Of DNA retention and other blanket measures: the importance of stricto sensu proportionality in times of crisis

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Introduction

In Steven Spielberg's *Minority Report*, a film based on a story by Philip K. Dick, Pre crime, a specialised police department, manages to detect crime before it occurs, through the invaluable help of thee precogs, who see "previsions" of crimes yet to be committed. Based on the precogs' foreknowledge and a vast database holding all citizens' personal data, Precrime is able to apprehend perpetrators in advance, through pattern and retinal recognition software.

Albeit this plot takes place in 2054, one cannot but simply draw strong analogies to the various crime prevention and detection techniques that have emerged as a result of technological advances.

One such technique is DNA retention by law enforcement agencies, which can be utilised as an important tool in the fight against serious crime, by ensuring the quick and accurate cross-reference identification of future perpetrators, especially as regards crimes the circumstances under which they take place make it hard for them to be solved. In 2001 the Criminal Justice and Police Evidence Act was introduced. According to Section 82 of the Act, which substituted Section 64(1A) of the Police and Criminal Evidence Act 1984, fingerprints, cellular and DNA samples taken from a person in connection with the investigation

of an offence could be indefinitely retained, regardless of the outcome of the investigation.[1]

As far as the European Convention on Human Rights is concerned, the right to privacy is engaged not only in the context of analysis and sharing, but also when material is "collected, stored and filtered", even by automatic procedures.[2] In *Shimovolos v Russia*, the applicant challenged a Russian law that established a Surveillance Database, which collected information about the movements of individuals within the country, the European Court of Human Rights reiterated that "the systematic collection and storing of data by the Security Services on particular individuals constituted an interference with these persons' private lives, even if the data was collected in a public place",[3] while in *S. and Marper v UK*, it noted that the mere storing of DNA and cellular samples, containing a vast amount of sensitive genetic information relating to the private life of an individual amounts to an interference within the meaning of article 8".[4]

Although the Strasbourg Court has always been "readier" than English courts to rule that an interference engages article 8 of the Convention, Lord Sumption in *Catt* opined that "the state's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life",[5] including information where "intrusive procedures have been used to discover and record them".[6]

This paper addresses the issue of proportionality of indiscriminate

[1] Criminal Justice and Police Act 2001, s 82(4).

[2] David Anderson, *A Question of Trust; Report of the Investigatory Powers Review* (2015) 75. <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf> accessed 20 August 2016.

[3] *Shimovolos v Russia* (2014) 58 EHRR 26, paras 65-66; *Rotaru v Romania* ECHR-VII 109, paras 43-44; *Amann v Switzerland*(2000) 30 EHRR 843, paras 65-67.

[4] *S. and Marper v UK* (2009) 48 EHRR 50, para 67; *R v Chief Constable of South Yorkshire Police* [2004] UKHL 39 [74].

[5] *Catt v Association of Chief Police Officers of England Wales and Northern Ireland* [2015] UKSC 9 [6].

[6] *Ibid.* [26].

and indefinite DNA retention measures, in the context of article 8 of the ECHR. The right to respect for private and family life is a qualified right which means that interferences engaging it may be permitted, provided they pursue a legitimate aim, are "in accordance with the law" and are "necessary in a democratic society". Our analysis will not only focus on the relevant Strasbourg jurisprudence but also on various domestic judgments that have sought to articulate a principled approach towards the proportionality assessment encapsulated in article 8.

Criticising the approaches taken by Strasbourg as well as by English courts,[7] it is proposed that indiscriminate measures, such as the indefinite DNA retention of arrested persons, should not be regarded as *per se* failing to meet the necessity test -a conclusion that might well lead to onerous implications-, but examined at the final *stricto sensu* stage of the overall proportionality assessment. In particular, since DNA samples engage with the essence of the right to privacy, their indefinite retention would have to be held disproportionate, while the retention of any other sample of a less intrusive nature would have to be assessed on a case by case basis.

