Deutscher Bundestag
1. Untersuchungsausschuss
30. Mai 2014

29 May 2014

1. Untersuchungsausschuss des Deutschen Bundestages
Platz der Republik 1
11011 Berlin
Federal Republic of Germany

Deutscher Bundestag
1. Untersuchungsausschuss
der 18. Wahlperiode

MAT A - SV 3-1

zu A-Drs.: 55

Hearing 3, Part 1 – Legal situation in the USA and the UK

Sehr geehrte Damen und Herren,

Please find overleaf my written opinion (3) requested in your letter of invitation to your hearing on 5 June 2014. Much further detail is available in the application to the European Court of Human Rights cited therein (App. No. 58170/13), and my expert witness statement for that application. Those documents are available online:

(1) https://www.privacynotprism.org.uk/assets/files/privacynotprism/496577_app_No_58170-13_BBW_ORG_EP_CK_v_UK_Grounds.pdf
(2) https://www.privacynotprism.org.uk/assets/files/privacynotprism/IAN_BROWN-FINAL_WITNESS_STATEMENT.pdf

I look forward to answering your further questions on 5 June.

With best wishes,

Ian Brown

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1) Which fields of law contain provisions relevant for assessment of the matters covered by the Committee of Inquiry's mandate?

- Enabling laws conferring powers on the security agencies

The UK Government Communications Headquarters (GCHQ) operates under the Intelligence Services Act 1994, as does the Secret Intelligence Service (also known as MI6) responsible for foreign intelligence. The Security Service (also known as MI5), responsible for domestic intelligence, operates under the Security Service Act 1989.

- Telecommunications law

The key statute regulating interception of telecommunications is the Regulation of Investigatory Powers Act 2000 (RIPA – specifically, Part 1 Chapter 1). "Communications data" (or "metadata" as it is called in the US) is collected by many government agencies from UK Communications Service Providers using powers in Part 1 Chapter 2 of RIPA.

A second key power is contained in the Telecommunications Act 1984:

> ***94 Directions in the interests of national security etc.***
>
> *(1) The Secretary of State may, after consultation with a person to whom this section applies, give to that person such directions of a general character as appear to the Secretary of State to be necessary in the interests of national security or relations with the government of a country or territory outside the United Kingdom...*
>
> *(8) This section applies to OFCOM and to providers of public electronic communications networks.*

Very little is known about the use of this broad power. The Interception of Communications and Intelligence Services Commissioners appointed under RIPA have both told the UK Parliament they do not oversee its use.[1]

- Data protection law

The Data Protection Act 1998 implements the EU Data Protection Directive (EC/95/46). However, it contains a broad exemption for national security purposes:

> ***28 National security.***
>
> *(1) Personal data are exempt from any of the provisions of—*
> *(a) the data protection principles,*
> *(b) Parts II, III and V, and*
> *(c) sections 54A and 55,*

[1] Home Affairs Committee – Seventeenth Report, Counter-Terrorism, 30 April 2014, §175

> *if the exemption from that provision is required for the purpose of safeguarding national security.*
>
> *(2) Subject to subsection (4), a certificate signed by a Minister of the Crown certifying that exemption from all or any of the provisions mentioned in subsection (1) is or at any time was required for the purpose there mentioned in respect of any personal data shall be conclusive evidence of that fact...*
>
> *4) Any person directly affected by the issuing of a certificate under subsection (2) may appeal to the Tribunal against the certificate.*

"National security" is a term that has been broadly interpreted in UK law. In a leading case, the Court of Appeal agreed with a government submission that it "is a protean concept, 'designed to encompass the many, varied and (it may be) unpredictable ways in which the security of the nation may best be promoted'."[2]

- *Constitutional law*

The UK does not have a codified constitution. Certain laws have quasi-constitutional effect, most pertinently the Human Rights Act 1998 (HRA), which requires public authorities to act in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention's protections can be directly enforced by UK courts under the HRA, and those courts must take notice of – but are not bound by – the jurisprudence of the European Court of Human Rights. The senior courts may declare that a UK legislative provision is not in accordance with the Convention, but it is then up to Parliament to change the law to remedy this incompatibility. Until this happens, the provision remains in effect.

2) What provisions at the level of ordinary legislation exist, or existed during the period under inquiry, authorising the collection, retention and passing-on of content-related and other data pertaining to telecommunications activities and Internet use – with respect to data from and to
- communications within Germany,
- communications from and to Germany,
- communications outside Germany
What restrictions exist on powers of this sort?

GCHQ's first statutory function is "to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material" (s.3(1)(a) Intelligence Services Act 1994). GCHQ's Director must ensure "that there are arrangements for securing that no information is obtained by GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except

[2] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153

so far as necessary for that purpose or for the purpose of any criminal proceedings" (s.4(2) ISA). These functions can be exercised in the interests of national security, the economic well-being of the UK, and in support of the prevention or detection of serious crime (s.3(2) ISA).

All communications that begin and/or end outside the UK are "external" communications. These may be intercepted by GCHQ under a broad warrant issued by the Secretary of State under s.8(4) RIPA, specifying the facilities affected (such as the fibre optic cables landing in the UK that carry much of the Internet traffic between continental Europe and the USA), and certificates issued by the Secretary of State specifying the types of material that can be accessed from this intercepted material. It has been reported that ten "basic" certificates exist, covering broad categories of data such as "fraud, drug trafficking and terrorism".[3] The warrants must be renewed every six months (three where they relate to protecting the UK's economic well-being).

Under the UK's implementation of the EU Data Retention Directive (2006/24/EC), UK public communications providers notified by the Secretary of State are required to retain for 12 months certain data generated or processed in the UK relating to telephony and Internet communications. It is not yet clear how the EU Court of Justice's judgment invalidating the Directive affects the UK implementation. Communications data can be accessed by a range of government authorities using Part 1 Chapter 2 of RIPA.

In relation to gaining unauthorised access to computer networks and systems outside the UK, the Intelligence Services Act 1994 provides:

> ***7 Authorisation of acts outside the British Islands.***
>
> *(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section...*
>
> *(9) For the purposes of this section the reference in subsection (1) to an act done outside the British Islands includes a reference to any act which—*
> *(a) is done in the British Islands; but*
> *(b) is or is intended to be done in relation to apparatus that is believed to be outside the British Islands, or in relation to anything appearing to originate from such apparatus*

The Secretary of State must put in place "general safeguards" in relation to intercepted material and related communications data (s.15(2) RIPA) to ensure:

> *(a) the number of persons to whom any of the material or data is disclosed or otherwise made available,*

[3] GCHQ taps fibre-optic cables for secret access to world' s communications, *The Guardian*, 21 June 2013

(b) the extent to which any of the material or data is disclosed or otherwise made available,
(c) the extent to which any of the material or data is copied, and
(d) the number of copies that are made,

is limited to the minimum that is necessary for the authorised purposes.

This material must be stored in a "secure manner" and "destroyed as soon as there are no longer any grounds for retaining it as necessary for any of the authorised purposes." Such protections must also be in place when material is "surrendered to authorities of a country or territory outside the United Kingdom". However, there are no further statutory controls on the sharing of such data with foreign governments.

The Secretary of State must issue codes of practice on interception and the acquisition and disclosure of communications data, but these provide little additional detail to the protections set out in RIPA.

3) What form does protection against the collection, retention and passing-on of content-related and other data pertaining to telecommunications activities (including Internet use) take? What protective rights exist for private users of telecommunications and the Internet
- vis-à-vis government agencies?
- vis-à-vis firms providing telecommunications and Internet infrastructure?
- vis-à-vis private individuals and companies, in particular all categories of service provider?

The situation is similar for all of these organisations. RIPA s.1(1) specifies: "It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of... (b) a public telecommunications system." RIPA then sets out the circumstances under which intelligence agencies (as well as law enforcement agencies and the taxation authority HM Revenue and Customs) can gain lawful authority to conduct interception.

Two Commissioners (who hold or have held high judicial office) are appointed by the Prime Minister to oversee the use of RIPA powers: the Intelligence Services Commissioner, and the Interception of Communications Commissioner. Both must provide reports to the Prime Minister, who may redact sensitive information before they are provided to Parliament.

The Justice and Security Act 2013 established an Intelligence and Security Committee of Parliament to oversee the intelligence agencies. The members must be nominated by the Prime Minister, who may also redact its annual report.

Postal and telecommunications service providers may intercept communications "for purposes connected with the provision or operation of that service or with

the enforcement, in relation to that service, of any enactment relating to the use of postal services or telecommunications services" (RIPA s.3).

Users also have rights under the Data Protection Act 1998, based on the EU Data Protection Directive (except for matters related to national security) and the Privacy and Electronic Communications Regulations 2011, based on the EU Directive on Privacy and Electronic Communications (2009/136/EC).

4) What possibilities for individual legal protection do affected persons have where their content-related and other data pertaining to telecommunications activities and Internet use is collected, retained and passed on by the "Five Eyes" states in those states?

The Investigatory Powers Tribunal (IPT), established by RIPA, has exclusive jurisdiction to hear complaints about the intelligence agencies or interception. However, since individuals are not notified they have been the subject of interception or other surveillance, they have little opportunity to contest it. Intercepted material may not be introduced in legal proceedings outside the Tribunal or a limited range of other special proceedings (ss.17-18 RIPA).

A Pakistani human rights group, Bytes for All, has filed suit with the IPT. Their complaint alleges that GCHQ's mass surveillance programme infringes their rights under ECHR Articles 8, 10 and also 14, given the discriminatory effect of GCHQ's focus on non-UK communications.[4] An initial directions hearing combined this complaint with four others made by UK organisations. The next hearing is scheduled for 14 July 2014.

The IPT is not one of the "senior courts" that under the Human Rights Act may make a declaration of incompatibility of UK law with the ECHR. It has no duty to publish any details of its negative decisions. Nor may decisions be appealed. Up until 2012, the IPT upheld 11 out of 1469 complaints.

