

## The Relationship between the European Court of Human Rights and National Legislative Bodies: Considering the Merits and the Risks of the Approach of the Court in Surveillance Cases

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This article examines the relationship between the European Court of Human Rights and domestic legislatures in the surveillance context. Specifically, this article considers how the analytical approach of the Strasbourg Court in surveillance cases influenced the formulation of the *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*. This article argues that the focus of the European Court of Human Rights on the “in accordance with the law” limb of Article 8(2) E.C.H.R. has encouraged the lax consideration of proportionality at the domestic level. Notably, however, this article identifies a shift in the case law that suggests the approach of the Court is developing and that there is potential for improved protection of the right to respect for private life in the future.

### I – Introduction

In modern times, government surveillance has become an embedded feature of society - “a routine and inescapable part of everyday life”.<sup>1</sup> The topic of surveillance is inextricably bound with notions of the national and public interest, and the concept of “if you have nothing to hide, you have nothing to fear” carries considerable rhetorical sway with the general populace. Competing with the imperative to safeguard society is the obligation to protect the right to privacy.<sup>2</sup> Striking the appropriate balance presents a significant challenge for legislatures.

This article focuses on the relationship between the European Court of Human Rights (E.Ct.H.R.) and domestic legislative bodies. Decisions of the E.Ct.H.R. in surveillance cases have led to legislative reform across the Council of Europe. Changes

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<sup>1</sup> D. Lyon, “Surveillance, power, and everyday life” in R. Mansell, C. Avgerou, D. Quah, R. Silverstone, eds., *The Oxford Handbook of Information and Communication Technologies* (Oxford: O.U.P., 2009) at 449.

<sup>2</sup> For example, Article 8 of the European Convention on Human Rights provides a clear legal basis for the right to respect for private life in the Member States of the Council of Europe.

include the reform of Article 100 of the French Code of Criminal Procedure, the introduction of Spanish legislation providing a legal basis for the interception of telecommunications, and the successful passage of the *Interception of Communications Act 1985* through the United Kingdom Houses of Parliament.<sup>3</sup> Article 8 of the European Convention on Human Rights (E.C.H.R.) - the right to respect for private life - is the most relevant Article of the E.C.H.R. in surveillance cases.<sup>4</sup> Some interesting features of the application of Article 8 E.C.H.R. by the Strasbourg Court raise questions as to how the approach of the E.Ct.H.R. may affect the development of surveillance legislation at the national level. Particularly, this article discusses how, when considering surveillance cases, the E.Ct.H.R. has tended to focus on the “in accordance with the law” limb of Article 8(2) E.C.H.R. as opposed to the “necessary in a democratic society” test. The merits and risks of the approach are evaluated.

While Ireland has avoided Strasbourg scrutiny of its surveillance regime, the E.C.H.R. has played a clear role in the formulation of Irish surveillance legislation. This is evidenced by the approach of the Irish government in formulating and debating surveillance regulation. In spite of the introduction of surveillance legislation in Ireland, there is cause to suspect that the legislative requirements may not add up to effective privacy protection. This article takes as a case study, the role of Convention jurisprudence in forming a rights-compliant surveillance regime for the interception of telecommunications in Ireland. While telephone tapping may not be the hot topic in

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<sup>3</sup>Article 100 of the French Code of Criminal Procedure was amended in response to the judgments in *Huvig v. France* [1990] 12 E.H.R.R. 528 [after *Huvig*]; *Kruslin v. France* 12 E.H.R.R. 547 [after *Kruslin*]. See *Lambert v. France* [1998] E.C.H.R. 75 at para. 28 [after *Lambert*]. A legislative basis for the interception of communications was provided in Spain for the first time in 1988 in response to decisions of the E.Ct.H.R. See L. Winter, “Telephone Tapping in the Spanish Criminal Procedure: An Analysis from the European Court of Human Rights’ Perspective” [2007] *Jura: A Peci Tudományegyetem Allam-es Jogtudományi Karának tudományos lapja* (2) 7 at 7. Available at: [http://jura.ajk.pte.hu/JURA\\_2007\\_2.pdf](http://jura.ajk.pte.hu/JURA_2007_2.pdf) (date accessed: 04 May 2013). In the United Kingdom, a series of negative judgments led to several attempts to pass compliant legislation. See B. Loftus, B. Goold & S. MacGiollabhui, “Covert Policing and the Regulation of Investigatory Powers Act 2000” [2010] *Arch. Rev.* 5.

<sup>4</sup> Article 8 E.C.H.R. states “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. This right is qualified in the same provision with the second paragraph stating: “[t]here shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

surveillance practices today,<sup>5</sup> the examination of the *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993* – passed following several key interception decisions in Strasbourg<sup>6</sup> – can provide valuable insight.<sup>7</sup>

The *Interception Act* was chosen for investigation in this article on the grounds of its factual relevance to the core surveillance jurisprudence of the E.Ct.H.R. The foundational Strasbourg surveillance cases – where the Court developed its “in accordance with the law” focused inquiry – were telephone tapping cases and the Irish government referenced several of these cases in the Oireachtas debates concerning the Act.<sup>8</sup> While the standards endorsed in the telephone tapping case law have broader relevance to other forms of similarly intrusive surveillance activities,<sup>9</sup> the fact that the *Interception Act* was directly related to telephone tapping enables a more straightforward comparison and a cleaner consideration of responsiveness. Accordingly, it is the most suitable Act to examine in order to analyse the impact of the established approach of the E.Ct.H.R. on the formulation of surveillance legislation in Ireland.

This article argues that the focus of the E.Ct.H.R. on the “in accordance with the law” test at the expense of full consideration of the “necessary in a democratic society” inquiry has resulted in a superficial legislative response from the Irish government. The *Interception Act* provides several of the safeguards endorsed by the E.Ct.H.R., but suffers from a number of crucial weaknesses that undermine the protection of privacy in the

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<sup>5</sup>Bevan has suggested that, compared to other gadgets used in surveillance, telephone tapping as a method of surveillance appears “primitive”—and that was in 1980. V. Bevan, “Is Anybody There?” [1980] P.L. 431 at 445.

<sup>6</sup> *Malone v. The United Kingdom* [1984] E.C.H.R. 10 [after, *Malone*]; *Huvig, supra* note 3; *Kruslin, supra* note 3.

<sup>7</sup> *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993* [after *Interception Act*].

<sup>8</sup> *Malone, supra* note 6; *Huvig, supra* note 3; *Kruslin, supra* note 3. Subsequent cases where the E.Ct.H.R. continued to adopt the same approach include *Valenzuela Contreras v. Spain* [1999] 28 E.H.R.R. 483 [after, *Valenzuela Contreras*] and *Weber & Saravia v. Germany* [2006] E.C.H.R. 1173 [hereinafter *Weber & Saravia*].

<sup>9</sup> Including the use of surveillance devices (see *Khan v. The United Kingdom* [2000] 31 E.H.R.R. 45 at para. 26), the monitoring of email and internet usage (see *Copland v. The United Kingdom* [2007] 45 E.H.R.R. 37 at para. 46) and the retention of DNA information in databases (see *S. & Marper v. The United Kingdom* [2008] E.C.H.R. 1581 [hereinafter *Marper*]). In *Marper* the E.Ct.H.R. stated “it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness”. *Marper, ibid.* at para. 99.

system as a whole. Moving forward, this article endorses the example provided by the E.Ct.H.R. in its consideration of the “necessary in a democratic society” requirement in *Marper*.<sup>10</sup>

## **II – The appropriate role of the E.Ct.H.R.**

The E.Ct.H.R. exists “to ensure the observance of the engagements undertaken by the High Contracting Parties”.<sup>11</sup> The position of the E.Ct.H.R. as a supranational protector of human rights, combined with the sensitive nature of national surveillance policies and practices, poses a series of challenges for the E.Ct.H.R. The E.C.H.R. is an international document binding on the State Parties in international law.<sup>12</sup> While it is true that the primary duty of the State Parties is to comply with judgments in cases to which they were a party<sup>13</sup> and it is uncertain whether judgments of the E.Ct.H.R. have effect *erga omnes*,<sup>14</sup> it is clear that the binding authority of the judgments extends beyond the confines of the relevant case.<sup>15</sup> The manner of interpretation and application by the E.Ct.H.R. of the Convention rights is generally regarded as authoritative.<sup>16</sup> This position is supported by reference to Article 1 E.C.H.R., which obliges State Parties to secure “to everyone within their jurisdiction the rights and freedoms” of the Convention. With the E.Ct.H.R. offering the definitive interpretation of Convention rights, a duty on Party States and domestic legislatures to be cognisant of relevant Strasbourg rulings can be inferred.<sup>17</sup> The Strasbourg Court itself has pronounced that its judgments act not only to decide the individual cases brought before it, but also to

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<sup>10</sup> *Marper*, *ibid.* at para. 67.