Although this paper will not deal with the "legality test" enshrined in article 8 of the Convention, it is worth mentioning that not a few judgments of the Strasbourg Court follow an approach that has been characterised as "incomplete".[8] When dealing with blanket policies, the ECtHR has developed the tendency of finding a violation of the "in accordance with the law" requirement, after a thorough examination, and not proceeding with the next steps of necessity and proportionality.[9] Albeit logical, this approach, which becomes more evident in the context of challenges against telecommunications surveillance re-

[7] Domestic courts are not bound to follow the ECtHR jurisprudence, Human Rights Act 1998 HRA, s.2(1).

[8] *Rotaru* (n 3), para 62.

[9] Maria Helen Murphy, 'A shift in the approach of the European Court of Human Rights in surveillance cases: a rejuvenation of necessity?' (2014) 5 *EHRLR* 515.

gimes,[10] deprives the Court of considering the peculiar nature of indiscriminate measures and, in our view, demonstrates a hesitation to adjudicate upon thorny issues, such as the *stricto sensu* proportionality of blanket policies, where a more interventionist approach would necessarily have to be adopted.

Breaking Proportionality

The "necessary in a democratic society" is the final challenge under article 8 of the European Convention on Human Rights that a challenged measure must survive. Unlike the CJEU, the Strasbourg Court does not treat this test as a structured one.[11] Necessity, and *stricto sensu* proportionality are implied in it and courts have to balance competing public and private interests, taking into account a range of relevant factors and often affording the respondent state a certain margin of appreciation.[12]

English courts have occasionally failed to apply the proportionality test in a structured manner as well, resorting many times in a "broad brush balancing".[13] In addition, a *stricto sensu* proportionality assessment (last stage of the "necessary in a democratic society" test) was not part of the general proportionality analysis applied by English courts until 2007.[14] In *Bank Mellat (No. 2)* Lord Reed "re-formulated" this fourth, *Huang* criterion as part of the general, *lato sensu* proportionality analysis.[15] Practically, the question at the final stage is whether the overall impact of the impugned measure on the right(s) is disproportionate to its likely benefit.

The breaking down of the general proportionality assessment to in-

[10] *Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015), para 232.

[11] See Paul Craig a&nd Gráinne de Búrca**,** *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 551ff.

[12] Pieter van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 747.

[13] Helen Fenwick (ed.), *Judicial Review* (5th edn, Lexis Nexis 2014) 279ff.

[14] See *Huang v SSHD* [2007] UKHL 11.

[15] Bank *Mellat v HMT* [2013] UKSC 39.

dividual stages allows for a more structured approach and it would thus be more appropriate to examine the implied stages of necessity and *stricto sensu* proportionality separately, both from a Strasbourg as well as a domestic perspective.

The Implied Necessity Test

The first stage of the "necessary in a democratic society" requirement is necessity. Necessity in the human rights context is interpreted as the requirement of "less restrictive means", meaning that when another means exists that could achieve the same result with less onerous human rights implications, then the more human rights compliant alternative must be chosen. A necessity assessment does not imply of course that an interference with the right must always be minimal.[16] In other words, what is important for the necessity stage is the measure to be precisely tailored to its aim.

The ECtHR case law has not always been clear about the exact application of the necessity test. The equivalent of a necessity test that English courts have been applying "throughout the life" of the Human Rights Act is the third step of the De Freitas test, namely whether "the means used to impair the right or freedom are no more than is necessary to accomplish the objective".[17]

However, there have been instances where the necessity step has been ignored, because the invasion of the rights in question was not seen as substantial or fundamental enough.[18] In *R (Begum) v Headteacher and Governors of Denbigh High School*, the claimant invoked her right to freedom of religion, because the school policy prohibited her from wearing a full-body covering (jiljab). The measure was not even considered to amount to an interference and the school's policy was found proportionate, but had they engaged in an actual "less intrusive means" assessment and examined the relation between the policy and

[16] Aharon Barak, *Proportionality: Constitutional rights and their limitations* (CUP 2011) 321.