Three UK-based organisations (Big Brother Watch, Open Rights Group and English PEN) and a Berlin-based academic (Dr. Constanze Kurz) have complained directly to the European Court of Human Rights about the infringement of their privacy. They argue that the UK courts cannot provide an effective remedy under the Convention, and that they therefore do not need to first exhaust domestic remedies.[5] The European Court has prioritised the application, but stayed it until the conclusion of the IPT case described above.

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[4] *Bytes for All v The Secretary of State for Foreign and Commonwealth Affairs and others*, Investigatory Powers Tribunal, at https://www.privacyinternational.org/sites/privacyinternational.org/files/file-downloads/ipt-bytes-for-all.pdf

[5] Application No. 58170/13 §§62-66

(2) https://www.privacynotprism.org.uk/assets/files/privacynotprism/IAN_Brown-Final_WITNESS_STATEMENT.pdf

On Behalf Of: The Applicants
Name: Ian Brown
Number: First
Exhibit: IB1
Date: 27 September 2013

Application No: 58170/13

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

(1) BIG BROTHER WATCH;
(2) OPEN RIGHTS GROUP;
(3) ENGLISH PEN; and
(4) DR CONSTANZE KURZ

Applicants

- v -

UNITED KINGDOM

Respondent

WITNESS STATEMENT OF DR IAN BROWN

I, Doctor Ian Brown, of **Oxford Internet Institute, University of Oxford, 1 St. Giles', Oxford OX1 3JS, United Kingdom**, will say as follows:

INTRODUCTION

1. I am a Senior Research Fellow at the Oxford Internet Institute at the University of Oxford and Associate Director of its Cyber Security Centre. I make this statement in support of the application brought by the Applicants and in order to assist the Court with matters within my expertise. Where the contents of this statement are within my knowledge, I confirm that they are true; where they are not, I have identified the source of the relevant information, and I confirm that they are true to the best of my knowledge and belief.

2. I am an ACM (Association for Computing Machinery) Distinguished Scientist and a BCS (British Computer Society Chartered Institute) Chartered Fellow. I am also a member of the UK Information Commissioner's Technology Reference Panel. I have consulted for the US Department of Homeland Security, the United Nations Office on Drugs and Crime, Council of Europe, the OECD, JP Morgan, the BBC, the European Commission, the British Government's Cabinet Office and other major regulators and corporations. I am an adviser to Open Rights Group and have acted as a trustee and adviser to a number of other non-governmental organisations. I have particular expertise in the fields of Internet technologies, cyber security, surveillance and regulation. My detailed academic curriculum vitae is available should it be requested.

3. In this statement I briefly address the following matters:

   3.1. The growth of Internet surveillance in the UK;

   3.2. The recent disclosures in the Guardian newspaper regarding the UK Government's Internet surveillance activities and the subsequent UK Government response;

   3.3. How the disclosed programmes are likely to operate;

   3.4. The legal basis for the programmes under UK law; and

   3.5. Brief commentary on the significance of this information.

4. The recent disclosures of information have also concerned programmes of the United States' National Security Agency ("**NSA**"). I understand that Cindy Cohn of the Electronic Frontier Foundation will address these in detail in a separate witness statement. However, I comment briefly on them below as UK cooperation with the US programmes is also relevant to the issues above.

5. There is now produced and shown to me a paginated bundle of true copy documents marked "IB1". All references to documents in this statement are to Bundle IB1 unless otherwise stated, in the form [**IB1/Tab/Page**].

INTERNET SURVEILLANCE IN THE UK

6. Internet surveillance in the UK is primarily carried out by Government Communications Headquarters (GCHQ). GCHQ produces signals intelligence or 'sigint' for the UK Government. Its roots extend to before the first world war, when predecessor organisations intercepted German communications. The then Government Code and Cypher School's code-breaking played a highly significant role in the outcome of the second world war. Thereafter, and with the advent of the cold war, GCHQ was increasingly important in supplying secret information to successive governments. With the advent of personal computing and the Internet, the role of GCHQ and the scope of its activities has continued to expand.

7. Over the last 20 years, the Internet has developed from a specialist network of academic researchers into a mainstream communications mechanism. In 2013, 83% of British households (21 million) had Internet access, according to the UK Government's Office for National Statistics. Alongside the development in communications technology that has driven the growth of the Internet, we continue to see exponential increases in computing capability and data storage capacity. Processing power has doubled roughly every two years, increasing approximately one million-fold since 1965. Bandwidth and storage capacity are growing even faster.

8. With greater Internet use has come a greater appetite on behalf of policing and intelligence agencies to put Internet users under surveillance. New surveillance technologies exploiting these capabilities include "bugs" and tracing technologies that can access the geographical position of mobile phones and act as a remote listening device; and hard-to-detect (even with anti-virus tools) "spyware," surreptitiously installed on a suspect's PC by the authorities, that can remotely and secretly monitor a suspect's online activities, passwords and e-mail, and even the PC's camera and microphone. Such surveillance technology is, by its nature, relatively targeted in its scope. However, surveillance technologies have also permitted GCHQ to monitor, screen and analyse, in a much less targeted, indeed pervasive manner, records of billions of telephone and e-mail communications. There has been a commensurate expansion in "dataveillance": the monitoring of the "data trails" left by individuals in numerous transactions, through access to communications and other databases containing such trails. It is now clear that both email content and metadata have been surveilled in this manner.

9. In the words of Professor Edward Felten, the first Chief Technologist at the US Federal Trade Commission, metadata can often be a *"proxy for content"*. I exhibit, with his permission, a copy of his Declaration in ongoing litigation brought in the US by the American Civil Liberties Union (ACLU) in relation to some of the recent press disclosures as Exhibit **IB1/1/pp.543-577**. In this document he provides the example of calls to support hotlines for victims of domestic violence and rape, people considering suicide, addictions etc.; and of text donations to particular causes. He states:

> "46. Although it is difficult to summarize the sensitive information that telephony metadata about a single person can reveal, suffice it to say that it can expose an extraordinary amount about our habits and our associations. Calling patterns can reveal when we are awake and asleep; our religion, if a person regularly makes no calls on the Sabbath, or makes a large number of calls on Christmas Day; our work habits and our social aptitude; the number of friends we have; and even our civil and political affiliations."

10. He also correctly observes that aggregated metadata is even more revealing, stating as follows:

> "48. Analysis of metadata on this scale can reveal the network of individuals with whom we communicate—commonly called a social graph. By building a social graph that maps all of an organization's telephone calls over time, one could obtain a set of contacts that includes a substantial portion of the group's membership, donors, political supporters, confidential sources, and so on. Analysis of the metadata belonging to these individual callers, by moving one "hop" further out, could help to classify each one, eventually yielding a detailed breakdown of the organization's associational relationships...
>
> ...52. Consider the following hypothetical example: A young woman calls her gynecologist; then immediately calls her mother; then a man who, during the past few months, she had repeatedly spoken to on the telephone after 11pm; followed by a call to a family planning center that also offers abortions. A likely storyline emerges that would not be as evident by examining the record of a single telephone call.
>
> 53. Likewise, although metadata revealing a single telephone call to a bookie may suggest that a surveillance target is placing a bet, analysis of metadata over time could reveal that the target has a gambling problem, particularly if the call records also reveal a number of calls made to payday loan services."

11. He also points to mass surveillance – so called "big data" – as heralding even more intrusive surveillance. He observes, and I agree, that *"the power of metadata analysis and its potential impact upon the privacy of individuals increases with the scale of the data collected"*. He concludes as follows:

> "64. The privacy impact of collecting all communications metadata about a single person for long periods of time is qualitatively different than doing so over a period of

days. Similarly, the privacy impact of assembling the call records of every American is vastly greater than the impact of collecting data about a single person or even groups of people. Mass collection not only allows the government to learn information about more people, but it also enables the government to learn new, previously private facts that it could not have learned simply by collecting the information about a few, specific individuals."

12. Professor Felten describes the process of metadata analysis as follows:

> "22...the structured nature of metadata makes it very easy to analyze massive datasets using sophisticated data-mining and link-analysis programs. That analysis is greatly facilitated by technological advances over the past 35 years in computing, electronic data storage, and digital data mining. Those advances have radically increased our ability to collect, store, and analyze personal communications, including metadata.
> 23. Innovations in electronic storage today permit us to maintain, cheaply and efficiently, vast amounts of data. The ability to preserve data on this scale is, by itself, an unprecedented development—making possible the maintenance of a digital history that was not previously within the easy reach of any individual, corporation, or government.
> 24. This newfound data storage capacity has led to new ways of exploiting the digital record. Sophisticated computing tools permit the analysis of large datasets to identify embedded patterns and relationships, including personal details, habits, and behaviors. As a result, individual pieces of data that previously carried less potential to expose private information may now, in the aggregate, reveal sensitive details about our everyday lives—details that we had no intent or expectation of sharing."

13. He provides an example based on commercially available analysis software named "Pen-Link" and IBM's Analyst's Notebook:

> "27...Pen-Link can perform automated "call pattern analysis," which "automatically identifies instances where particular sequences of calls occur, when they occur, how often they occur, and between which numbers and names." As the company notes in its own marketing materials, this feature "would help the analyst determine how many times Joe paged Steve, then Steve called Barbara, then Steve called Joe back."