<sup>11</sup> Article 19 E.C.H.R.

<sup>12</sup> State Parties agree “to guarantee the rights enshrined in the E.C.H.R” and declare that they “will comply with the judgments of the European Court”. Article 41 E.C.H.R.

<sup>13</sup> G. Ress, “The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order” 40 *Tex. Int. L.J.* [2004–2005] 359 at 374.

<sup>14</sup> E. Lambert-Abdelgawad, “The Execution of Judgments of the European Court of Human Rights” (Strasbourg: Human Rights Files, 2002) at 7 [after Lambert-Abdelgawad (2002)].

<sup>15</sup> *Marckx v. Belgium* [1979] E.C.H.R. 2 at para. 58. As stated in *Marckx*, “Admittedly, it is inevitable that the Court’s decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from the individual measures of implementation”.

<sup>16</sup> J. Gerards & H. Senden, “The Structure of Fundamental Rights and the European Court of Human Rights” [2009] *I.J.C.L.* 7(4) 619 at 637.

<sup>17</sup> Article 1 E.C.H.R. C. Paraskeva, *The Relationship between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights: (with a Case Study on Cyprus and Turkey)* (Antwerp: Intersentia, 2010) at 9.

“elucidate, safeguard, and develop the rules instituted by the E.C.H.R., thereby contributing to the observance by the states of the engagements undertaken by them as Contracting Parties”.<sup>18</sup>

Accordingly, judgments of the E.Ct.H.R. provide guidance to the national legislatures, including the Oireachtas, when considering issues concerning Convention rights. Indeed, Greer ranks identification by the E.Ct.H.R. of Convention-inspired “constitutional limits” on the exercise of government power as the most important role of the E.Ct.H.R. - alongside the duty of the E.Ct.H.R. to scrutinise allegations of human right breaches.<sup>19</sup> The judgments of the E.Ct.H.R. serve as a medium for communication with the Party States, including the legislative branches. As Gerards points out, domestic compliance with the Convention depends on “the perceived strength of international obligations and legal rules and the quality and persuasiveness of their judgments”.<sup>20</sup> This reality will clearly affect the approach of the E.Ct.H.R. It follows that the method chosen by the E.Ct.H.R. when deciding surveillance cases can have a significant influence on the protection of human rights at the domestic level.

The European Court has a basic interest in the effectiveness of its own judgments. In the supranational context, effective adjudication depends on the ability of the Court to convince domestic governments “to use their power on its behalf”.<sup>21</sup> While the E.Ct.H.R. has been tasked with protecting human rights in Europe, it must be conscious of maintaining its ability to influence domestic practices. A careless approach could result in pushback from the national governments and hinder the influence of the Court at the domestic level. Even though the Court was established to “ensure the observance of the engagements undertaken by the High Contracting Parties”,<sup>22</sup> due to

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<sup>18</sup> *Ireland v. United Kingdom* [1978] E.C.H.R. 1 at 239-240. *Karner v. Austria* [2004] 38 E.H.R.R. 24 at para. 26.

<sup>19</sup> S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006) at 170-171.

<sup>20</sup> J. Gerards, “Judicial Deliberations in the European Court of Human Rights” in N. Huls & M. Adams, eds., *The Legitimacy of Highest Courts’ Rulings* (The Hague: TMC Asser Institute, 2008) at 6-7.

<sup>21</sup> L. Helfer & A. Slaughter, “Towards a Theory of Effective Supranational Adjudication” [1997] Y.L.J. 273-391 at 273 [after Helfer & Slaughter (1997)].

<sup>22</sup> Article 19 E.C.H.R.

its lack of enforcement power it must be alert not to overstep the boundaries and risk reduced compliance from the Contracting Parties.

A key method by which the E.Ct.H.R. attempts to regulate its relationship with Party States is the judicially created doctrine of the margin of appreciation.<sup>23</sup> The concept of the margin of appreciation rests on the assumption that “[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge” to determine if an action is necessary in a democratic society.<sup>24</sup> Mahoney views the margin as the “natural product” of the relationship and power balance between the Party States and the Convention organs.<sup>25</sup> The E.Ct.H.R. employs this doctrine in order to limit the scope of its review by giving the State authorities “a certain discretion”.<sup>26</sup> Appreciating that claims of national interest, sensitivity, and executive branch expertise can be advanced in the surveillance context, it is unsurprising that the margin of appreciation plays a significant role in the Convention jurisprudence concerning surveillance.

The margin of appreciation serves as an acknowledgement of the role of States in domestic protection of human rights. When the E.Ct.H.R. applies the margin of appreciation, it shows appreciation for the importance of local conditions and respect for the principle of subsidiarity. In spite of its acknowledgment of the special position of the States, the E.Ct.H.R. has been careful to reserve its role and has repeatedly stated that there is not an unlimited margin of appreciation and that the “domestic margin of appreciation thus goes hand in hand with European supervision”.<sup>27</sup> While the margin of appreciation is a good faith attempt by the E.Ct.H.R. to account for the sometimes

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<sup>23</sup> According to Gerards the doctrine offers “some leeway to states in cases where there are no important fundamental rights at stake and where the complaint relates to sensitive or complex policy areas.” J. Gerards, “The Prism of Fundamental Rights” [2012] *EuConst.* 8, 173 at 200.

<sup>24</sup> *Handyside v. The United Kingdom* [1976] E.C.H.R. 5 at para. 48 [hereinafter *Handyside*]. D. Harris, M. O’Boyle, E. Bates & C Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009) at 301 [hereinafter Harris, *et al.*, (2009)].

<sup>25</sup> P. Mahoney, “Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin” [1990] 11 *H.R.L.J.* 57 at 81. Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the E.C.H.R.* (Antwerp: Intersentia, 2002) [hereinafter Arai-Takahashi (2002)].

<sup>26</sup> R. Bernhardt, “The Convention and Domestic Law” in R. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Martinus Nijhoff: Dordrecht, 1993) at 33 [hereinafter Macdonald, *et al.*, (1993)].

<sup>27</sup> *Handyside*, *supra* note 24 at para. 49.

tenuous balance between individual rights and significant government interests, the doctrine has been subject to criticism.<sup>28</sup> The principle of proportionality, discussed further below, has been described as “the other side of the margin of appreciation”<sup>29</sup> and as “corrective and restrictive of the margin of appreciation”.<sup>30</sup> While the margin of appreciation provides the Party States with some discretion, the principle of proportionality limits that discretion and restrains unreasonable human rights interferences.<sup>31</sup> Where a high standard of proportionality is required by the Court, the margin of appreciation will be narrowed.<sup>32</sup> The following section considers how the E.Ct.H.R. has applied Article 8 E.C.H.R. in the specific context of surveillance.

