**Hebrew University & University of Essex Surveillance Workshop Series**

Workshop 1 – Necessity and Proportionality

Overview of Questions to be addressed

The purpose of this workshop is to examine the necessity and proportionality tests established by international human rights law to the surveillance powers established under the UK Investigatory Powers Act 2016. A key – although not exclusive – focus are large-scale or bulk powers. The following illustrative and non-exhaustive questions have been prepared as a guide to the day, and the issues to be discussed.

The meeting will be held under the Chatham House rule.

**Questions to be addressed regarding the human rights tests applied:**

* How should necessity be evaluated in the context of the Investigatory Powers Act?
  + In particular, how to determine what techniques, and in relation to what categories of activities, are necessary in a democratic society.
  + What means are available to evaluate the professed utility of a specific investigatory power?
  + What means are available to circumscribe the scope of individuals who are caught up in a technique, i.e. collateral intrusion.
* What is meant by the term ‘strictly necessary in a democratic society’, as applied to secret surveillance techniques in, for example, *Szasbo and Vissy* and *Digital Rights Ireland Ltd.*
  + Do these measures, and the understanding as to what constitutes ‘strict necessity’, apply to both content data and communications data?
  + How does the ‘strict necessity’ test fit with the necessity/proportionality test established in the Investigatory Powers Act
  + Do all potentially legitimate aims (i.e. with respect to Article 8: national security, public safety, economic well-being of the State, prevention of disorder or crime, protection of health or morals, or protection of rights or freedoms of others) fit within a strict necessity test.
* How should the requirement that, in order to satisfy strict necessity, a measure be strictly necessary to obtain ‘vital intelligence in an individual operation’ be interpreted?
  + Is it possible to demonstrate the vital nature of a particular technique?
  + Should the understanding of ‘vital’ be equated to lack of reasonable alternative means?[[1]](#footnote-1)
* What is the relationship between necessity/strict necessity and proportionality?
* What are the factors brought into play during the proportionality assessment?
  + i.e. what rights are brought into play, on both sides of the proportionality equation. Typically discussion focuses on privacy, is this appropriate?
  + How can the potential impact on these rights evaluated? This is particularly relevant in relation to interferences with rights that may exert a broad, or societal level, impact, such as rights that may affect the functioning of a participatory democracy.
  + Are access restrictions relevant to the proportionality test? i.e. can rights-based harm be mitigated by stricter access controls?
  + How do safeguards and remedies affect the proportionality analysis?

**Questions to be addressed regarding how the human rights tests are applied, in specific circumstances**

* What is to be understood by ‘serious crime’, noting, *inter alia*, the Court of Justice of the European Union’s statement that ‘only the fight against serious crime is capable of justifying’ retention of communications data. See, *Tele2*, para. 102.
  + Is it possible to identify specific crimes, or categories of crimes?
* In the context of bulk interception, how should the tests discussed apply to automated ‘selectors’ (i.e. searches used to filter results) as distinct from human analysis.
  + In general, should distinct tests be applied to automated v. human analysis?

1. The concept of alternative means is reflected, to a certain degree, in the Investigatory Powers Act 2016; e.g. s.(2)(2)(a): “The public authority must have regard to […] (a) whether what is sought to be achieved could reasonably be achieved by other less intrusive means”. [↑](#footnote-ref-1)