[17] *De Freitas v Secretary of Agriculture* [1999] 1 AC 69 [80].

[18] Fenwick (n. 13) 279.

the goal (which was ensuring social tranquillity), the Law Lords would probably have reached the conclusion that there existed alternative means with less onerous consequences for the school to achieve that objective, especially when it did allow for similar body covering student uniforms (shalwar kameeze).[19]

The *Denbigh High School* case demonstrates that the necessity question also implies a suitability assessment; an appropriate rational connection between the impugned measure and the aim sought to be achieved.[20]

1. *Blanket policies and indiscriminate measures*

In the ECHR context, a number of issues emerges as regards policies, including indiscriminate DNA retention, that could be characterised as blanket or indiscriminate. *Barak* argues that a measure that is over-inclusive, in a sense that affects anyone concerned without discrimination, should not be in principle ruled out as disproportionate.[21] If the non-blanket alternative does not advance the means pursued by the choices of the legislature to the same degree of success, then the proportionality review has to proceed to its final, *stricto sensu* stage.[22]

This view was endorsed by the Canadian Supreme Court in the case of *USA v Cotroni*, which concerned an extradition law according to which Canadian citizens could also be extradited.[23] The Supreme Court examined the indiscriminate nature of the law, noting that "the effective prosecution and the suppression of crime is a social objective of a pressing and substantial nature" and held that an alternative policy of

[19] [2006] UKHL 15.

[20] For a detailed suitability assessment of DNA retention and detection or prevention of crimes see Liberty, 'Response to the Home Office's Consultation: Keeping the Right People on the DNA Database: Science and Public Protection' (August 2009): https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-response-to-dna-database-consultation.pdf (accessed 20 August 2016).

[21] See also *James and Ors v UK*(1986) 8 EHRR 123, para 51.

[22] Barak (n. 16) 321-323.

[23] [1989] 1 S.C.R. 1469.

refusing to extradite Canadian citizens "would reduce the effectiveness of extradition as a major tool in combatting transnational crime".[24]

As *Hickman* also observes, "in the overwhelming number of cases, any less injurious alternatives will also be less effective in achieving the aim in question, to a greater or lesser extent".[25] The question that thus arises, and is attached to the fundamental distinction between judiciary and executive functions, is how much a judge could intervene in defining the executive's choices. In that respect, the necessity test seems problematic.

2. *Margin of appreciation and domestic deference*

A significant part of the Strasbourg case law indicates that it is usually at the necessity stage that the Court chooses to afford the respondent state a margin of appreciation in choosing relevant policies and measures to achieve its legislative aims.[26] The principle of the margin of appreciation, which goes "hand in hand with European supervision", underpins the Court's jurisprudence and refers to the weight accorded to a state in striking a fair balance between competing public and private interests.[27]

DEFERENCE AND NATIONAL SECURITY

The equivalent of the margin of appreciation when it comes to domestic deference is also observed when courts reach the "less restrictive means", stage. This approach could be originally attributed to the common law reasoning as depicted in *Rv Oakes* which calls for limited judicial activism at this stage. In *Bank Mellat (No. 2)*, Lord Reed opined as follows:

To allow the legislature a margin of appreciation is also essential if… a devolved system such as that of the United Kingdom, is to work,

[24] *Ibid*. 1499; *USA v. Swystun* (1987) 50 Man. R. (2d) 129, 133.

[25] Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) 181.

[26] See *Handyside v UK* (1979) 1 EHRR 737, para 49ff; Fenwick (n 13) 84.