## **II – Considering Article 8 E.C.H.R. in the Surveillance Context**

### **A. The Legality Requirement in Surveillance Cases**

Article 8 E.C.H.R. has been decisive in many surveillance cases heard by the E.Ct.H.R. The Article states, “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. As the right to respect for private life is limited, government interference may be justified under Article 8 E.C.H.R. if the interference is “in accordance with the law”, “necessary in a democratic society” and serves a legitimate purpose.<sup>33</sup> In order to understand some interesting developments in

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<sup>28</sup> A notable example of such criticism is found in the stern condemnation delivered by Judge de Meyer in a partly dissenting opinion. He stated: “In the present judgment the Court once again relies on the national authorities’ ‘margin of appreciation’. I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies.” Partly dissenting opinion of Judge de Meyer, Part III in *Z. v. Finland* [1998] 25 E.H.R.R. 371.

<sup>29</sup> Arai-Takahashi (2002), *supra* note 25, at 14.

<sup>30</sup> F. Matscher, “Methods of Interpretation” in R. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) at 79. Arai-Takahashi (2002), *supra* note 25, at 15.

<sup>31</sup> A. Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the E.C.H.R.* (Antwerpen: Intersentia, 2002) at 2.

<sup>32</sup> Arai-Takahashi (2002), *supra* note 25, at 15.

<sup>33</sup> For discussion of these requirements see generally Harris, *et al.*, (2009), *supra* note 24, at 344-360; P. van Dijk, F. van Hoof, A. van Rijn & L. Zwaak, eds., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Martinus Nijhoff, 2006) at 336-342; D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 2002) at 537-542; A. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (Oxford: Oxford University Press, 2012) at 590-595. G. Cohen-Jonathan, “Respect for private and family life” in R. Macdonald, F. Matscher & H. Petzold, eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) at 420-424. Significant E.Ct.H.R. case law on the “in accordance with the law” standard: *The Sunday Times*

the surveillance jurisprudence, it is necessary to provide some background to the application of the “in accordance with the law” requirement in this context.

A key feature of the “in accordance with the law” test is that it does not merely refer back to domestic law but also relates to the quality of the law. Interception legislation must accord with the rule of law, be accessible and foreseeable.<sup>34</sup> The domestic law must protect against “arbitrary interference” by public authorities with the rights safeguarded by Article 8 E.C.H.R. Such legal protection is particularly important where the government exercises power in secret in order to mitigate the accompanying greater risks of arbitrariness.<sup>35</sup>

In a foundational case concerning telephone tapping, *Malone v. The United Kingdom*, the E.Ct.H.R. accepted that the requirement of foreseeability must be applied differently in the context of secret surveillance.<sup>36</sup> The E.Ct.H.R. was clear, however, that there remains a strong responsibility on the Government to ensure that the law is:

sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.<sup>37</sup>

As secret surveillance is generally “not open to scrutiny by the individuals or the public at large”,<sup>38</sup> the law must indicate the scope of the discretion allowed to the authorities and the manner of its exercise with “sufficient clarity, having regard to the legitimate

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*v. The United Kingdom* [1979] 2 E.H.R.R. 245; *Silver v. The United Kingdom* [1983] E.C.H.R. 5 [hereinafter, *Silver*]; *Malone*, *supra* note 6; *Huwig*, *supra* note 3; *Kruslin*, *supra* note 3; *Kopp v. Switzerland* [1998] 27 E.H.R.R. 93 [hereinafter *Kopp*]; *Valenzuela Contreras*; *Lambert*. Significant E.Ct.H.R case law on “necessary in a democratic society standard” standard: *Handyside*, *supra* note 24; *Dudgeon v. The United Kingdom* [1981] E.C.H.R. 5 [hereinafter *Dudgeon*]; *Klass v. Germany* 2 E.H.R.R. 214 [hereinafter *Klass*]; *Leander v. Sweden* [1987] 9 E.H.R.R. 433 [hereinafter, *Leander*]; *Rotaru v Romania* [2000] E.C.H.R. 192 [hereinafter *Rotaru*]

<sup>34</sup> *Malone*, *supra* note 6 at para. 67.

<sup>35</sup> *Ibid.* See *Klass*, *supra* note 33 at paras. 42-49.

<sup>36</sup> *Ibid.* The reasoning for this is that the covert nature of surveillance activity is crucial to its success.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at para. 68.



aim of the measure in question, to give the individual adequate protection against arbitrary interference”.<sup>39</sup>

The E.Ct.H.R. developed the “in accordance with the law” requirement in the surveillance context in the cases of *Huvig* and *Kruslin*.<sup>40</sup> In a pivotal move by the E.Ct.H.R., it considered the question of safeguards against abuse of the law as “not simply a matter which went to the requirement of being ‘necessary in a democratic society.’”<sup>41</sup> The E.Ct.H.R. pointed out that “tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence”.<sup>42</sup> Consequently, the interference must be “based on a ‘law’ that is particularly precise”. *Huvig* and *Kruslin* still provide crucial guidance when evaluating the “in accordance with the law” sufficiency of surveillance laws today.<sup>43</sup> The minimum safeguards were restated in the admissibility decision, *Weber & Saravia*.<sup>44</sup> In this case, it was stated that surveillance legislation must include:

[1] the nature of the offences which may give rise to an interception order; [2] a definition of the categories of people liable to have their telephones tapped; [3] a limit on the duration of telephone tapping; [4] the procedure to be followed for examining, using and storing the data obtained; [5] the precautions to be taken when communicating the data to other parties; and [6] the circumstances in which recordings may or must be erased or the tapes destroyed.<sup>45</sup>

These safeguards are strikingly detailed. The highly prescriptive nature of these requirements guides domestic legislative bodies to legislate in a very specific manner. Such explicit guidance from a supranational tribunal regarding the contents of domestic legislation is notable.<sup>46</sup> The appeal of the seemingly rigid, procedural character of the

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Huvig*, *supra* note 3 at paras. 30, 32. *Kruslin*, *supra* note 3 at paras. 32.

<sup>41</sup> I. Cameron, *National Security and the European Convention on Human Rights* (The Hague: Kluwer Law International, 2000) at 103 [after Cameron (2000)].

<sup>42</sup> *Huvig*, *supra* note 3 at paras. 30, 32.

<sup>43</sup> France responded notably quickly to the negative judgments in *Huvig*, *ibid.* and *Kruslin*, *supra* note 3.

Following the finding of deficiencies in the French system of surveillance by the E.Ct.H.R. in April 1990, the French authorities promptly remedied those faults by July 1991. *Lambert*, *supra* note 3 at paras. 27-28.

<sup>44</sup> *Weber & Saravia*, *supra* note 8. These safeguards had been confirmed in several cases in the interim, including in *Valenzuela Contreras*, *supra* note 8 at para. 46.

<sup>45</sup> *Weber & Saravia*, *supra* note 8 at para. 95.

<sup>46</sup> P. De Hert, “Balancing Security and Liberty within the European Human Rights Framework” in A. Hol & J. Vervaele, eds., *Security and Civil Liberties: The Case of Terrorism* (Antwerp: Intersentia, 2005).

requirements can be explained by the particular problems the control of surveillance presents to the E.Ct.H.R. The clandestine nature of surveillance means that targets are unlikely to know they are being surveilled and the authorities will want to ensure that this remains the case.

Recognition of the special issues raised by surveillance appears to drive the approach of the E.Ct.H.R. to the “in accordance with the law” requirement.<sup>47</sup> The risk secrecy poses to the protection of rights is further compounded by the sensitive contexts within which surveillance usually operates - national security and serious crime. Where such ominous threats are considered, the intangible threat to private life can become displaced in the balance. The checks that will exist for readily apparent interferences with individual rights cannot exist in the same form and can be less effective in the surveillance context. Therefore, there is an obvious appeal in setting up practical hurdles that add to the “cost” of surveillance and encourage greater consideration of the value of the proposed interferences with Article 8 E.C.H.R.

