[1] and if prevention costs lives, as well as saves them. If, as U.S. and U.K. administrations claimed, the invasion of Iraq was to pre-empt a threat to international security, then it has been at the cost of tens of thousands of, mostly, Iraqi lives. At the other end of the scale, Tsang (1-2) notes in his introductory essay that the real problem of how to prevent suicide bombing led, through a change in police tactics in London 2005, to the shooting of an innocent man.

Terrorism: 'War' or 'Crime'?

Now, this is not the calmest context within which to consider complex human rights issues. John Yoo, employed in the U.S. Justice Department's Office of Legal Counsel (OLC) during 2001-03, seeks to explain the choices made by the Bush Administration after 9/11 regarding the use of assassination, wiretapping, domestic surveillance *via* the Patriot Act, Guantánamo Bay, military commissions and, perhaps most controversially of all, coercive interrogation in his book War by Other Means: An Insider's Account of the War on Terror. At the risk of simplifying, Yoo's argument is that, first, the U.S. was unquestionably at war as a result of the 9/11 attacks, and he cites Supreme Court support for this view (130); second, in wartime, the President enjoys certain powers

[1] Campbell and Connor (2006) examine how law both represses and mobilizes violent challengers to the state and use the Northern Ireland example to show how the abuse of prisoners can be a significant motivator for challengers.

beyond the reach of either Congress or Judiciary and, therefore, in law, the President alone can determine the conduct of the "war on terror," including appropriate forms of detention and interrogation. Finally, Yoo points out, whether, as a matter of policy, any particular counter-terrorist measure was a good idea was a political question that, he suggests, should be dealt with by a utilitarian calculation in terms of the national interest (for example, see Yoo: 44).

There are many who would challenge specific parts of Yoo's legal analysis, but I am not competent enough to do that. Instead, I want to consider the implications of the argument for the role of law in intelligence. Although I would disagree with Yoo on a number of points, he is correct to observe that the law does not provide a fully articulated ethical code and does not set policy. Any feasible legal framework for intelligence will allow for officials and agents to exercise discretion and the judgments they make will, especially in the field, in effect constitute "policy" in the broadest sense. Yoo's central argument is that there are only two ways in which states can deal with those who attack it, either they are treated as enemies in a war, or they are treated as criminals within the law enforcement and criminal justice processes. The latter is defined in terms of investigating past crimes, which is deemed inadequate for the prevention and pre-emption of future attacks, which are the roles of intelligence and military agents (8). This actually exaggerates the distinction; after all, Robert Peel, the founder of the police in London in 1829, laid down their core functions as "the prevention and detection of crime" although it is fair to say that the police use of intelligence techniques has played second fiddle to *post hoc* investigation. However, as far as countering domestic terrorism is concerned, it is arguable that there are far more similarities with policing criminal organizations (and the U.S. has much experience of that) than there are with soldiers "fighting wars."

Police have for some time sought to "disrupt" criminal organizations or ongoing criminal market operations, and counter-terrorism may avail itself of similar opportunities; but, if people are arrested as part of some disruptive operation, what is to be done with them? The crux of the problem is this: if the key objective of counter-terrorism policy is prevention, then intervention in networks or possible groups of suspected conspirators may have to come at an earlier stage of planning than will enable the gathering of what police and prosecutors would describe as "evidence" rather than "intelligence"—the former enjoying a higher level of certainty than the latter. The U.K. government has become embroiled in a series of scrapes with the courts in recent years as it sought, first, to intern suspects and, once that was ruled by the House of Lords as incompatible with the ECHR,[2] passed the Prevention of Terrorism Act 2005 to subject them to "control orders," a form of house arrest. If those arrested were non-citizens, then an additional possibility was to deport them back to their home country, but this is prohibited by the ECHR in cases where there would be a realistic chance of them being tortured.

Governments will prefer to deal with alleged terrorists by means of the criminal justice system in order to maintain legitimacy, but may perceive that they can do so only by making adjustments to that system so that suspects' rights are protected at least to a higher degree than treating them as enemy combatants in a war context. This was the U.K. strategy in Northern Ireland after 1973,

[2] A. v. Secretary of State for the Home Department (2004) UKHL 56.

where Diplock courts were instituted that, *inter alia*, relaxed the normal rules on the admissibility of confessions and sat without juries. Predictably, clear evidence of prisoner abuse followed and a judicial inquiry recommended increased safeguards such as time limits on interrogation, greater medical supervision and regular access to lawyers (Bennett 1979). Despite some improvements, complaints of ill-treatment continued (Committee on the Administration of Justice 2008).

The "Torture Memo"

Yoo was one of the architects of the August 2002 memo in which the OLC responded to a White House request for a view of the standards of conduct required under the U.N. Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) as implemented by sections 2340-2340A of title 18 of the U.S. Code (Bybee 2002).[3] Yoo wants to defend not only his own conduct but that of the Administration in general, although he criticizes then-Attorney General John Ashcroft for ducking any responsibility when the memo was leaked in the wake of the revelations of prisoner abuse at Abu Ghraib in 2004. However, the discussion is hindered somewhat by a Justice Department prohibition against discussing the specific process by which the memo was produced (Yoo: 170). Again at the risk of over-simplifying somewhat, Yoo observes that CAT requires countries to criminalize "torture" while they "undertake to prevent" lesser cruel, inhuman and degrading treatment (CAT Article 16). This is a crucial distinction for Yoo, and the 2002 memo addresses in detail the meaning of "torture" while ignoring the obligation to "prevent" cruel, inhuman, and degrading treatment.