[27] Lord Lester, Lord Pannick & Javan Herberg (eds.), *Human Rights Law and Practice* (3rd edn, Lexis Nexis 2009) 122.

since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.[28]

It has been argued that the Human Rights Act 1998 has allowed for a more interventionist approach in human rights adjudication.[29] *Thwaites* draws a comparison, in the context of the Special Immigration Appeals Commission proceedings, between the cases of *Rehman* and *Belmarsh (A No.1)*.[30] Whilst in *Rehman* the House of Lords endorsed a deferential approach in matters of national security and a traditional compartmentalisation of the functions of the judiciary and the executive,[31] the Law Lords in *Belmarsh* examined the executive's measure and held that the detention regime under Part 4 of the 2001 Anti-terrorism, Crime and Security Act was disproportionate.[32] In other words, in *Belmarsh*, "detention pending deportation", under article 5 of the ECHR, was viewed by the Government as an "elastic category", able to accommodate national security concerns.[33]

This argument, however, is not convincing, considering that the Law Lords chose to defer on the issue of derogation due to public emergency (Lord Hoffmann dissenting) and that the case concerned the *"sui generis"* right to liberty, whose nature is different from that of the qualified rights enshrined in the Convention, which, unlike the qualified rights of the ECHR, is a *"sui generis"* right and any restriction has to be strictly justified under six tight circumstances and for no longer than it is necessary.[34]

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[28] *Bank Mellat (n 15) [75]; R v Edwards Books and Art Ltd [1986] 2 SCR* 713, 781–782.

[29] Fenwick (n. 13) 158.

[30] Rayner Thwaites, *The Liberty of Non-Citizens; Indefinite Detention in Commonwealth Countries* (Hart 2014) 141.

[31] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47[50] and [60].

[32] [2004] UKHL 56 [42]-[44].

[33] *A v UK* (2009) 49 EHRR 29, para 171.

[34] Lord Sumption, 'Anxious scrutiny', Administrative Law Bar Association Annual Lecture, 4 November 2014, 6-7: https://www.supremecourt.uk/docs/speech-

When it comes to interferences with qualified rights, and with the right to privacy in particular, it could be argued that domestic courts would easily defer to the executive, especially as regards national security choices.[35] That is the first reason that, in our view, the proportionality of blanket measure necessarily has to be examined at the final, *stricto sensu* stage of the proportionality assessment.

S. AND MARPER: THE EFFECT OF A PROBLEMATIC REASONING

The second reason relates to the ECtHR approach as regards blanket measures. When blanket policies or indiscriminate measures are involved and generally no consensus among Council of Europe Member States exists, the ECtHR has been quite strict in criticising and limiting government choices.[36] The case of *S. and Marper*, where the 2001 Act that allowed for indefinite retention of DNA samples taken by anyone accused of an offence (regardless of consequent convictions or acquittals) was challenged, is considered seminal in the Strasbourg case law. The Court, instead of finding the UK in breach of article 8 under the "in accordance with the law" test alone, since it was internal (non-statutory) policies that contained details regarding DNA sample retention, proceeded to examine the measure on the "necessary in a democratic society" stage concluding that:

> the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard.[37]

141104.pdf (accessed 20 August 2016).

[35] See also Andrew Le Sueur, Maurice Sunkin & Jo Murkens, *Public Law: Text, Cases, and Materials* (2nd edn, OUP 2013) 770; *R (Pro Life Alliance) v BBC* [2003] UKHL 23 per Lord Hoffmann [75]; *Zamora* [1916] 2 AC 77, 107.

[36] *S. and Marper* (n. 4), paras 107-112.

[37] *Ibid*., para 125.

