

**Research and Study Group 'International Law in the Age of Cyber'
Research seminar**

**THE 'BIG BROTHER' EFFECT:
MASS SURVEILLANCE AND
INTERNATIONAL HUMAN RIGHTS LAW**

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1. INTRODUCTION

1. Mass surveillance – a ‘new normal’?

2. The response of the ECHR and its critique

- *Centrum för Rättvisa v. Sweden*, Judgment (2018)
- *Big Brother Watch and Others v. The United Kingdom*, Judgment (2018)

3. Threats & resources perspective

2. BIG BROTHER CASE: TIME TO DISPEL THE ILLUSIONS?

- mass surveillance *per se* is **compatible** with the EConvHR
- **refusal** from a ‘reasonable suspicion’; a **consequent notification**; **prior judicial authorization**;
- ‘threats to national security’ as meeting the requirement of **predictability** (at the level of legislation and at the level of concrete operations);
- no attempt **to limit the category of persons** whose data can be intercepted
- ‘likely to become necessary’ instead of **the principle of necessity** in respect of disclosure of intercepted information
- **implied self-restriction** of the Intelligence services

3. CRITIQUE OF THE BIG BROTHER JUDGMENT (INTERNAL PERSPECTIVE)

- a one-sided approach
- the ‘margin of appreciation’ doctrine as a camouflage for the use of the proportionality test
- inconsistent with previous case-law of the ECHR
 - *Roman Zakharov v Russia*, Judgment (2015):
‘reasonable suspicion’; supervision of the secret surveillance measures; notification; remedies under the national law
 - *Szabo and Vissy v Hungary*, Judgment (2016):
‘strict necessity’, an ‘individual suspicion’
- impact of the institutional biases of the ECHR

4. LEGALITY OF MASS SURVEILLANCE: THREATS & RESOURCES PERSPECTIVE

1. security as a 'trump'

- revision of the proportionality test

2. a consensus of 'Big Brothers'

- a 'democratic society' component

3. to be watched becomes a social norm

- contextual approach to privacy
- personal autonomy as a principle and a value
- privacy = security

5. CONCLUDING REMARKS

‘We must cease once and for all to describe the effects of power in negative terms: it ‘excludes’, it ‘represses’, it ‘censors’, it ‘abstracts’, it ‘masks’, it ‘conceals’. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production’.