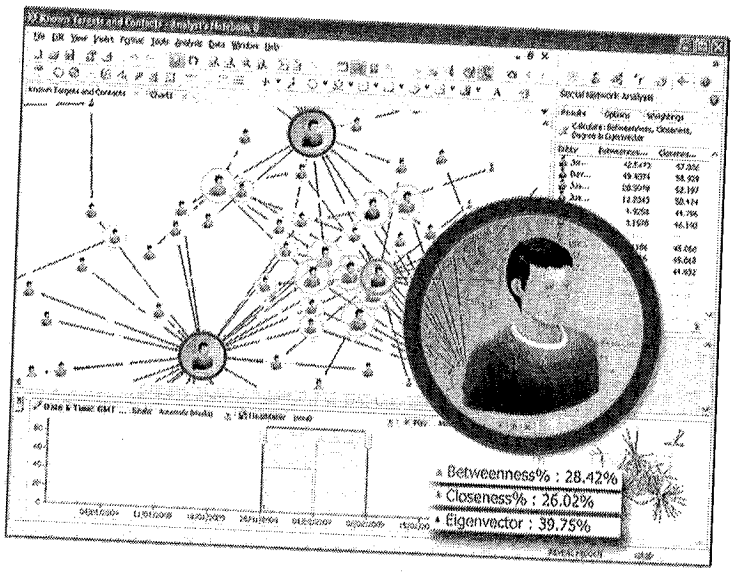


Figure 1: Screenshot of IBM's Analyst Notebook.

14. Professor Felten applies these observations to an organisation such as the ACLU:

> "55. With an organization such as the ACLU, aggregated metadata can reveal sensitive information about the internal workings of the organization and about its external associations and affiliations. The ACLU's metadata trail reflects its relationships with its clients, its legislative contacts, its members, and the prospective whistleblowers who call the organization. Second-order analysis of the telephony metadata of the ACLU's contacts would then reveal even greater details about each of those contacts. For example, if a government employee suddenly begins contacting phone numbers associated with a number of news organizations and then the ACLU and then, perhaps, a criminal defense lawyer, that person's identity as a prospective whistleblower could be surmised. Or, if the government studied the calling habits of the ACLU's members, it could assemble a detailed profile of the sorts of individuals who support the ACLU's mission...
> ...57. Metadata analysis could even expose litigation strategies of the plaintiffs. Review of the ACLU's telephony metadata might reveal, for example, that lawyers of the organization contacted, for example, an unusually high number of individuals registered as sex offenders in a particular state; or a seemingly random sample of parents of students of color in a racially segregated school district; or individuals associated with a protest movement in a particular city or region."

In my opinion, these observations are equally applicable to the Applicants in these proceedings, given their work in protecting civil liberties and doing so, in many cases, on behalf of anonymous persons.

15. The recent disclosures give us a much greater understanding of the extent of GCHQ's Internet surveillance programmes. Their scale and scope has taken many experts by surprise. The targets of the programmes include foreign governments, even those allied with the US/UK. However, we still do not know which citizens have come under

surveillance and for what reasons. That underlines the importance of ensuring that known practices and systems are proportionate and in accordance with the law, which I understand to be the purpose of the applicants' complaint.

16. Before the Guardian revelations, many experts thought that the continued dramatic growth in levels of Internet traffic would outstrip the capacity of signals intelligence agencies to monitor this data flood. We now know that NSA and GCHQ have developed technology that is able to record and filter through very large volumes of traffic; there is no technological reason why they should not be able to continue to do this.

RECENT DISCLOSURES REGARDING UK INTERNET SURVEILLANCE

17. There have been a large number of recent disclosures of UK and US Internet surveillance programmes in the media, the vast majority of which arose as a result of leaks by former Booz Allen Hamilton employee, Edward Snowden. I understand these disclosures form the basis of the applicants' main complaints in these proceedings. I set out a brief timeline of the disclosures below:

6 June 2013 – Order of the US Foreign Intelligence Surveillance Court (FISC) requiring Verizon Corporation to hand over metadata from US citizens' phone calls ("**IB1/2/pp.578-587**")

6 June 2013 – Details of NSA PRISM programme, alleging that NSA gained direct access to major US Internet companies' servers. ("**IB1/2/pp.594-600**")

7 June 2013 – President Obama Orders US to draw up overseas target list for cyber-attacks. ("**IB1/2/pp.601-605**")

8 June 2013 – 'Boundless Informant': NSA tool to summarise global surveillance data is disclosed. ("**IB1/2/pp.606-618**")

9 June 2013 – Edward Snowden reveals his identity as source of leaks. ("**IB1/2/pp.619-625**")

13 June 2013 – NSA hacking of civilian computer networks in Hong Kong and mainland China. ("**IB1/2/pp.626-629**")

16 June 2013 – NSA and UK (Government Communications Headquarters (GCHQ)) monitoring foreign diplomats. ("**IB1/2/pp.630-634**")

19 June 2013 – Project Chess, by which Skype permits access to the NSA. ("**IB1/2/pp.635-638**")

20 June 2013 – FISC documents detailing NSA arrangements for warrantless access to US data. ("**IB1/2/pp.639-657**")

21 June 2013 – GCHQ Tempora programme, tapping into fibre-optic cables and storing data. ("**IB1/2/pp.658-678**")

27 June 2013 – NSA programmes for 'harvesting' online user metadata revealed, including how GCHQ-collected metadata is transferred to NSA. ("**IB1/2/pp.679-681**")

29 June 2013 – US bugging of EU offices in New York, Washington DC and Brussels, and European Government embassies. ("**IB1/2/pp.682-683**")

30 June 2013 – NSA surveillance of 500 million data connections in Germany every month. ("**IB1/2/pp.684-685**")

6 July 2013 – US using 'Fairview' programme of foreign telecoms' partnerships with US telecoms to gain access to Internet and telephone data of foreign citizens. ("**IB1/2/pp.686-690; IB1/2/pp.693-696**")

8 July 2013 – Australian monitoring stations aiding in NSA collection of data. ("**IB1/2/pp.691-692**")

10 July 2013 – Further details of NSA 'Upstream' programme, tapping fibre-optic cables. ("**IB1/2/pp.697-701**")

20 July 2013 – Germany's Federal Intelligence Service contributing to NSA's data collection network. ("**IB1/2/p.702**")

31 July 2013 – Xkeyscore NSA data collection tool, using 500 servers around the world. ("**IB1/2/pp.703-713**")

1 August 2013 – NSA paid GCHQ c.$155 million between 2010 and 2013. ("**IB1/2/pp.714-718**")

2 August 2013 – GCHQ provided with direct access to seven telecom companies' fibre optic cable networks (including BT, Vodafone and Verizon). GCHQ pays for compliance costs. ("**IB1/2/pp.719-736**")

9 August 2013 – NSA changes to data minimisation rules may permit viewing of US citizens' data without a warrant. ("**IB1/2/pp.737-741**")

16 August 2013 – NSA violations of US law/internal rules. ("**IB1/2/pp.742-743**")

21 August 2013 – NSA declassifies three secret court opinions showing widespread surveillance of US citizens not connected to terrorism. ("**IB1/2/pp.749-752**")

23 August 2013 – GCHQ station in the Middle East collecting information from fibre optic cables. ("**IB1/2/pp.753-755**")

30 August 2013 – NSA spending hundreds of millions of dollars paying private companies for access to fibre optic hubs. ("**IB1/2/pp.756-757**")

30 August 2013 – details of 231 cyber-attacks carried out by the US in 2011. ("**IB1/2/pp.758-763**")

31 August 2013 – NSA carried out surveillance on Al-Jazeera. ("**IB1/2/p.766**")

1 September 2013 – NSA carried out surveillance of Brazilian and Mexican presidents. ("**IB1/2/pp.767-775**")

5 September 2013 – NSA and GCHQ successfully broke through a number of encryption methods in 2010. ("**IB1/2/pp.776-806**")

7 September 2013 – NSA can spy on smartphone data, including emails, contacts, notes and location. ("**IB1/2/p.807**")

9 September 2013 – NSA surveillance of private computer networks belonging to Google, Petrobras, French Foreign Ministry and SWIFT, contradicting earlier claims the NSA did not engage in corporate espionage. ("**IB1/2/pp.808-811**")

11 September 2013 – NSA shares data with Israel. Full memorandum of understanding published. ("**IB1/2/pp.812-822**")

16 September 2013 – Financial networks monitored by NSA programme, including VISA and the SWIFT network, violating a 2010 agreement with the EU. ("**IB1/2/pp.823-825**")

18. The most significant of these disclosures concerned the UK's Tempora programme, the NSA's PRISM programme, offensive operations, and cracking cryptographic protection systems through technical and 'HUMINT' means.

STATEMENTS BY THE UK GOVERNMENT

19. The UK government and Parliament's response to these disclosures has been circumspect. On 7 June 2013, the Intelligence and Security Committee (ISC) of Parliament issued a short statement indicating that it was investigating the allegations regarding UK use of the NSA's PRISM programme (at that time, the details of the Tempora programme had not been disclosed). Subsequently, on 10 June 2013, the Foreign Secretary, William Hague, made a statement to Parliament ("**IB1/3/pp.826-830**") in which he addressed the disclosures. He asserted the propriety of GCHQ's activities and the warranting process, but without specifying how that process had operated nor how oversight mechanisms had operated at the time.

20. On 1 July 2013 the ISC postponed a planned public hearing with the intelligence agencies until after the summer recess; but in the meantime, on 17 July 2013, the Chairman of the committee, Sir Malcolm Rifkind MP, issued a three page statement ("**IB1/3/pp.831-833**"), reporting on an ISC investigation into the allegations regarding PRISM. The investigation absolved GCHQ of the allegation that it had circumvented statutory mechanisms by using PRISM, on the evidence that it had seen. However, it did

not say how the mechanisms had operated and appeared to acknowledge that the regulatory framework was lacking, leading to the promulgation of secret policies by GCHQ:

> "7. In some areas the legislation is expressed in general terms and more detailed policies and procedures have, rightly, been put in place around this work by GCHQ in order to ensure compliance with their statutory obligations under the Human Rights Act 1998..."

The ISC indicated that further consideration would be given to these issues. In a press briefing for the report (see *Inquiry into snooping laws as committee clears GCHQ*, Guardian, 18 July 2013 ("**IB1/3/pp.834-836**")), the Chair of the ISC acknowledged that the ISC's investigation had only focused on intelligence that GCHQ had specifically requested from the US on particular warranted suspect individuals. It did not therefore cover whether PRISM data was being shared with the UK through other means, such as pursuant to broader generic warrants, or the provision of unsolicited information from the US to the UK. Nor did the inquiry cover communications *metadata* obtained through PRISM: it only looked at the sharing of *content* information.