This reasoning is flawed in several aspects. It regards blanket policies as in principle incompatible with article 8, by drawing a horizontal distinction between convicted and non-convicted individuals, giving the impression that unconvinced persons have more of a *pro tanto* right to privacy than convicted persons. In other words, the Strasbourg Court, instead of addressing the moral question of whether the retention of cellular samples and DNA profiles was justified under the Convention, stopped at the necessity stage of the *lato sensu* proportionality assessment[38]. By focusing, however, on such quantifiable aspects of a case, the Court seems to withdraw "from a battle regarding the general principle without a fight".[39]

The implications such a reasoning can have on blanket policies is obvious if one takes a closer look at a decision that followed *Marper* on a domestic level. In *Gaughran* the Supreme Court held that the measure of indiscriminate retention of DNA profiles, fingerprints and photographs of all adults convicted of recordable offences was compatible with article 8 of the ECHR.[40] Interpreting *Marper* by the same token, the Supreme Court found that:

the only issue to be considered by the court was whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, was justified under article 8(2) the Convention. There is no indication that the Strasbourg court was considering the position of those who had been convicted at all… Strasbourg was not saying that a blanket policy of [indefinite] retaining the data of convicted persons would be unlawful.[41]

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[38] George Letsas, 'The scope and balancing of rights: Diagnostic or constitutive?' in Eva Brems & Janneke Gerards (eds.), *Shaping Rights: The role of the European Court of Human Rights in determining the scope of human rights* (CUP 2015) 59.

[39] Stavros Tsakyrakis 'Proportionality: an assault on human rights?' (2009) 7 *IJCL* 486.

[40] *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29.

[41] *Ibid*. [31]-[33].

Proportionality *stricto sensu*

Having indicated why we consider appropriate for indiscriminate policies to be examined at the final stage of the proportionality assessment, we shall first try to articulate this balancing step, before applying it to the blanket measure of DNA retention.

The need of a fourth step to the general proportionality assessment was first recognised by the House of Lords in *Huang*. The Law Lords concluded that the standard proportionality test should be understood as including a final step, namely "the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention".[42]

The formulation of this final stage originally derived from the judgment of Dickson CJ in the Canadian case of *R v Oakes*, where it was mentioned as a further element, seeking to "balance the interests of society with those individuals and groups".[43] This means that whether a measure is proportionate will depend on the measure's impacts compared to the measure's benefits, and basically the impacts that were felt by the claimant.[44]

On the other hand, domestic courts have quite often engaged in broad brush balancing approaches that hardly resemble *stricto sensu* proportionality.[45] The case of *Marper* before the House of Lords, as well as the case of *Gaughran* before the Supreme Court serve as illustrative examples. In *Marper*, Lord Steyn applied a two-step proportionality reasoning, a "broad brush" cost-benefit analysis, reaching the conclusion that, even if the indiscriminate and indefinite retention of DNA samples constituted an interference with the right to privacy, this interference would always be proportionate, because it would be outweighed by the importance of the public aim it served, namely the

[42] *Huang* (n. 14) [19].

[43] [1986] 1 SCR 103.

[44] Cf *R v Ministry of Defence, ex parte Smith* [1996] QB 517 [564]; *Soering v UK* (1989) 11 EHRR 439, para 89.

[45] Tom Hickman, 'The substance and structure of proportionality' (2008) *PL* 707.

prevention and detection of serious crime,[46] while, in *Gaughran*, Lord Clarke admitted, quoting Girvan LJ, that "the larger the database the greater the assistance it will provide".[47]

This barely resembles any *stricto sensu* balancing, however, that the court has to engage with at the last stage. As Lord Reed opined in *Bank Mellat (No. 2)*: there is a meaningful distinction to be drawn between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).[48]

In *Dudgeon v UK*, the applicant complained that Section 11 of the Criminal Law Amendment Act 1885 which criminalised male homosexuality violated his rights under the Convention. While the Strasbourg Court acknowledged the "legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are [e]specially vulnerable",[49] it reasoned as follows:

> The right affected by the impugned legislation protects an essentially private manifestation of the human personality… Such justifications as there are for retaining the law in force… are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation... [T]he restriction imposed… by reason of its breadth and absolute character, is… disproportionate to the aims sought to be achieved.[50]

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[46] *R* (n 4) [39].
[47] *Gaughran* (n. 40) [48].
[48] *Bank Mellat* (n. 15) [76].
[49] *Dudgeon v UK* (1981) 4 EHRR 149, para 49.
[50] Ibid, paras 60-61; *Norris v Ireland* (1988) 13 EHRR 186, para 46.