## B. The Necessity Requirement in Surveillance Cases

The final requirement when evaluating the justifiability of an interference with the right to a private life is whether the interference is “necessary in a democratic society”.<sup>48</sup> According to the E.Ct.H.R. the requirement of necessity “implies the existence of a ‘pressing social need’ for the interference in question”<sup>49</sup> and the interference must be “proportionate to the legitimate aim pursued”.<sup>50</sup> It is in the application of the necessity test that the doctrine of the margin of appreciation and the principle of proportionality become most relevant. Classically, proportionality can be

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<sup>47</sup> *Ibid.* at para. 93; *Malone*, *supra* note 6 at para. 67; *Huwig*, *supra* note 3 at para. 29; *Rotaru*, *supra* note 33 at para. 43. *Amann v. Switzerland* [2000] 30 E.H.R.R. 843 at para. 55. The E.Ct.H.R. has noted that, “especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident” *Kopp*, *supra* note 33 at para. 72 and *Valenzuela Contreras*, *supra* note 8 at para. 46.

<sup>48</sup> *Handyside*, *supra* note 24 is the seminal case in this area. In *Handyside*, the E.Ct.H.R. considered the necessity in a democratic society requirement in the context of Article 10 E.C.H.R., the right to freedom of expression. In *Handyside*, the E.Ct.H.R. pointed out that the adjective “necessary” in this context “is not synonymous with ‘indispensable’”, “strictly necessary”, nor “absolutely necessary.” The E.Ct.H.R. cautioned, however, that neither was it so flexible to be compared with “admissible”, “ordinary”, “reasonable”, nor “desirable.” *Handyside* at para. 48.

<sup>49</sup> *Dudgeon* at para. 51.

<sup>50</sup> *Silver* at para. 97. Citing *Handyside* at paras. 48-49.

conceived as containing three “sub-principles” - the principle of suitability, of necessity, and of proportionality “in the narrow sense”.<sup>51</sup> While the E.Ct.H.R has not opted to apply a strict version of the three-pronged proportionality test,<sup>52</sup> the structured framework of analysis provided by the proportionality test has the potential to offer valuable guidance. Intrinsically related to the necessity requirement and the assessment of proportionality is the margin of appreciation doctrine. The concept of the margin of appreciation, as introduced earlier, gives the State Party a certain amount of discretion and rests on the assumption that “[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge” to determine if an action is “necessary in a democratic society”.<sup>53</sup> The doctrine has been criticised as “broad, vague, and largely undefined” leading to “unpredictable (and often arbitrary) results”.<sup>54</sup> These difficulties - associated with the margin of appreciation - could be seen as another point in favour of the type of review offered by the expanded legality focus in many of the E.Ct.H.R surveillance cases.

Commentators have remarked that a “feature of the electronic surveillance jurisprudence is the policy of the E.Ct.H.R of considering the compatibility of such measures with Article 8 E.C.H.R, primarily under the “in accordance with the law” heading, rather than applying the democratic necessity test”.<sup>55</sup> In surveillance cases, once an interference is found not to be “in accordance with the law”, the E.Ct.H.R has often chosen not to proceed with a consideration of whether the action satisfied the necessity test. Ruiz has suggested that the focus on the “in accordance with the law” requirement in surveillance cases can be attributed to the fact that it is an easier requirement to check.<sup>56</sup>

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<sup>51</sup> R. Alexis, “Constitutional Rights, Balancing, and Rationality” [2003] 16 R.J. at 135.

<sup>52</sup> In certain situations the Court has adopted the least restrictive means doctrine, described by Arai-Takahashi as “one of the most stringent forms of proportionality appraisal.” Arai-Takahashi (2002), *supra* note 25, at 11.

<sup>53</sup> *Handyside*, *supra* note 24 at para. 48-49; Harris, *et al.*, (2009) at 349-350.

<sup>54</sup> M. Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” [2008] 48 I.C.L.Q. 638 at 119.

<sup>55</sup> S. Sottiaux, *Terrorism and the Limitation of Rights: The E.C.H.R and the US Constitution* (Oxford: Hart Publishing, 2008) at 276.

<sup>56</sup> B. Ruiz, *Privacy in Telecommunications: A European and an American Approach*. (The Hague: Kluwer Law International, 1997) at 181.

An early example of disagreement with this approach is the concurring opinion of Judge Pettiti in *Malone*. Pettiti believed that the E.Ct.H.R could have delivered a clearer and more explicit decision if it had not confined itself to ascertaining whether the interference was “in accordance with the law”.<sup>57</sup> Pettiti believed that the “major importance of the issue at stake” called for a fuller assessment of the British measures and practice.<sup>58</sup> He made a strong argument that the E.Ct.H.R should have completed its reasoning and drawn the conclusion of a breach on the grounds of necessity, as there was no judicial control.

It is understandable that the E.Ct.H.R may choose not to proceed beyond a conclusion that a regime is not “in accordance with the law” as it avoids the difficult issues that are posed by the margin of appreciation. In addition, the legality focus of the E.Ct.H.R offers a level of concreteness and consistency in a controversial area of the law. De Hert criticises the preference for focusing on the safer issues of accountability and foreseeability at the expense of making more “clear-cut statements about the reasonableness of new police powers that are developed within and outside Europe”.<sup>59</sup>

Even where the E.Ct.H.R moves beyond the legality limb of the analysis in surveillance cases, and considers the necessity test, a formalistic process-centric approach remains the norm in the majority of cases. The focus of the E.Ct.H.R has been more procedural than would otherwise be expected of a necessity analysis and has taken the form of a global assessment of the national systems for authorising and supervising surveillance measures and providing redress.

The language of Article 8 E.C.H.R effectively sanctions the limiting of individual rights under Article 8 E.C.H.R in certain circumstances where it is in the general interest. Due to the political nature of this assessment, there is an imperative on the

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<sup>57</sup> Concurring opinion of Judge Pettiti in *Malone*, *supra* note 6.

<sup>58</sup> *Ibid.*

<sup>59</sup> P. De Hert & S. Gutwirth, “Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power” in E. Claes, A. Duff & S. Gutwirth, eds., *Privacy and the Criminal Law* (Brussels: Intersentia, 2005) at 63 [hereinafter De Hert & Gutwirth (2005)].

E.Ct.H.R to resolve the conflict using a conceptually defensible method.<sup>60</sup> The hesitance of the E.Ct.H.R to engage in consideration of the necessity test in the surveillance context avoids any explication of the reasoning that underlies the decisions. According to Helfer and Slaughter, the precise nature of reasoning is “less important than that judicial decisions *be reasoned* in the first place: Reasons should explain why and how a particular conclusion was reached”.<sup>61</sup>

The scholarship of Tulkens and Van Droogenbroeck sees the focus on foreseeability by the E.Ct.H.R as an example of the “proceduralisation of substantial rights”.<sup>62</sup> The focus on formal requirements offers the benefit of greater objectivity and credibility by imposing distance from the facts of the case including consideration of the margin of appreciation.<sup>63</sup> However, one concern which arises in relation to such proceduralisation is that it can lead to “the formalisation, bureaucratisation and depoliticisation of human rights questions” as “meeting formal constraints and conditions is never a hurdle too high to take”.<sup>64</sup>

### C. The Relationship of the E.Ct.H.R with the Contracting States

While the E.Ct.H.R has stated that “the Contracting States which are parties to a case are in principle free to choose the means which they will use in order to comply with a judgment finding a violation”,<sup>65</sup> this theoretical freedom will be practically limited where the breach of the E.C.H.R identified by the Court involves a deficiency in the legal basis for an interference. The surveillance case law discussed thus far has led to significant legislative change in several countries across Europe<sup>66</sup> and has fostered greater awareness of privacy issues in the surveillance context. It is important to recall

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<sup>60</sup> A. McHarg, “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights” [1999] 62 M.L.R. 5 at 672.

<sup>61</sup> Helfer & Slaughter (1997), *supra* note 21, at 320.