21. Since that time, the disclosures have continued, most notably those of 21 June 2013 regarding the Tempora programme, but with little further official comment. It has been reported that on 20 July 2013 the Guardian newspaper destroyed computer hardware containing GCHQ files at the request of the UK Government ("**IB1/2/pp.744-748**"). Subsequently, in a written statement to the High Court regarding the detention of the partner of one of the Guardian journalists, Britain's Deputy National Security Adviser for Intelligence, Security and Resilience, Oliver Robbins, stated that "*real damage has in fact already been done to UK national security by media revelations*" ("**IB1/2/p.764**"). But he did not substantiate this claim further.

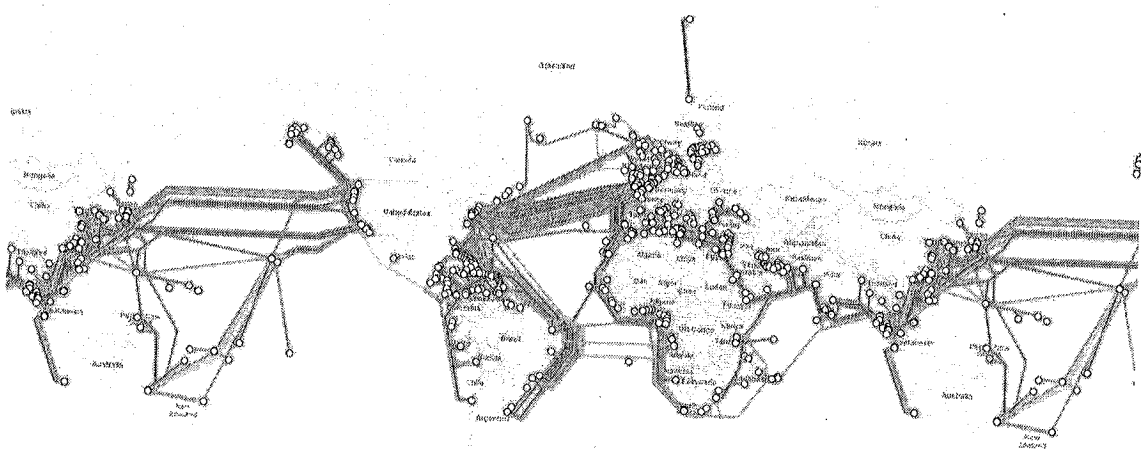
THE OPERATION OF THE PROGRAMMES

Tempora Programme

22. The Guardian newspaper's report of 21 June 2013 disclosed that GCHQ had placed data interceptors on fibre-optic cables conveying Internet data in and out of the UK. These UK-based fibre optic cables include transatlantic cables between the US and Europe. It is believed that interceptors have been placed on at least 200 "wavelengths" (data channels) carried by fibre optic cables, near to the points where they come ashore. This appears to have been done with the secret co-operation of the companies that

operate the cables. The programme is reported by the Guardian to have been operational since 2011[1].

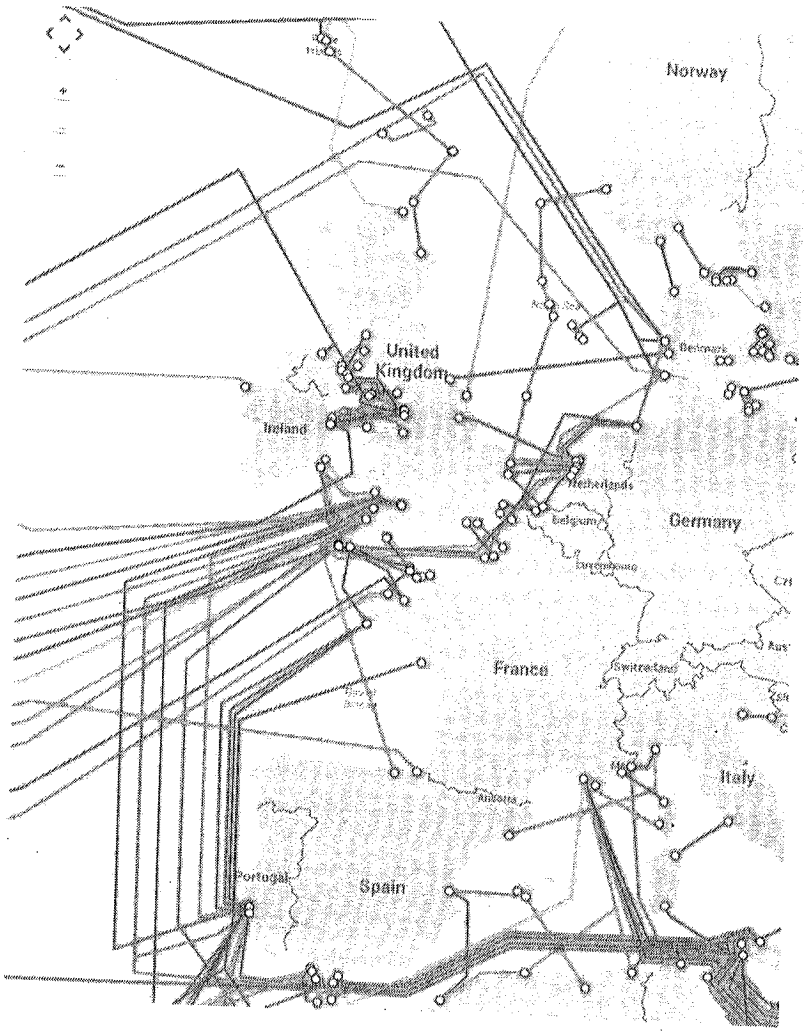
23. Global submarine cables are the main arteries of the Internet worldwide. If they can be successfully tapped, then they provide a 'fast track' to total Internet surveillance, without the need to target an individual user with more specialised surveillance methods. I exhibit a map of showing their location around the world[2] ("**IB1/4/p.848**").



24. One consequence of monitoring of cables entering and exiting the UK will be that a large quantity of communications relating to the rest of the world will be caught. Much of the rest of Europe's external Internet traffic is routed through the UK, as this is the landing point for the majority of transatlantic fibre-optic cables. I reproduce below an enlargement of the map at Exhibit **IB1/4/p.848** showing this concentration:

[1] *GCHQ taps fibre-optic cables for secret access to world's communications*, The Guardian, 21 June 2013 ("**IB1/2/pp.658-663**")

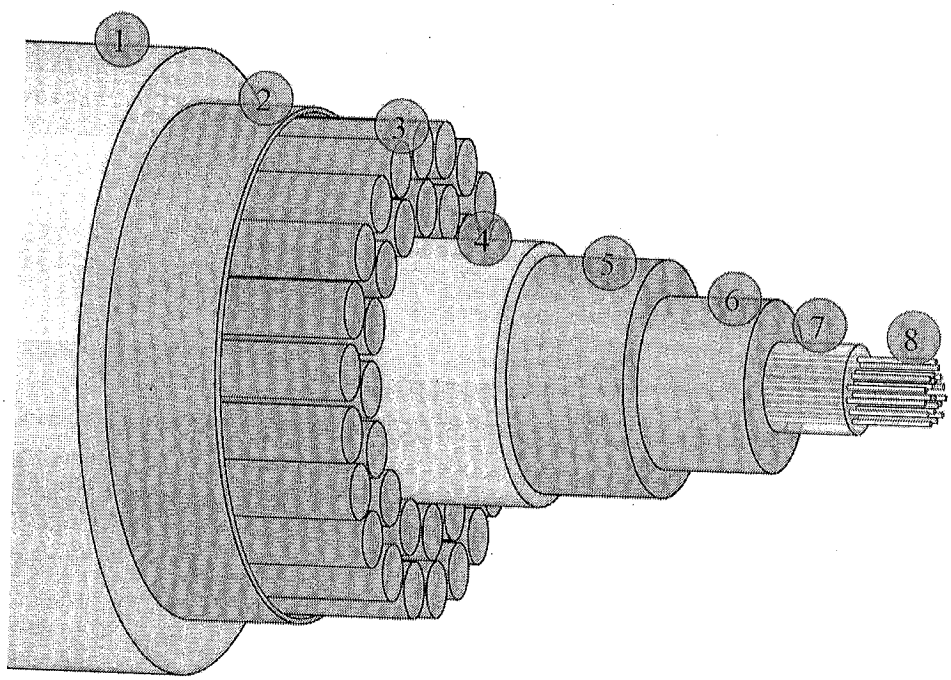
[2] Reproduced by permission: Submarine Cable map, Telegeography © 2013 PriMetrica, Inc (at http://www.submarinecablemap.com)



25. In the UK and the rest of Europe, many 'intra-European' communications will nevertheless pass through offshore cables as they are routed to Internet and communications servers based overseas (often in the US). Although the unnamed intelligence source stated to the Guardian that "*There is no intention in this whole programme to use it for looking at UK domestic traffic – British people talking to each other*"[3], it is clearly within GCHQ's capabilities, and there is no suggestion in the source materials reported by the Guardian that 'purely domestic' (UK-internal) traffic was being excluded.

26. The cables themselves consist of a number of protective layers around a series of fibre optic cables. Typically, they are around 10cm in diameter. The following diagram shows the construction of a typical cable.

[3] Supra, note 1



The fibre optic cables themselves are labelled "8". The other layers are 1 – Polyethylene; 2 – Mylar tape; 3 – Stranded steel wires; 4 – Aluminium water barrier; 5 – Polycarbonate; 6 – Copper or aluminium tube; and 7 – Petroleum jelly.

27. Although it would be speculative to predict exactly how GCHQ is tapping these cables, this could be done using an 'optical splitter', which duplicates the light signals flowing through the cables. I expect that these duplicated signals are transported over further fibre optic cables to GCHQ's storage and processing centres in Bude, Cheltenham and elsewhere.