As far as Yoo is concerned, the law permitted considerable latitude for U.S. personnel to use "coercive interrogation" techniques short of torture and, when it came to policy, recounted cases in which it could be shown to have worked in producing information that saved lives (188-92). Further, Yoo gives examples from the U.K. and Israel in order to challenge the view that U.S. practice had defied world opinion. But he does not give the whole story. Deploying Robert Kagan's characterization of Americans (from Mars) as relying on military power compared with the Europeans (from Venus) looking to develop rules and practices of co-operation, Yoo sees European criticism as based on short-term self-interest, especially a desire not to upset Muslim minorities (Kagan 2003, cited in Yoo: 38). Yet he draws partially inaccurate pictures of European experience in order to bolster his case. For example, he refers to the U.K. army deploying the "five techniques"[4] during questioning of those interned in Northern Ireland in 1971, pointing out correctly that when their use was brought before the European Court of Human Rights, they were found to constitute inhuman and degrading treatment, but not to be of the intensity and cruelty implied by torture (which would therefore be permissible under the U.S. Code). However, what Yoo does not point out was that the British Government prohibited their use, once the use of the techniques had been publicized and caused such controversy, including generating sympathy for the Republican cause. Nor did he point out that the ECHR does not allow states to derogate from Article 3 of the Third Geneva Convention, which includes the ban on torture *and* inhuman or degrading treatment or

[3] Yoo does not reprint the memo in the book but it is available in Greenberg & Dratel 2005:172-217.
[4] Wall standing, hooding, subjection to noise, sleep deprivation, deprivation of food and drink. *Ireland v. the United Kingdom*, 1978, ECtHR.

punishment. Moreover, the European Court had made clear before Yoo wrote his 2002 memo that acts previously classified as "inhuman or degrading treatment" could be classified as "torture" in the future.[5]

Yoo is anxious to deny any connection between the 2002 memo, developed for use against those detained in Afghanistan, and the practices later revealed at Abu Ghraib on the legalistic grounds that the memo was written for a context in which the U.S. found the Geneva Conventions did not apply while they clearly did in Iraq. He criticizes as "hyperbole and partisan smear" the argument that techniques migrated from Gitmo to Iraq (168)—well, that may not have been the lawyers' intention but it is certainly what happened, as Alex Danchev identifies in his powerful and detailed critique of the actual policies and practices at Guantánamo and then Abu Ghraib (Tsang: 93-108). Overall, around one-hundred detainees have died in U.S. hands, thirty-four of them suspected or confirmed homicides by the U.S. military's own reckoning (Tsang: 100-07). After 2001 the link between legal interpretation, Administration policy and intelligence practice is clear, amounting to an example of "barbarisation": the "pathological degeneration of political violence" used by both insurrectionaries and states increasingly since the First World War (Hobsbawm 2007: 125-26).

Yoo provides a detailed if flawed insight into rights issues as they pertain to current concerns with terrorism and, specifically U.S. law and policy in combating it, but he provides no real sense of any solution to what many Americans clearly find distasteful in the actions of some of their own military and intelligence personnel. For example, Yoo denies the role of policy, arguing that the prisoner abuse at Abu Ghraib was found by "multiple commissions and investigations to be solely the acts of individuals," (194)—in other words, the "rotten apple" explanation for organizational deviance. But this ignores the finding of the internal report by Major General Taguba before anything had become public and which was written purely for internal army purposes. He found that the abuse happened at the behest of military intelligence personnel wanting to "set the conditions" for their interrogations (Taguba 2004: Part One, paragraph 10).

Richard Stearns, contributing to Tsang's volume, provides a more balanced summary of the implications of terrorism for the rule of law in democratic countries, specifically how al Qaeda poses an unprecedented threat and what might be an appropriate legal framework. Like Yoo, Stearns draws comparisons between U.S., European, and Israeli experiences, and discusses the possibilities of alternative mechanisms in order to avoid the wholesale resort to "war" advocated by Yoo; but he notes, sadly from the point of view of rights, that politicians will rarely see the costs to liberties if they overreact, as outweighed by the risks if they under react (Tsang 88). While European legal standards are different from those pertaining in the U.S., unfortunately European practice in recent years has not always been different. This is illustrated by the deaths and revelations of other prisoner abuse in British custody and, most recently, serious allegations that British suspects were tortured by Pakistan's Inter-Services Intelligence (ISI) prior to their interrogation by U.K. Security Service officers (Cobain, 2008).

[5] *Selmouni v. France* (1999) [G.C.] 29 EHRR 403.

Bringing Human Rights into Intelligence

What is to be done? Law provides the necessary basis for intelligence as much as any other state activities in democracy. However, if in the current over-heated climate, verging on security panic, necessary intelligence activities are to be conducted with respect for human rights, much thinking needs to be done as to how this can be achieved. Although U.S. Congress banned "cruel, inhuman or degrading" treatment in the Detainee Treatment Act of 2005, bringing the U.S. into line with the ECHR, it has recently been reported that the legislation was effectively nullified by unpublished Justice Department opinions that required little modification of "enhanced" interrogation techniques (Shane et al. 2007) that the CIA might use in certain circumstances (Mazzetti 2008). Once again, we see that automatic transmission of law into policy may not be assumed. Even if new policy guidelines were to be created, great care would have to be taken in terms of training, including ethics, supervision and so on to ensure that a new structure of "plausible deniability" was not the only thing to have been created. Very strong sub-cultures develop among people who work closely together in often stressful situations and these protect against intrusion by outside managers and supervisors let alone "busybody" politicians and activists. This is the crucial challenge, whether on Mars or Venus: to achieve sufficiently robust personal ethics, organizational management and political oversight that ensure effective and ethical intelligence while allowing it to serve its protective function.

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