<sup>62</sup> F. Tulkens & S. Van Droogenbroeck, “La Cour Européenne des Droits de l’homme Depuis 1980. Bilan et Orientations” in W. Debeuckelaere & D. Voorhoof, eds., *En Toch Beweegt het Recht, Tegenspraak-cahier 23*, (Brugge: Die Keure, 2003) at 224. As discussed in De Hert & Gutwirth (2005), *supra* note 59, at 88.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Papamichalopoulos & Others v. Greece* [1995] E.C.H.R. 45 at para. 34; *Belilos v. Switzerland* [1988] E.C.H.R. 4 at para. 78. Lambert-Abdelgawd (2002), *supra* note 14, at 7.

<sup>66</sup> For examples, see *supra* note 3.

the benefits offered from the legality requirement for precision. The existence of precise legislation can increase the transparency of surveillance mechanisms and increased transparency leads to greater accountability in turn. Obligations to keep records of interception and interception materials facilitate this accountability in practice. There is a danger, however, that when attention is primarily focused on the requirements of legality, the necessity test “fades into the background”.<sup>67</sup>

Considering the issue of data processing, De Hert and Gutwirth point out that the legality test is “fundamentally different” from the necessity test. Only the necessity test “deals with the political question whether (processing) power should be limited”.<sup>68</sup> They assert that the necessity test “inevitably implies an ultimate balancing of interests, a value judgment and/or a substantial choice, which cannot be found in an exegetic reading of the text, or in a strict application of logical rules”.<sup>69</sup> The necessity test serves the additional role of exercising the “political function of human rights”.<sup>70</sup>

De Hert has called for the necessity test to be taken more seriously, and has entreated the E.Ct.H.R to draw the line “between acceptable and non-acceptable power”.<sup>71</sup> He believes “a better balance between the two approaches should be devised” to ensure the adequate protection of private life and the genuine consideration of the issues.<sup>72</sup> Other commentators have also called for an adjustment in the approach of the E.Ct.H.R, recommending that the E.Ct.H.R engage in more “in-depth analysis on necessity and efficiency, especially in relation to systems of mass surveillance”.<sup>73</sup>

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<sup>67</sup> De Hert & Gutwirth (2005), *supra* note 59 at 89.

<sup>68</sup> P. De Hert & S. Gutwirth, “Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action” in S. Gutwirth, Y. Poulet, P. De Hert, C. de Terwangne, S. Nouwt, eds., *Reinventing Data Protection* (Dordrecht: Springer, 2009) at 21 [hereinafter De Hert & Gutwirth (2009)].

<sup>69</sup> De Hert & Gutwirth (2009), *supra* note 68 at 21.

<sup>70</sup> *Ibid.*

<sup>71</sup> De Hert & Gutwirth (2005), *supra* note 59 at 95.

<sup>72</sup> *Ibid.*

<sup>73</sup> M. Klamberg, “A Paradigm Shift in Electronic Surveillance Law” [2010] *Nordic Yearbook of Law and Information Technology* 34 at 34.

#### **IV – The construction and enactment of the *Interception Act* and the Influence of the E.C.H.R**

##### **A. Influence of the E.C.H.R on the formation of the *Interception Act***

When the *Interception Act* was introduced in 1993, the Strasbourg approach to interception appeared settled. The timing is relevant as the more recent deviations (discussed below) in the approach of the E.Ct.H.R had yet to occur. Analysis of legislation produced at this point enables a clear assessment of the effectiveness of the procedural legality approach originally adopted by the E.Ct.H.R in surveillance cases.

The *Interception Act* was the first piece of legislation that provided an explicit and non-administrative basis for interception by Irish Government authorities and is the central legislation governing the interception of communications in Ireland today. Two key events that catalysed the introduction of the Act were the negative judgment delivered in *Malone* regarding the system of interception in the UK<sup>74</sup> and the exposure of Government phone hacking of the telecommunications of two journalists, Geraldine Kennedy and Bruce Arnold.<sup>75</sup> The *Interception Act* has been described as a “delayed reaction” to the public outrage that emerged in the early eighties in response to the regular headlines regarding telephone tapping.<sup>76</sup> Accordingly, it is clear that the particular political and social context in Ireland at the time played a key role in the development of the legislation.

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<sup>74</sup> Law Reform Commission, *Consultation Paper on Privacy: Surveillance and the Interception of Communications* (Dublin: Law Reform Commission, 1996) at 121.

<sup>75</sup> In response to a negative E.Ct.H.R judgment in *Malone*, the UK Parliament passed the *Interception of Communications Act 1985*. This makes the I.O.C. Act the contemporaneous counterpart of the Irish *Interception Act*. While the I.O.C. Act was a direct response by the U.K. Parliament to the decision in *Malone*, the Kennedy scandal appears to be the primary political motivation of the Irish Government when it introduced the *Interception Act*. However, this does not take away from the significance of the *Malone* judgment regarding the form and substance of the legislation.

<sup>76</sup> Seanad Deb., Vol. 424, No. 5 (28 October 1992) at 1208. “I suggest that this legislation is a delayed reaction to that public outrage and the people’s insistence that their level of tolerance did not stretch that far and that political power would have to be used in a sensitive and sensible way.” Mr Cotter also acknowledged the importance of the protection of national security against the threat of a “private army on the prowl.” Seanad Deb., Vol. 424, No. 5 (28 October 1992) at 1209. The reference to the IRA as being the dominant threat to national security is illustrative of the different context that existed during the debates on the *Interception Act* compared to the parliamentary debates that occurred around the *Criminal Justice (Surveillance) Act 2009*.

When our internal institutions have failed it often makes sense to look externally for guidance. Not only could the E.Ct.H.R play this guiding role, its distance from the distrusted Irish political scene and its foundations of principle and the rule of law could also lend legitimacy to a politician who turned to it for credibility. While the level of understanding of the E.C.H.R and the genuine willingness of politicians to realise Convention rights in Irish society is still (and in 1993 most certainly was) open to question, the E.C.H.R played a key role in the legislative construction of the *Interception Act*.

The then Minister for Justice Flynn characterised the Bill as striking the balance between the privacy of communications and the need to combat crime and subversion.<sup>77</sup> The Minister chose to support his point by quoting the Strasbourg Court in *Malone*: “the increase of crime and particularly the growth of organised crime, the increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crime.”<sup>78</sup>

Predictably, the *Malone* decision attracted significant attention from the Irish legislators, as might be expected of a decision which found our closest neighbours to be in breach of the E.C.H.R. When debating the Bill at the second stage, the then Minister for Justice stated that full account was taken of the E.C.H.R and he specifically referenced the judgment of the E.Ct.H.R in *Malone*. The cases of *Huvig* and *Kruslin* were also on the radar of the drafters as evidenced by statements from the then Minister for Justice, Minister Burke, when discussing the possibility of interception legislation in May 1991. Minister Burke, having been asked whether he would be introducing telephone tapping legislation during his tenure, specifically referenced the importance of examining the *Kruslin* decision.<sup>79</sup> Minister Burke stated that as soon as the implications of that key Strasbourg decision were clear, telephone tapping legislation would be

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<sup>77</sup> *Ibid.* at 1186-1187.

<sup>78</sup> *Malone*, *supra* note 6 at para. 81.