28. The Guardian reported that "*by the summer of 2011, GCHQ had probes attached to more than 200 Internet links, each carrying data at 10 gigabits a second*"[4]. As to the location of this tapping, I expect that it will be near to where the cables make landfall (see below). The Guardian reported that the tapping had been carried out in cooperation with the companies who own the cables, reporting that: "*companies have been paid for the cost of their co-operation and GCHQ went to great lengths to keep their names secret. They were assigned "sensitive relationship teams" and staff were urged in one internal guidance paper to disguise the origin of "special source" material in their reports*

[4] Supra, note 1

for fear that the role of the companies as intercept partners would cause "high-level political fallout"[5].

29. The Guardian reported that this mode of surveillance potentially gives GCHQ access to 21 petabytes of data a day.[6] A petabyte is approximately 1000 terabytes (which is in turn 1000 gigabytes). To convey an idea of the scale, the US Library of Congress had, in 2009, 15.3 million documents available online, the approximate size of which totalled 74 terabytes. The comparison made by the Guardian was that this quantity of data was equivalent to sending all the information in all the books in the British Library 192 times every 24 hours. It was reported that this programme gave GCHQ the largest Internet access out of the "Five Eyes" group of countries referred to in the classified documents (Australia, New Zealand, Canada, the USA and the UK).[7]

30. The data will flow from the cable probe along fibre-optic cables to GCHQ's monitoring stations. There the information is reportedly stored using GCHQ's "Internet buffers".[8] These will be massive data storage facilities searched using GCHQ's own internal servers. Even using high compression and capacity of modern data storage drives, it would require a very large area in order to store the large number of data storage facilities necessary. This storage is likely to be based, in whole or in part, in the four underground computer halls at GCHQ in Cheltenham, three of which are larger than Wembley football pitch[9] and possibly at other GCHQ sites around the country. The Guardian named GCHQ Bude (Cornwall) and one other overseas site, and quoted from an internal GCHQ document which stated that the NSA had provided £15.5m of funding to "radically enhance the infrastructure at Bude".[10]

31. The Guardian reported that the thus-obtained massive amounts of Internet data could be stored for up to three days (for content) and thirty days (for meta content).[11] "Content" refers to the entirety of the communicated data (so the content of an email or instant message, all Internet pages viewed, all information accessed and shared through social networking sites like Facebook, documents edited in "cloud" computing services like Google Docs, etc. – all of the activities carried out by individuals online, not just

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[5] Supra, note 1
[6] Supra, note 1
[7] Supra, note 1
[8] Supra, note 1
[9] *GCHQ. Cracking the Code*, BBC Radio 4, 4 April 2010 (at http://www.bbc.co.uk/programmes/b00rmssw)
[10] *GCHQ: inside the top secret world of Britain's biggest spy agency*, The Guardian, 1 August 2013 ("**IB1/2/pp.723-736**")
[11] Supra, note 1

"communications" in the traditional sense). "Meta content" is 'data about the data' i.e. data recording the means of creation of transmitted data, the time and date of its creation, its creator, the location on a computer network where it was created and the standards used. Meta-content can however be extremely revealing, as I set out above.

32. Under the Tempora programme, both metadata and content data are sifted using a technique called Massive Volume Reduction (MVR). Peer-to-peer downloads of music, films and computer programmes for example, are classed as "high-volume, low-value traffic" and filtered out, reducing the volume of data by 30 percent. The remaining data is then searched using keywords, email or other addresses of interest, or the known names or aliases of targeted persons and phone numbers. The Guardian reported that many of these keywords have been supplied by the US Government. It was reported that GCHQ and the NSA have respectively identified 40,000 and 31,000 such "selectors"[12]. An "intelligence source" described the process to the Guardian:

> "Essentially, we have a process that allows us to select a small number of needles in a haystack. We are not looking at every piece of straw. There are certain triggers that allow you to discard or not examine a lot of data so you are just looking at needles. If you had the impression we are reading millions of emails, we are not.
>
> He explained that when such "needles" were found a log was made and the interception commissioner could see that log."[13]

33. I anticipate that such sifting is partly automated, with an ever-expanding list of keywords and selectors being added to the list that is searched. It is unclear when a log will be created – whether it is when information is read by a searcher, or whether it is when useful information is found by a searcher – but in either case, it appears that the logs may not provide a complete picture of the searching activities and the surveillance carried out, since automated analysis of large quantities of data without human intervention are less carefully audited. From what the Guardian has reported about the NSA's "XKeyScore" programme, it is also likely that GCHQ staff can undertake broad categories of searches through captured data in a process akin to using standard Internet search engines.

34. Much Internet traffic these days is encrypted to protect it from interception, especially since large companies such as Google and Microsoft enabled encryption for their webmail and other services. However, GCHQ and the NSA have also reportedly

[12] Supra, note 1
[13] Supra, note 1

succeeding in decrypting data protected using many of the commonly used encryption standards (see [48] below for further details). Communications identified during searches may therefore have to be decrypted before they can be read and further used.

35. The Guardian reported that around 300 GCHQ and 250 NSA operatives are tasked with sifting through this data. The numbers of people who subsequently have access to this data are no doubt much larger. The NSA's access to the data is believed to be substantial. Citing original documents, the Guardian reported as follows:

> "In 2011, the agency [GCHQ] boasted that sharing this database with the Americans highlighted 'the unique contribution we are now making to the NSA in providing insights into some of their highest priority targets'. GCHQ also boasted that it had given the NSA 36% of all the raw information the British had intercepted from computers the agency was monitoring. The intelligence had been "forwarded to NSA", the document explained. It added: "We can now interchange 100% of GCHQ End Point Projects with NSA." This suggests the NSA potentially has access to all the sifted and refined intelligence gathered by GCHQ...
> ...In the mid-year review for 2010/11, GCHQ proclaimed: "Our partners have felt the impact of our capability too, with NSA in particular, delighted by our unique contributions against the Times Square and Detroit bombers." What those contributions were is not explained. We know the NSA is forbidden from spying on American citizens; in the case of Shahzad, this question remains – was GCHQ doing it for them?"[14]

36. It is not known what use the NSA make of data obtained through access to the Tempora programme. However, there is clearly a possibility that such data may find its way into the hands of third states, whether other members of the "five eyes" group of states collaborating on Internet surveillance (the US, the UK, Australia, Canada and New Zealand) or Israel. The Guardian reported on 11 September 2013 that the NSA routinely shared raw 'sigint' data with the Israeli intelligence authorities pursuant to a memorandum of understanding between the two countries.[15]

37. A Der Spiegel article on 16 September 2013, regarding surveillance of global financial transactions by the NSA and GCHQ, noted an admission from a GCHQ presentation that the data being shared with the US was extremely wide-ranging:

> *"a document from the NSA's British counterpart -- the Government Communications Headquarters (GCHQ) -- that deals with "financial data" from a legal perspective and examines the organization's own collaboration with the NSA. According to the document, the collection, storage and sharing of "politically sensitive" data is a highly*

[14] Supra, note 1
[15] *NSA shares raw intelligence including Americans' data with Israel*, The Guardian, 11 September 2013 ("**IB1/1/pp.812-822**")

invasive measure since it includes "bulk data -- rich personal information. A lot of it is not about our targets."[16]

38. The US' access to Tempora also opens up the possibility that the UK may, by accident or by design, cooperate with the NSA to enable US intelligence gathering on UK targets and may, in turn, receive further reports from the US regarding UK citizens, based on UK surveillance (but without any individuated warrant having been issued). The actions of the NSA fall outside the purview of the provisions of RIPA outlined above, and are not overseen by the ISC, the IPT or the Interception of Communications Commissioner (see further below).

39. The Guardian reports appear to me to be credible. Some of the details have been confirmed by the US government, and by previous leaks (including by statements by former senior NSA officials such as William Binney.) Much of the technology used (such as optical splitter equipment) is commercially available. The budgetary resources required fit within the publicly known budgets of the UK and US intelligence agencies. NSA has recently completed building a widely reported data centre in Utah, costing an estimated $1.5-$2bn, with extremely large data storage and computation capabilities.[17]

40. I set out overleaf a simple diagram with a summary of how the process of gathering information via Tempora is likely to operate, in light of the information disclosed. Although informed by my knowledge of cyber-security technology and Internet surveillance, it is based on the recent disclosures. This is because there are very few other information sources regarding GCHQ's practices. I therefore do not offer the following as a confirmed example, but as an illustration of how surveillance may operate, in light of what is now known. The diagram shows an individual in Germany communicating with a person in the UK. An email is sent by him, the data passing through under-sea cables via US servers. The data is tapped in the way I described earlier and sent to GCHQ's servers, where it is buffered along with a large amount of other data. That data might then be sifted before being picked up through the use of keyword/indicator searches. GCHQ operatives then use the content to compile intelligence reports which are then transmitted elsewhere for further action. It is probable that such a communication would then be stored, or a copy made, before the content data that it was 'buffered' alongside is deleted. The meta-data would, it appears, be available to be searched for a longer period before being deleted.