1. *DNA samples and the essence of the right to privacy*

The Strasbourg Court has repeatedly held that "the very essence of the Convention is respect for human dignity and human freedom".[51] In *S. and Marper*, the Grand Chamber, noting the "highly personal nature" of DNA and cellular samples, which was not affected by the existence of safeguards or by the fact that the information was "in coded form… intelligible only with the use of computer technology and capable of being interpreted only by a limited number of persons",[52] emphasis ed that:

notwithstanding the advantages provided by comprehensive extension of the DNA database, the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests.[53]

Therefore, any adjudication upon the proportionality of indefinite DNA retention by law enforcement agencies, in a domestic context, would, firstly, require application of the four stage proportionality test, and, secondly, bring any judge before a case by case serious *stricto sensu* balancing.

Specifically, the indefinite retention of DNA samples would *per se* have to be held as impairing the very essence of the right. The sensitive nature of the information the samples contain, as well as the fact that they could be indefinitely retained by law enforcement authorities, creates a constant interference, rendering the protection enshrined by the Convention ineffective.

On the other hand, if the DNA retention concerns files which contain no significant genetic information about one's health or behaviour and ergo information of a less intrusive nature, such as specially modified profiles which serve only an identification purpose, it could be re-

[51] *Pretty v UK* (2002) 35 EHRR 1, para 65.

[52] *S. andMarper* (n. 4), paras 72-75.

[53] *Ibid*., para 112. See also *Goodwin v UK* (2002) 35 EHRR 447, para 97.

garded as proportionate if the aim sought to be achieved outweighs the overall impact on the right to privacy, provided their retention period is accordingly justified by the gravity of the offences.[54]

Lessons from Luxembourg: *Digital Rights Ireland* and *Watson*

Our approach towards the stages of necessity and *stricto sensu* proportionality finds also support in the Digital Rights Ireland case as well as in the opinion of the Advocate General in the Watson case.

In *Digital Rights Ireland* the CJEU declared invalid the Data Retention Directive 2006/24/EC laying down the obligation on the providers of publicly available electronic communication services or of public communications networks to retain all traffic and location data, "in order to ensure that the data were available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law". The Luxembourg Court referred to the absence of reasonable suspicion, noting that the Directive applied "even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime".[55]

However, in the very recent case of *Watson*, following a challenge by two MPs against the Data Retention and Investigatory Powers Act 2014 which sought to immediately replace the Directive[56] and a subsequent question for a preliminary ruling by the Court of Appeal, the Advocate General concluded that bulk surveillance is not in principle unlawful, if it is accompanied by all safeguards considered by the CJEU in *Digital Rights Ireland*.[57]

In examining the question of whether a general data retention obli-

[54] Joined Cases C-203 and 698/15 *Secretary of State for Home Department v Tom Watson and Others* (CJEU, 19 July 2016), Opinion AG Saugmandsgaard Øe, para 262.

[55] Joined Cases C-293 and 594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* [2014] ECR I-238, para 58.

[56] *SSHD v Davis* [2015] EWCA Civ 1185.

[57] *Watson* (n. 54), para 202.

gation is proportionate, contrary to the submissions of Tele2 Sverige, Privacy International and Open Rights Group that any general (blanket) data retention obligation should be *per se* regarded as violating the principle of necessity, due to their inherently over inclusive character,[58] the Advocate General stated that the obligation did not go beyond what was strictly necessary, but it was due to the "combined effect of the generalised retention of data and the lack of safeguards aimed at limiting to what was strictly necessary the interference with the rights enshrined in Articles 7 and 8 of the Charter"[59] that led the Luxembourg Court to declare the Directive invalid in its entirety. He then went on to opine as follows:

> [T]he requirement of strict necessity… requires a comparison to be made between the effectiveness of such an obligation and that of any other possible national measure... Nevertheless, it is important to bear in mind that any substantial limitation of the scope of a general data retention obligation may considerably reduce the utility of such a regime in the fight against serious crime.[60]

According to the Advocate General, the issue of proportionality of such measures has thus to be determined at the final *stricto sensu* stage by (national) courts, which are called to weigh the advantages of such techniques and the serious risks that arise "from the power to catalogue the private lives of individuals".[61]

This conclusion signals, in our view, the importance of the role of domestic courts when it comes to human rights adjudication, considering also the rather hesitant stance taken by Strasbourg as regards the *stricto sensu* proportionality assessment of blanket measures; a stance that could be basically attributed to its subsidiary role.[62]

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[58] *Ibid*., para. 192.

[59] *Ibid*., para. 202; C-362/14*Schrems v Data Protection Commissioner* (CJEU, 6 October 2015), para 93.

[60] *Ibid*., *Watson*, paras 207 and 213.

[61] *Ibid*., para. 261.

[62] Steven Greer, 'Balancing and the European Court of Human Rights: a contri-

Finally, emphasis should be placed on to the crucial distinction between metadata and the actual content of communications. In *Digital Rights Ireland* the CJEU noted that "Directive 2006/24 did not adversely affect the essence of the right to privacy or of the other rights enshrined in Article 7 of the Charter, since it did not permit the acquisition of knowledge of the content of the electronic communications as such".[63] Contrary to the actual content of communications, communications data relate to data surrounding the message, such as subscriber, location, date/time information.[64]

Taking into account the similar reasoning of the Advocate General, it could be *a contrario* assumed that measures allowing mass acquisition of electronic communications' content should be regarded as not observing the essence of the right to privacy.[65] *Mutatis mutandis* the information contained in DNA samples could be, hence, comparable to the actual content of communications and considered as engaging with the essence of the right to privacy.

Conclusion

This paper has sought to assess the compatibility of the indefinite retention of DNA samples with article 8 of the ECHR in the context of proportionality. Having shown that the acquisition of DNA samples constitutes a grave interference with the right to privacy, and drawn upon domestic and European approaches towards the proportionality test encapsulated in the Convention, we have suggested that, albeit

bution to the Habermas-Alexy debate' (2004) 63 *CLJ* 429; William Schabas, *The European Convention on Human Rights: A commentary* (OUP 2015) 406.

[63] *Digital Rights Ireland* (n. 55), para. 39.

[64] Anderson (n. 2) 259ff. See also *Big Brother Watch v UK* App no 58170/13 Witness Statement of Dr Ian Brown 23: https://www.privacynotprism.org.uk/assets/files/privacynotprism/IAN_BROWN-FINAL_WITNESS_STATEMENT.pdf (accessed 20 August 2016).

[65] *Watson* (n. 54), para. 160; Luisa Marin, 'The fate of the Data Retention Directive: about mass surveillance and fundamental rights in the EU legal order' in Valsamis Mitsilegas, Maria Bergstrom & Theodore Konstadinides (eds.), *Research Handbook on EU Criminal Law* (Elgar 2016) 218.

DNA retention by law enforcement authorities should not be regarded as per se failing to meet the necessity test, an indiscriminate DNA retention, which consequently engages the essence of the right to privacy, should be considered as *stricto sensu* disproportionate, while the acquisition of others -of a less intrusive nature- would have to be assessed through a case by case balancing.

However, these rapid technological advances, which allow for intrusive surveillance techniques, in the light of modern day threats, should not result in relaxation of the Convention safeguards, as interpreted by the Strasbourg court. Eventually, it all boils down to the indispensable role judges are entrusted with, namely "to prevent the establishment of systems and methods that would allow 'Big Brother' to become master of the citizen's private life".[66]

[66] *Malone v UK* (1985) 7 EHRR 14, Concurring Opinion of Judge Pettiti.