<sup>79</sup> Minister Burke was replaced by Minister Flynn as Minister for Justice by the time the legislation was introduced to the Oireachtas. Dáil Deb., Vol. 407 (2 May 1991) at 1987-1988.



published and debated.<sup>80</sup> According to Minister Burke, *Kruslin* raised questions as to whether the original Bill designed to govern the issue of interception of communications (previously drafted by the Fine Gael-Labour coalition in 1985) satisfied the Convention requirements.<sup>81</sup> He argued that it was important for the Oireachtas to “get it right this time”.<sup>82</sup> When moving the Bill for second reading, Minister Flynn highlighted the primary motivations for the new controls as being the importance of satisfying Convention requirements and providing a statutory basis for interception.<sup>83</sup> While the Minister stated that surveillance would only be carried out “to the extent permitted by Article 8”, the “in accordance with the law” requirements clearly dominated his focus.<sup>84</sup>

As discussed above, the E.Ct.H.R had laid out a series of safeguards in *Huvig* and *Kruslin* that should be contained in legislation to ensure that it is “in accordance with the law”.<sup>85</sup> From an examination of the *Interception Act* it appears clear that the legislature took guidance from these suggested safeguards, apparently directly responding to the prescriptive instructions of the E.Ct.H.R and adopting a checklist-like approach.<sup>86</sup> In an apparent response to the legality requirement of publishing details of the “nature of the offences which may give rise to an interception order” and “the categories of people liable to have their telephones tapped”, the *Interception Act* provides

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<sup>80</sup> Dáil Deb., Vol. 407 (2 May 1991) at 1988.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Seanad Deb., Vol. 424, No. 5 (28 October 1992) at 1185.

<sup>84</sup> The Minister stated that the Bill took account for Article 8 E.C.H.R by setting “out in detail the conditions under which the power of the Minister for Justice to authorise interceptions is to be exercised and it regulates the procedure for authorisations; as a result, interceptions will be carried out only ‘In accordance with the law’ in the sense in which that phrase was interpreted by the court and, of course, only to the extent permitted by Article 8. Second, it ensures that information obtained from metering is not disclosed save as permitted by Article 8.” This suggests that the Minister primarily drew his evidence for Convention compatibility from a direct examination of the text of *Malone*, and chose not to consider the Convention issues more widely. Seanad Deb., Vol. 424, No. 5 (28 October 1992) at 1206.

<sup>85</sup> Cameron (2000), *supra* note 41, at 103.

<sup>86</sup> The *Huvig*, *supra* note 3 and *Kruslin*, *supra* note 3 safeguards have been reaffirmed in several cases including *Valenzuela Contreras*, *supra* note 8 *Weber & Saravia*, *supra* note 8 and *Kennedy v. the United Kingdom* [2011] E.H.R.R. 4 [hereinafter *Kennedy*]. The safeguards were restated in *Weber & Saravia* as requiring that surveillance legislation to include: “[1] the nature of the offences which may give rise to an interception order; [2] a definition of the categories of people liable to have their telephones tapped; [3] a limit on the duration of telephone tapping; [4] the procedure to be followed for examining, using and storing the data obtained; [5] the precautions to be taken when communicating the data to other parties; and [6] the circumstances in which recordings may or must be erased or the tapes destroyed.” *Weber & Saravia*, *ibid.* at para. 95.

for restrictions on the categories of people liable to surveillance and the nature of the offences that may give rise to such measures in sections 1 and 2.<sup>87</sup> The necessity to place limits on the potential duration of telephone tapping measures, as required by the E.Ct.H.R., is reflected in the standard maximum time limit of three months that is placed on interception measures in section 2(5) of the Act.<sup>88</sup> Sections 11 and 12 attempt to meet the requirements regarding the publication of the details of the procedures on how intercept material and official documents related to interception should be treated.<sup>89</sup> The pragmatic decision of the E.Ct.H.R. to adopt a formalistic approach when it does opt to consider the necessity requirement in surveillance cases is also reflected by the *Interception Act* through the provision of judicial involvement in section 8 and a complaints system in section 9 of the *Interception Act*.<sup>90</sup>

### **B. Assessment of the *Interception Act***

The fact that the E.Ct.H.R. has never been called to consider the Irish law on interception of communications is not an endorsement of the *Interception Act*. The absence of Convention challenges to the legislation may simply be the result of the opacity of the system, or individual ignorance about whether one's own communications have been intercepted. Providing a legislative basis - transparent and available to the public - for the long-time administrative practice governing interception was a much needed improvement in bringing Irish surveillance practices towards greater compliance with the E.C.H.R.<sup>91</sup> The Irish legislature appeared clearly influenced by the focus in the Convention case law on the procedural safeguards and it appears that the

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<sup>87</sup> Compare, "the nature of the offences which may give rise to an interception order", and "a definition of the categories of people liable to have their telephones tapped" respectively. *Weber & Saravia, ibid.* at para 95. *The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*, ss. 1-2.

<sup>88</sup> *The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*, s. 2(5).

<sup>89</sup> Compare to "the procedure to be followed for examining, using and storing the data obtained", "the precautions to be taken when communicating the data to other parties", and "the circumstances in which recordings may or must be erased or the tapes destroyed." *Weber & Saravia, ibid.* at 95. *The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*, ss. 11-12.

<sup>90</sup> *The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*, ss. 8-9.

<sup>91</sup> See *Malone*, where the E.Ct.H.R. found no legal basis for the U.K. practice of metering telephone calls. Simple absence of prohibition could not justify the interference, proper regulation would be necessary. *Malone, supra* note 6 at para. 79.

legislature at least attempted to follow the quality of law requirements.<sup>92</sup> The members of the Oireachtas referenced the E.C.H.R<sup>93</sup> in the debates on the Act and they considered the jurisprudence of the E.Ct.H.R in the process.<sup>94</sup> Unfortunately, however, this does not necessarily indicate an embrace of E.C.H.R principles.

The major deficiency of the *Interception Act* occurs under the necessity limb of the Article 8 E.C.H.R analysis. Having an independent check on interception is essential and the authorisation process established under the *Interception Act* is entirely controlled by the Executive branch. Claims that an internal system of authorisation is essential due to national security or operational issues will be difficult to make in light of a system of judicial authorisation operating under the *Criminal Justice (Surveillance) Act 2009*. The oversight offered by the review bodies of the Designated Judge and the Complaints Referee provides little mitigation to the independence problem.

Additional analysis by the E.Ct.H.R in the telephone tapping case law may have produced more protective legislation. With the primary focus squarely on procedural safeguards in the case law, the key principle of proportionality appeared forgotten by members of the Oireachtas debating the Act. If the E.Ct.H.R engaged in more detailed examination under the necessity limb, the Irish drafters would have had more guidance when formulating this Act. They also would have had a harder case to make for good faith interpretation. The ability of safeguards to ensure the necessity of surveillance is undermined when a cumulative approach is taken and where there is a lack of genuine analysis concerning whether the safeguards truly add up to a satisfactory level of protection.

The Government introduced the *Interception Act* and the Oireachtas considered the Act and the various safeguards - section by section - in the standard manner. The members of the Oireachtas duly debated the issues they identified as important.

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<sup>92</sup> For example, it appears likely that the categorisations of persons potentially subject to surveillance would be found by the E.Ct.H.R to satisfy the Convention requirements of foreseeability and clarity. Following the judgment of the E.Ct.H.R in *Kennedy*, *supra* note 86 the potential for perpetual renewal of interception measures is also likely to be found to be compatible with the Convention.

<sup>93</sup> See, for example, Seanad Debates 28<sup>th</sup> October 1992 col. 1205.

<sup>94</sup> See, for example, Seanad Debates 28<sup>th</sup> October 1992 col. 1187.

However, no consideration was given to whether these numerous safeguards actually added up to a complete system of protection under the E.C.H.R. The Government should be expected to explain in what manner new legislation is rights protective overall and should not simply list a series of apparently protective measures. A more comprehensive and detailed review of safeguards and how they interact with each other at the Strasbourg level would better inform domestic governments of how to ensure that proportionate legislation and procedures are created. It would also deter empty “mirroring” of language where the purported solution offered by the Government is not quite as responsive to the E.C.H.R. as it may appear at first glance.

This article proposes that the E.Ct.H.R. could have encouraged the creation of more rights-compliant regulation if it had engaged with a broader analysis of necessity in the surveillance case law. When assessing proportionality, the “appropriateness and effectiveness of the measures and distinctions under consideration, as well as their effects on groups or individuals” should be taken into account.<sup>95</sup> The Oireachtas debates concerning the *Interception Act* lacked discussion of the broader issues and the bigger picture was completely forgotten.