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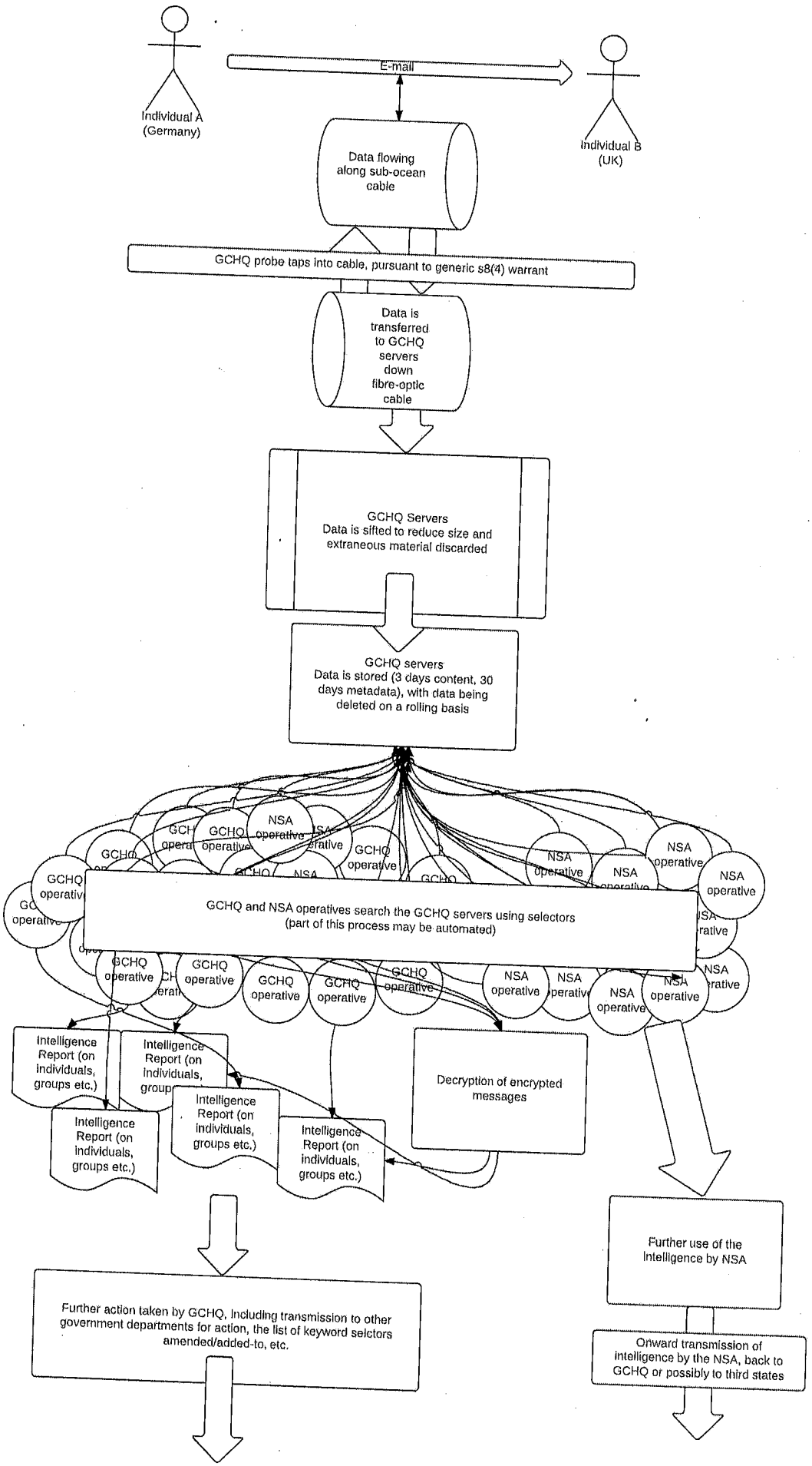
[16] *Follow the Money': NSA Monitors Financial World*, Der Spiegel, 16 September 2013 ("**IB1/2/pp.823-825**")
[17] *Welcome to Utah, the NSA's desert home for eavesdropping on America*, The Guardian, 14 June 2013 ("**IB1/3/pp.844-846**")

41. As the Guardian has reported, it is possible that use of seized email content may also be made by the US authorities, and this is also represented in the diagram. Indeed, it is possible that the German national in question may be a person in whom the US is interested and in respect of whom the US has made a specific request to the UK for access to Tempora material generated by him. He may therefore find himself amongst the many keyword selectors used to sift Tempora data. The US may then have access to substantial content data from his emails, messages and other traffic, apparently without restriction. This material may be stored and, if it is likely to be useful in the future, perhaps indefinitely.

42. This also points up another problem with the vast use of keyword searches of the Tempora data. In reality, these may amount to targeted surveillance of a number of individuals, through inclusion in a rapidly growing list of keywords. However, it appears that the generalised warranting process for the Tempora programme does not treat such searches as targeted individual searches under RIPA. Although section 16 of RIPA points provides some protections for material obtained under a general section 8 (4) warrant which could otherwise have been obtained under an individuated warrant, these protections only apply to individuals located in the British Isles at the time. It would therefore offer no protection in the illustration I have given, other than to limit the period of surveillance to a maximum of six months.


Individual A
(Germany)
E-mail
Individual B
(UK)
Data flowing along sub-ocean cable
GCHQ probe taps into cable, pursuant to generic s8(4) warrant
Data is transferred to GCHQ servers down fibre-optic cable
GCHQ Servers
Data is sifted to reduce size and extraneous material discarded
GCHQ servers
Data is stored (3 days content, 30 days metadata), with data being deleted on a rolling basis
GCHQ and NSA operatives search the GCHQ servers using selectors
(part of this process may be automated)
GCHQ operative
NSA operative
Intelligence Report (on individuals, groups etc.)
Decryption of encrypted messages
Further action taken by GCHQ, including transmission to other government departments for action, the list of keyword selctors amended/added-to, etc.
Further use of the intelligence by NSA
Onward transmission of intelligence by the NSA, back to GCHQ or possibly to third states

Global Telecoms Exploitation

43. The Guardian has also reported another GCHQ programme named "Global Telecoms Exploitation". It is believed that this programme has also been achieved by tapping fibre-optic cables. The Guardian reported that by 2012 GCHQ was handling "600m 'telephone events' each day".[18] It is unclear to me whether this extends beyond metadata to content, but, as I explained earlier, metadata can often be very revealing as to the content of a call and other relevant intelligence associated with that call.

UK Use of PRISM Programme

44. The details of the PRISM programme are, I understand, explained in another witness statement. Through this programme, the NSA gains access to data held on the private servers of well-known US Internet companies such as Google, Facebook, Microsoft, Apple, Yahoo and Microsoft subsidiary Skype. These companies state they have not provided a 'back door' to servers; they are instead transferring (large) quantities of specific data (likely matching the "selectors" described earlier) in response to legal orders[19]. The PRISM programme therefore does not involve tapping of communications 'in transit' but gaining access via the servers of major Internet companies. The fact that the UK also seeks access to PRISM suggests that it is able to access data which it is unable to reach through Tempora, either because the information has been deleted from GCHQ's servers, has not passed through UK-based fibre-optic cables, or was encrypted in transit.

45. When the Guardian disclosed details of this programme on 7 June 2013 it also disclosed that GCHQ had had access to that programme and had generated 197 intelligence reports from it in 2012[20]. It was alleged that the UK had circumvented the Regulation of Investigatory Powers Act ("RIPA"") warranting processes using PRISM. As noted above, the ISC subsequently investigated this allegation and concluded that there had been no circumvention. As noted above, the ISC found that PRISM data had been requested in cases subject to existing warrants. However, the breadth of the terms of those warrants is not known. Nor does it follow that the UK authorities consider PRISM requests require a warrant, nor did the ISC's investigation examine whether PRISM intelligence is also

[18] Supra, note 1
[19] See, for example, *Google: There is no PRISM Back Door to Our Servers, No Open-Ended Access to User Data*, techcrunch.com, 7 June 2013 ("**IB1/3/p.847**")
[20] Supra, note 1

provided to the UK authorities on an unsolicited basis or pursuant to general requests from the UK authorities. It also appears that until the disclosure of the UK's use of the PRISM programme the ISC was unaware of it and the programme itself[21].

46. In addition to requested information, the PRISM programme may also benefit the UK through unsolicited intelligence provided by the US authorities, or provided pursuant to general UK requests only, regarding UK and other European citizens. If information is 'volunteered' by the US authorities, then its receipt by the UK authorities would appear not to be subject to any warranting procedure. Indeed, the ISC clarified that its investigation into the UK's use of PRISM only looked at cases in which a specific warrant had been requested and granted by the UK authorities. In reality what is supplied pursuant to a request and what is 'volunteered' may be a grey area: given that the UK and US authorities effectively work as a team, the former hardly need to specifically request information of interest to them from the latter: the US authorities are fully aware of the UK authorities' areas and persons "of interest".

47. These facts highlight the limited effectiveness of the warranting and oversight process set out in RIPA. Based on the known facts it is possible that under the UK's use of the US PRISM Programme, PRISM data can be specifically requested of the US authorities by the UK authorities or supplied by the US pursuant to a more generalised request or even supplied unsolicited by the US. This information will have been obtained by GCHQ by a form of interception and, as it is external US material, is subject to few US law targeting protections and can have been obtained by a wide trawl for data. Further, this could include situations where one person is in the UK or even where all communications are in the UK (but stored on US servers). The restrictions on the receipt, use and dissemination of such material are insufficient.

Cracking Cryptographic Protection Systems

48. On 5 September 2013 the Guardian published further disclosures regarding GCHQ and the NSA's cracking of commonly used encryption systems used to protect emails, banking and medical records, and other private information. These disclosures are significant, not only for the further intrusion into the intentionally private communications and records of individuals, but also because of the historical context and methods used. The US Government had attempted to restrict the use of common encryption methods

[21] Sir Malcolm Rifkind, ISC Chair: "*No, I didn't know it, nor would I have expected to any more than I would any other country's process....*" Frontline Club Debate, 9 July 2013 (http://www.frontlineclub.com/the-trade-off-individual-privacy-and-national-security/ at 58:30).

from the late 1970s until 2001, and this was roundly rejected at the time[22]. However, these allegations suggest that commonly used encryption systems have in any event been defeated by GCHQ and the NSA. The methods used are also of note: they have been achieved through covert influencing of encryption standards; through liaison with technology companies selling products to government; through 'HUMINT' – i.e. covert human intelligence means – i.e. personnel at selected private stakeholders; and through massive investment in computing capacity. The Guardian reported that funding for the programme - $254.9m for 2013 – dwarfed that for the PRISM programme ($20m per year).

49. The reported cracking of commonly used encryption standards is no doubt of importance for other programmes such as Tempora, as stored communications may require decryption before their content can be analysed.