The approach of the E.Ct.H.R. encourages the type of legalistic debate that occurred during the passing of the *Interception Act*. Authentic debate on the value of privacy and its interactions with the needs of security and crime control was absent. No consideration of the underlying benefits of privacy – such as the protection of free speech, free association, and trust in government – occurred; instead a sanitised legal requirement was used to methodically justify various safeguards. When electronic surveillance is at its most effective it certainly can provide an important service to society by capturing communications of terrorists and criminals and using that information to protect the general good. However, there are limits to the effectiveness of surveillance and these should also be considered by legislatures. Much planning for

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<sup>95</sup> D. Moeckli, “Stop and Search under the Terrorism Act 2000: A Comment on R (Gillan) v. Commissioner of Police for the Metropolis” [2007] 7 M.L.R. 4, 659 at 666. Moeckli refers to *Abdulaziz, Cabales and Balkandali v. The United Kingdom* [1985] 7 E.H.R.R. 471 at para. 81 and *National Union of Belgian Police v. Belgium* [1975] 1 E.H.R.R. 578 at para. 49.

serious crime and terrorism occurs face-to-face.<sup>96</sup> In addition to the avoidance strategies of personal rather than digital communications, preventive technologies offer terrorists and criminals additional methods to circumvent the surveillance that instead merely affects the general public.<sup>97</sup> Simply because interception was occurring before the *Interception Act* was introduced does not mean there is no place for an analysis of the merits of interception in the legislative debates. In fact, it must be insisted that there is an important place for such consideration as it sets the tone and context for the progress of the legislation and aids a more holistic approach to the problem.

Following the decision of the E.Ct.H.R in *Malone*, the legislature of the United Kingdom provided a legal basis for interception measures. It has been argued, however, that the silence of the E.Ct.H.R on the broader issues in *Malone* provided the UK Government with “a golden opportunity to extend its own powers” and to “exclude effective parliamentary or judicial control or oversight in this area”.<sup>98</sup> This is clearly an undesirable impact of a judgment of the Strasbourg Court and while the Irish Government may not have used the decision in *Malone* to extend its powers through the *Interception Act*, it found it appropriate to take a formalistic approach that provides only minimal protection for privacy rights in the face of government interception.

## **V – An Alteration in the Approach of the E.Ct.H.R**

It is notable that in a number of more recent Court decisions, the E.Ct.H.R has opted to consider the necessity test jointly with the “in accordance with the law” test.<sup>99</sup> According to the E.Ct.H.R, it does this where it believes “the arguments concerning the

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<sup>96</sup>W. Peissl, *Surveillance and Security—A Dodgy Relationship* (Institute of Technology Assessment Manuscript, 2002) at 7. Available at: [http://www.oew.ac.at/ita/pdf/ita\\_02\\_02.pdf](http://www.oew.ac.at/ita/pdf/ita_02_02.pdf) (date accessed: 04 May 2013). B. Schneider, “Uncle Sam is Listening” *Salon* (20 December 2005). Available at: <http://dir.salon.com/story/opinion/feature/2005/12/20/surveillance/index.html> (date accessed: 04 May 2013).

<sup>97</sup> *Ibid.* at 7.

<sup>98</sup> A. Tomkins, “Intercepted Evidence: Now You Hear Me, Now You Don’t” [1994] 57 M.L.R. 6 at 950. See K. Ewing & C. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford: Oxford University Press, 2001).

<sup>99</sup> *Kvasnica v. Slovakia* [2009] App 72094/01 [after *Kvasnica*]; *Kennedy*, *supra* note 86.

lawfulness of the interference are closely related to the question as to whether the ‘necessity’ test was complied with” in the case under consideration.<sup>100</sup>

The combination approach may be an acknowledgement by the E.Ct.H.R of the overlap between the issues of legality and necessity that has only been increased by the detailed safeguard-focused approach adopted by the E.Ct.H.R when applying the legality requirement. The joint consideration approach recognises that overlap can occur and that issues are at times better addressed in tandem and considered in the same context as opposed to repeated under the separate limbs. It is arguable that the separate branch approach is artificial to an extent and that the movement towards combining the analysis is an attempt by the E.Ct.H.R to correct this. This may be a welcome sign that the E.Ct.H.R is moving away from the semantic separation of issues in the surveillance context. It is important to note that the development will only be an improvement if it involves the E.Ct.H.R engaging in a complete analysis and not mere obfuscation of the inquiry by blurring the functions of the separate questions. If the second approach is adopted, there is a real risk that the level of protection currently provided for the right to a private life will be reduced. It remains to be seen what exactly the altered approach, adopted in cases such as *Kvasnica* and *Kennedy*, means for the future of the case law of the E.Ct.H.R in this area as the approach can still be considered to be in the experimental phase.<sup>101</sup>

A case that considered necessity and legality under one heading and that has the potential to provide the member States of the Council of Europe with a clear and positive example of the necessity test is *Marper*.<sup>102</sup> In *Marper*, the E.Ct.H.R recognised that the retention of D.N.A. records had a basis in the domestic law of England and

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<sup>100</sup> *Kvasnica, ibid.* at para. 84; *Kennedy, ibid.* at para. 155. In *Kvasnica*, the E.Ct.H.R found the contentions regarding the lawfulness of Slovakian interference with an individual’s privacy right to be closely related to whether there was compliance with the “necessity” test and the E.Ct.H.R did not consider it necessary to examine separately the argument that the quality of the law in force at the time in Slovakia had not complied with the requirements incorporated in Article 8. In *Kennedy*, while examining the U.K. surveillance regime, the E.Ct.H.R stated that the “the lawfulness of the interference is closely related to the question whether the “necessity” test has been complied with.”

<sup>101</sup> The 2010 case of *Uzun v. Germany* provides one example of a subsequent case where the E.Ct.H.R returned to the familiar two-part approach to assessing whether surveillance measures were “in accordance with the law” and “necessary in a democratic society”. *Uzun v. Germany* [2010] App 35623/05 at paras. 64, 80-81.

<sup>102</sup> *Marper, supra* note 9.

Wales, but the Court questioned whether the arrangements for the storing and use of this personal information were sufficiently precise.<sup>103</sup> The E.Ct.H.R went on to state that it is just as important in the context of D.N.A. retention as it is in telephone tapping to have “clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.”<sup>104</sup>

It has been pointed out that the E.Ct.H.R could have chosen to continue to focus on the “in accordance with the law” questions as “[a]ll the significant detail about operation of the DNA and fingerprint databases - from the arrangements about who could access the data, for what purpose and for how long, to the criteria for removal of profiles - was contained in non-statutory internal guidance”.<sup>105</sup> In spite of this, the E.Ct.H.R chose to focus on the necessity test, stating that, in the circumstances of the case, the “in accordance with the law” questions were “closely related to the broader issue of whether the interference was necessary in a democratic society”.<sup>106</sup> Accordingly - in a reversal of previous case law on surveillance matters - the E.Ct.H.R did not find it necessary to decide whether the legislation met the “quality of law” requirements.<sup>107</sup>

The consideration by the E.Ct.H.R of the necessity requirement began by recognising the legitimate aim - finding it “beyond dispute that the fight against crime, and in particular against organised crime and terrorism ... depends to a great extent on the use of modern scientific techniques of investigation and identification”.<sup>108</sup> In determining that the “blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples, and D.N.A. profiles of persons suspected but not

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<sup>103</sup> *Ibid.* at paras. 97-98. While the legislation provided that retained samples and fingerprints were not to be used except for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, the E.Ct.H.R pointed out that “the prevention or detection of crime” was worded very generally and could give rise to “extensive interpretation.” *Ibid.* at paras. 98-99.

<sup>104</sup> *Ibid.* at paras. 98-99.