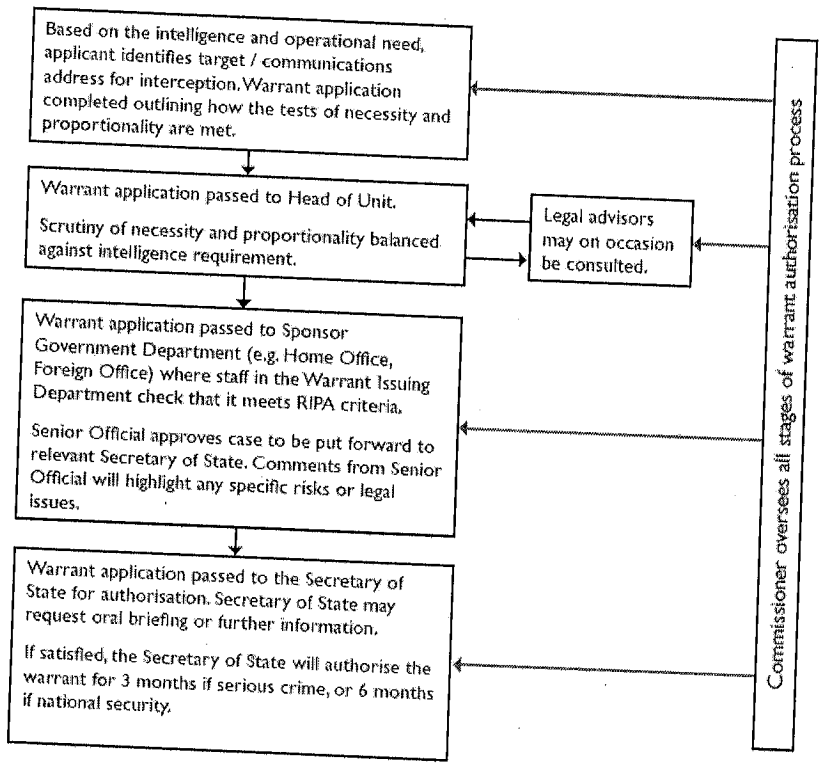
LEGAL AUTHORISATIONS

The Warranting Process

50. Surveillance of communications comes under two separate regimes in UK law. Interception of content (what is said in a letter, phone call or e-mail) is authorised for three or six months (depending on the purpose) by a warrant specifying an individual or premises from the Secretary of State under Part I Chapter 1 of the Regulation of Investigatory Powers Act 2000 (RIPA). Access to "communications data" — subscriber information; records of calls made and received, e-mails sent and received, websites accessed, the location of mobile phones — is regulated under Part I Chapter 2 of RIPA, with a large number of government agencies able to self-authorise access to some of this data. The diagram below sets out the interception of content authorising process according to the report of the Interception of Communications Commissioner:[23]

[22] See e.g. *UK and US spy agencies undermined encryption standards*, Wired, 6 September 2013 ("**IB1/3/pp.837-840**")
[23] Source: 2012 Annual Report of the Interception of Communications Commissioner ("**IB1/4/pp.851-920**").

Figure 2 - The Warrantry Authorisation Process



51. During 2012, 3,372 intercept warrants were issued using RIPA Part 1 Chapter 1, according to the 2012 report of the Interception of Communications Commissioner (para 6.3 ("**IB1/4/p.866**")).

52. An interception warrant need **not** specify an individual or premises if it relates to the interception of communications external to the UK and if an authorizing certificate has been issued by a Secretary of State which also describes the classes of material to be examined (RIPA section 8(4)). This appears from the Guardian reports and statements of the Chair of the ISC[24] to be the mechanism by which the government authorises GCHQ to undertake automated searches of communications that originate or terminate outside the British Isles, such as through the Tempora programme. Yet "external" communications could include the transmission of data to or from servers outside the UK. This would include traffic to the facilities of most of the large companies (such as Facebook, Google and Microsoft) to whom reference has been made in the NSA's PRISM programme. The Guardian reported from an internal GCHQ legal document which stated that "*The certificate is issued with the warrant and signed by the secretary*

[24] Supra, notes 1, 21.

of state and sets out [the] class of work we can do under it ... [It] cannot list numbers or individuals as this would be an infinite list which we couldn't manage." Such certificates "*cover the entire range of GCHQ's intelligence production*".[25] The Guardian reported that "*Lawyers at GCHQ speak of having 10 basic certificates, including a "global" one that covers the agency's support station at Bude in Cornwall, Menwith Hill in North Yorkshire, and Cyprus.*"[26] It is possible therefore that a typical warrant authorising the Tempora programme may be as wide as "'*all traffic passing along a specified cable running between the UK and the US*".

53. In practice, these warrants, whilst time limited under RIPA section 9 to periods of three or six months, may in effect be "rolling" warrants, a new warrant being granted upon the expiry of the preceding warrant. This is because, by necessity, generalised warrants will not refer to particular individuals or a specific threat, but generalised threats only. The UK Government has passed a Code of Practice for the Interception of Communications ("**IB1/4/pp.921-962**"), Chapter 5 of which provides guidance for the issue of section 8 (4) warrants. It includes a requirement (at 5.2) that consideration be given to "*any unusual degree of collateral intrusion, and why that intrusion is justified in the circumstances. In particular, where the communications in question might affect religious, medical or journalistic confidentiality or legal privilege, this must be specified in the application.*" However, it appears that in practice, such considerations have been insufficient to prevent the coming into being of a series of rolling warrants authorising a broad "big data" programme such as Tempora.

54. Based on RIPA, the Code of Practice and the recent disclosures, I expect that the following stages would apply to the issue of a s8(4) warrant:

    1. GCHQ applies to the Secretary of State for a warrant authorising the interception of an external communications link, such as a submarine cable, or a number of submarine cables between the UK and mainland Europe. This warrant is duly granted, pursuant to RIPA section 8 (4).
    2. The Secretary of State issues a certificate describing the categories of information to be searched. The Guardian reported that these were "broad" categories, stating that "the categories of material have included fraud, drug trafficking and terrorism"[27]. The

[25] *The legal loopholes that allow GCHQ to spy on the world*, The Guardian, 21 June 2013 ("**IB1/2/pp.664-668**")).
[26] Ibid
[27] Supra, note 1

certificate is highly unlikely to name the many thousands of potential targets and locations.

3. Tempora then gains access to this material. The use of the many thousands of keywords and selectors will not be referred to in the certificate.

55. In contrast, a warrant under the RIPA regime governing communications "internal" to the UK under section 8 (1) RIPA must name either a single person or a single set of premises as its target, and it must schedule the addresses, numbers and other factors that are to be used to identify the communications that are to be intercepted.

56. Section 12 RIPA gives the Home Secretary the power to require that communications providers facilitate lawful interception of their network. This would include requirements to install interception devices that provide specific functionality, such as the ability to intercept communications in real-time and to hide the existence of other simultaneous wiretaps from each intercepting agency. Communications Service Providers may appeal these requirements to a Technical Advisory Board, constituted by representatives of intercepting agencies and CSPs, who will report to the Secretary of State on the technical and financial consequences of the order. The order may then be withdrawn or renewed.

57. Under section 94 of the Telecommunications Act 1984, the Secretary of State may give providers of public electronic communications networks "directions of a general character... in the interests of national security or relations with the government of a country or territory outside the United Kingdom", which may be protected against disclosure.

58. Through the combination of several pieces of legislation (Section 10 of the Computer Misuse Act 1990, section 32 of RIPA, Part III of the Police Act 1997 and section 5 of the Intelligence Services Act 1994), government agencies can also be authorised to remotely break into computer systems to access data on those systems.

59. In addition to the above, under section 7 of the Intelligence Services Act 1994, the actions of GCHQ outside the UK are exempted from civil and criminal liability under UK law if done pursuant to an authorization of the Secretary of State under that section.

60. GCHQ may not be able to exploit relationships with the largest Internet companies in the same way that the NSA has apparently done through its PRISM programme, since very few of them are headquartered within the UK, although they do retain UK locations and

UK-sited infrastructure. But it clearly has conducted large-scale surveillance of communications entering or leaving the UK. The agency has reportedly already spent several hundred million pounds expanding its capabilities to intercept ISP networks in its "Mastering the Internet" programme (of which Tempora is part), with claims of a total budget of over £1bn ($1.5bn) to give analysts "complete visibility of UK Internet traffic, allowing them to remotely configure their deep packet inspection probes to intercept data – both communications data and the communication content – on demand"[28]).

OPINION

The Proportionality of the Disclosed Methods

61. It is not my role as an expert in Internet technologies, cyber-security and surveillance to determine whether or not the above-mentioned methods are a proportionate mode of surveillance. However, I feel I can note the main features of the surveillance framework and practices that I would assume will have a bearing on this question. In my opinion, the main aspects in this respect are:

- the vast (and until the Snowden revelations unimagined) scale of the operations;
- the fact that the offences and activities in relation to which surveillance may be (and clearly is) undertaken are not spelled out in a clear and precise manner;
- the fact that surveillance is not targeted at specific, pre-identified individuals or even categories of individuals: under the Tempora programme, the communications and Internet activity of *all* citizens whose data flows through the UK-originating fibre cables are subjected to scrutiny (even if not all of it is read or examined by a human agent);
- the fact that there are no clear limits on the duration of the surveillance; on the contrary, under the Tempora programme effectively *all* the data that flow through the "split" fibre cables is collected, on an on-going basis;
- the fact that the "policies and procedures" that currently cover the surveillance are by the authorities' own admission unclear and vague;
- the fact that these policies and procedures are not published and not subjected to Parliamentary or public democratic scrutiny;
- the fact that there are no serious safeguards against abuse, with the current oversight regime having been shown to be unable to check the growth of the massive suspicionless surveillance that has been put in place;

[28] *Jacqui's secret plan to 'Master the Internet'*, Christopher Williams, The Register, 3 May 2009 ("**IB1/3/pp.841-843**")

- the fact that there are no known clear rules limiting the uses and disclosures of the captured data, or the sharing of the data with other agencies, including the USA's NSA or other "FIVE EYES" agencies;
- the fact that there are no known clear rules that ensure, on the one hand, that captured data are not unduly retained when they are no longer needed or relevant, and on the other hand, that data are not destroyed at a time or in such a way that errors cannot be remedied after the fact;
- more specifically, the fact that there is no requirement for victims of surveillance to be informed of the fact that they have been spied upon;
- the fact that there has not been any public or parliamentary debate on the construction and operation of the massive surveillance programmes (outside secret inquiries by the Intelligence and Security Committee), and more generally;
- the fact that most of the safeguards applied to the UK's intelligence agencies in respect of access to data collected from a large proportion of European Internet traffic, are hidden from view, making it impossible to ascertain whether they do achieve that aim;
- the fact that GCHQ exercise significant surveillance over European citizens outside the UK (and share this data with other governments) with little effective oversight for such persons, due only to the UK's advantageous access to sub-ocean cables.