<sup>105</sup> G. Nardell, “Levelling up: Data Privacy and the European Court of Human Rights” in S. Gutwirth, Y. Pouillet & P. De Hert, eds., *Data Protection in a Profiled World* (Dordrecht: Springer, 2010) at 49–50.

<sup>106</sup> *Marper*, *supra* note 9 at paras. 99.

<sup>107</sup> *Ibid.* at para. 99.

<sup>108</sup> *Ibid.* at para. 105.

convicted of offences” failed to strike a fair balance between the competing public and private interests, the E.Ct.H.R considered several points.<sup>109</sup>

The analysis of the E.Ct.H.R criticised the fact that the information was “retained irrespective of the nature or gravity of the offence with which the individual was originally suspected”, the information retention was not time-limited, the material was retained indefinitely regardless of the nature of the offence and there was inadequate consideration of the special harm which may be suffered by minors.<sup>110</sup> In addition to this, the opportunity for an acquitted person to have his or her data removed from the database was extremely limited and no independent review was available.<sup>111</sup>

Bearing in mind each of these factors, the E.Ct.H.R found the retention regime to be “a disproportionate interference with the applicants’ right to respect for private life” that could not be “necessary in a democratic society”.<sup>112</sup> The structured approach to proportionality taken by the E.Ct.H.R in *Marper* is an appealing model for other surveillance cases. The E.Ct.H.R showed a willingness to consider the substantive effects of the D.N.A. database regime to determine whether the reasons adduced by the national authorities to justify the intrusion into Article 8 E.C.H.R rights were “relevant and sufficient”.<sup>113</sup> Substantive effects of the D.N.A. database regime considered included the actual benefits of the system as a tool of crime control<sup>114</sup> and the various individual interests at risk. Crucially, the E.Ct.H.R also considered the societal interest in preventing discrimination, protecting the presumption of innocence, and shielding the rights of minors.<sup>115</sup> The important necessity safeguards of review and remedies were also found to be lacking.<sup>116</sup> The decision of the E.Ct.H.R to engage in a fuller analysis of

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<sup>109</sup> *Ibid.* at para. 125.

<sup>110</sup> *Ibid.* at para. 119.

<sup>111</sup> *Ibid.* at para. 119.

<sup>112</sup> *Ibid.* at para. 125.

<sup>113</sup> *Ibid.* at para. 101.

<sup>114</sup> The E.Ct.H.R considered scientific conclusions of The Nuffield Council on Bioethics Report. Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (18 September 2007) Available at: <http://www.nuffieldbioethics.org/sites/default/files/The%20forensic%20use%20of%20bioinformation%20-%20ethical%20issues.pdf> (date accessed: 04 May 2013). *Marper* at paras. 38-40, 116.

<sup>115</sup> *Marper*, *supra* note 9 at paras. 122-124.

<sup>116</sup> *Ibid.* at para. 119.



the necessity issues could serve as a useful guideline to national legislators in each of the Member States of the Council of Europe.

The technical nature of the case law in this area has sometimes seen piece-meal and minimalist responses from State legislatures.<sup>117</sup> As Badar points out, “the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law”.<sup>118</sup> For this reason, guidance from Strasbourg is particularly important. The E.Ct.H.R is uniquely placed to provide the definitive interpretation of Article 8 E.C.H.R and has built an expert body of case law in applying the proportionality principle in the Convention context. Accordingly, more explicit consideration of the proportionality test and how it is applied in the surveillance context would enable the national authorities to carry out consistent and in-depth assessments at the national level. While the E.Ct.H.R must respect the role of each State to decide how domestic law provides for Convention compatibility,<sup>119</sup> the laws must be effective to achieve genuine compliance. It is submitted that the expert position of the E.Ct.H.R in this area, coupled with the importance of the proportionality requirement to the achievement of genuine compliance with privacy principles, should provide significant legitimacy to encourage the E.Ct.H.R to grapple with the question of proportionality - as it did in *Marper* - in other surveillance contexts. This could enable greater consideration of the context and scope of surveillance legislation and foster more effective protection of private life at the domestic level.

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<sup>117</sup> “The small amount of legislation that has been enacted or proposed in such areas has been of an *ad hoc* character, usually conceived hastily in response to a particular court decision. However, it will be argued here that recent changes in police practice, together with increasing numbers of relevant cases in both the domestic and European courts, make it difficult for Britain to justify or sustain this laissez-faire, piecemeal approach for much longer” M. Maguire & T. John “Covert and Deceptive Policing in England and Wales: Issues in Regulation and Practice” [1996] *Eur. J. Crime Cr. L. Cr. J.* 4 at 316, 317.

<sup>118</sup> M. Badar, “Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments” [2004] 7 *I.J.H.R.* 63 at 84.

<sup>119</sup> Macdonald, *et al.*, (1993), *supra* note 26, at 25. “Each State decides, at least in principle, how far and in which manner its internal law provides for execution of obligations derived from the Convention. The Convention, like other rules of international law, requires that the parties guarantee a certain result – the conformity of their domestic law and practice with the conventional duties – but leaves the manner in which the result is achieved to the discretion of all States concerned.”

## **VI – Conclusion**

It is important to recall the merits of the safeguard and procedurally focused approach as originally introduced by the Court in *Malone* and the *Huvig* and *Kruslin* cases. This article is not a criticism of the benefits of this focus. On the contrary, it is acknowledged that such an approach is an essential check on Government exertion of power in this sensitive context. The enhanced quality of law requirements, so crucial to the Article 8 E.C.H.R jurisprudence, led to several protections being included in the *Interception Act*. The secretive nature of surveillance makes the procedural hurdles all the more important. The more practical approach taken to necessity in the surveillance context is also an intelligent approach by the E.Ct.H.R and the clandestine nature of surveillance means that requiring a system of checks and oversight is a pragmatic response.

On the other hand, it is contended that such an approach is not sufficient in isolation. While it is not suggested that an enhanced consideration of proportionality by the E.Ct.H.R should occur *in lieu* of the focus on the procedural safeguards, it is proposed that a broader assessment is also essential. The *Interception Act* provides an example of how the safeguard driven, procedural approach adopted by the E.Ct.H.R in the surveillance context has led to legislation that appears to reflect key Convention language but could be improved to provide greater protection of substance. Where the broader issues of necessity, suitability, and effectiveness are not addressed, it is not only difficult to construct genuinely effective procedures, it is also more challenging to pinpoint the flaws in existing safeguards and formulate less-intrusive alternatives.

The *Criminal Justice (Forensic Evidence and DNA Database System) Bill* was originally introduced as a response to the *Marper* judgment in 2010 by the previous government administration.<sup>120</sup> The current coalition government has committed to introducing its own DNA database legislation. Once introduced, the content of the Bill and the parliamentary debates regarding the legislation will help evaluate the theory

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<sup>120</sup> *Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010*.

that the more holistic consideration of proportionality adopted in *Marper* should lead to greater engagement in the substantive issues by domestic legislative bodies.

Ad interim, it remains the case that the *Interception Act* manifests the weaknesses of the conventional approach adopted by the E.Ct.H.R in surveillance cases. While the legislators were industrious in their consideration of each section of the *Interception Act* and its various safeguards, overall evaluation of the system was lacking. This fragmentary approach led to the proposal of a number of minor modifications. These low-level debates detracted attention from the absence of any general consideration of how the system would ensure that the privacy interferences permitted under the Act would achieve the goals of the legislation in a proportionate manner. An integrative examination of the Act exposes several key weaknesses - most crucially the absence of independent authorisation or effective review – that undermine the effectiveness of the system as a whole. It is submitted that the Oireachtas – with the benefit of hindsight and more recent case law<sup>121</sup> – should reconsider the *Interception Act* and ensure that the legislation answers the question of proportionality.

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<sup>121</sup> *Marper*, *supra* note 9; *Kvasnica*, *supra* note 99; *Kennedy*, *supra* note 9.