62. Also important in terms of the Convention, is the fact that the US National Security Agency reportedly has direct access to Tempora and other GCHQ programme data, for purposes going far beyond those that have been accepted by the Court to justify the intrusiveness of "strategic" surveillance systems (in *Klass v. Germany, Weber and Saravia v. Germany* and other decisions). Any limits on NSA use of this data concerning UK residents are contained in secret treaty agreements. It is difficult to see how this is compatible with the UK's positive obligations to protect the privacy of those in its jurisdiction.

Alternatives that impose less far-reaching interferences:

63. I have consulted on issues of Internet privacy and cyber-security with both corporations and governments. In my opinion, it is possible to construct a system that accords sufficient respect to individual privacy rights whilst permitting proportionate, targeted surveillance for narrowly circumscribed purposes. Whilst the tensions in such a system cannot be eradicated, they can be managed sufficiently through oversight mechanisms that do permit public scrutiny.

64. Better protection could be achieved with notification of surveillance targets once investigations have concluded; judicial rather than executive warranting of targeted surveillance; publication of aggregate information on requests made to each Internet service provider and by investigation type and purpose; and the removal of confidentiality requirements that block Internet companies from publishing details of the procedures they apply when they receive surveillance orders.

65. In addition to the flaws in the s8(4) warranting procedures I have referred to above, it is also worth highlighting that "Metadata"/"communications data", whilst being extremely revealing about individuals' lives, receives very low levels of legal protection under RIPA Part 1 Chapter 2. This has been partially recognised by the current government, which legislated in the Protection of Freedoms Act 2012 section 37 to require a magistrate to approve local councils' access to communications data. This requirement should be extended to all government agencies.

66. One example of a system that does sufficiently protect individuals' rights to privacy can be seen in the International Principles on the Application of Human Rights to Communications Surveillance[29] ("**IB1/4/pp.963-982**"), which have been translated into many languages. They are the outcome of collaboration between civil society groups, industry and international experts in communications surveillance law, policy and technology. The preamble to the principles expressly recognises the rise of mass surveillance due to public adoption of the Internet coupled with the removal of logistical barriers to surveillance. It highlights the limitations of outmoded regulatory frameworks. The principles themselves set out standards that, in my view, have not been met by the practices I have described in this statement and their regulation under RIPA. I invite attention to all of the principles but of particular relevance are the following:

> "Legality: Any limitation to the right to privacy must be prescribed by law. The State must not adopt or implement a measure that interferes with the right to privacy in the absence of an existing publicly available legislative act, which meets a standard of clarity and precision that is sufficient to ensure that individuals have advance notice of and can foresee its application. Given the rate of technological changes, laws that limit the right to privacy should be subject to periodic review by means of a participatory legislative or regulatory process.
>
> Necessity: Laws permitting communications surveillance by the State must limit surveillance to that which is strictly and demonstrably necessary to achieve a legitimate aim. Communications surveillance must only be conducted when it is the only means of achieving a legitimate aim, or, when there are multiple means, it is the

[29] https://en.necessaryandproportionate.org/text

means least likely to infringe upon human rights. The onus of establishing this justification, in judicial as well as in legislative processes, is on the State.

Proportionality: Communications surveillance should be regarded as a highly intrusive act that interferes with the rights to privacy and freedom of opinion and expression, threatening the foundations of a democratic society. Decisions about communications surveillance must be made by weighing the benefit sought to be achieved against the harm that would be caused to the individual's rights and to other competing interests, and should involve a consideration of the sensitivity of the information and the severity of the infringement on the right to privacy.
Specifically, this requires that, if a State seeks access to or use of protected information obtained through communications surveillance in the context of a criminal investigation, it must establish to the competent, independent, and impartial judicial authority that:

1.there is a high degree of probability that a serious crime has been or will be committed;
2.evidence of such a crime would be obtained by accessing the protected information sought;
3.other available less invasive investigative techniques have been exhausted;
4.information accessed will be confined to that reasonably relevant to the crime alleged and any excess information collected will be promptly destroyed or returned; and
5.information is accessed only by the specified authority and used for the purpose for which authorisation was given.

If the State seeks access to protected information through communication surveillance for a purpose that will not place a person at risk of criminal prosecution, investigation, discrimination or infringement of human rights, the State must establish to an independent, impartial, and competent authority:

1.other available less invasive investigative techniques have been considered;
2.information accessed will be confined to what is reasonably relevant and any excess information collected will be promptly destroyed or returned to the impacted individual; and
3.information is accessed only by the specified authority and used for the purpose for which was authorisation was given.

Competent Judicial Authority: Determinations related to communications surveillance must be made by a competent judicial authority that is impartial and independent. The authority must be:

1.separate from the authorities conducting communications surveillance;
2.conversant in issues related to and competent to make judicial decisions about the legality of communications surveillance, the technologies used and human rights; and
3.have adequate resources in exercising the functions assigned to them.

Due process: Due process requires that States respect and guarantee individuals' human rights by ensuring that lawful procedures that govern any interference with human rights are properly enumerated in law, consistently practiced, and available to the general public. Specifically, in the determination on his or her human rights, everyone is entitled to a fair and public hearing within a reasonable time by an independent, competent and impartial tribunal established by law, except in cases of emergency when there is imminent risk of danger to human life. In such instances, retroactive authorisation must be sought within a reasonably practicable time period. Mere risk of flight or destruction of evidence shall never be considered as sufficient to justify retroactive authorisation.

User notification: Individuals should be notified of a decision authorising communications surveillance with enough time and information to enable them to appeal the decision, and should have access to the materials presented in support of the application for authorisation. Delay in notification is only justified in the following circumstances:

1.Notification would seriously jeopardize the purpose for which the surveillance is authorised, or there is an imminent risk of danger to human life; or

2.Authorisation to delay notification is granted by the competent judicial authority at the time that authorisation for surveillance is granted; and

3.The individual affected is notified as soon as the risk is lifted or within a reasonably practicable time period, whichever is sooner, and in any event by the time the communications surveillance has been completed. The obligation to give notice rests with the State, but in the event the State fails to give notice, communications service providers shall be free to notify individuals of the communications surveillance, voluntarily or upon request.

Transparency: States should be transparent about the use and scope of communications surveillance techniques and powers. They should publish, at a minimum, aggregate information on the number of requests approved and rejected, a disaggregation of the requests by service provider and by investigation type and purpose. States should provide individuals with sufficient information to enable them to fully comprehend the scope, nature and application of the laws permitting communications surveillance. States should enable service providers to publish the procedures they apply when dealing with State communications surveillance, adhere to those procedures, and publish records of State communications surveillance.

Public oversight: States should establish independent oversight mechanisms to ensure transparency and accountability of communications surveillance. Oversight mechanisms should have the authority to access all potentially relevant information about State actions, including, where appropriate, access to secret or classified information; to assess whether the State is making legitimate use of its lawful capabilities; to evaluate whether the State has been transparently and accurately publishing information about the use and scope of communications surveillance techniques and powers; and to publish periodic reports and other information relevant to communications surveillance. Independent oversight mechanisms should be established in addition to any oversight already provided through another branch of government.

Integrity of communications and systems: In order to ensure the integrity, security and privacy of communications systems, and in recognition of the fact that compromising security for State purposes almost always compromises security more generally, States should not compel service providers or hardware or software vendors to build surveillance or monitoring capability into their systems, or to collect or retain particular information purely for State surveillance purposes. A priori data retention or collection should never be required of service providers. Individuals have the right to express themselves anonymously; States should therefore refrain from compelling the identification of users as a precondition for service provision.

Safeguards for international cooperation: In response to changes in the flows of information, and in communications technologies and services, States may need to seek assistance from a foreign service provider. Accordingly, the mutual legal assistance treaties (MLATs) and other agreements entered into by States should ensure that, where the laws of more than one state could apply to communications

surveillance, the available standard with the higher level of protection for individuals is applied. Where States seek assistance for law enforcement purposes, the principle of dual criminality should be applied. States may not use mutual legal assistance processes and foreign requests for protected information to circumvent domestic legal restrictions on communications surveillance. Mutual legal assistance processes and other agreements should be clearly documented, publicly available, and subject to guarantees of procedural fairness.

67. The German state data protection authorities and the Federal Commissioner for Data Protection and Freedom of Information ("the DPAs") recently passed a resolution critical of Tempora and PRISM and endorsing principles akin to those above (see summary at "**IB1/4/p.983**"). The DPAs advocated the development and implementation of German, European and international laws to ensure that privacy is fully protected and called for the enforcement of Art 8 ECHR standards in relation to current practices.

The Effects of Surveillance

68. High levels of surveillance can damage trust in technology, reduce social mobility and cohesion, encourage conformity, and have a significantly constraining effect on political debate and protest.

69. The picture of an individual - and of groups of individuals - that can be built up from communications data is immensely detailed. There is little room for individual privacy or freedom of unmonitored association when state investigators can see with whom we communicate, what we read and watch online, and where we travel with mobile phones. Network analysis of communications data (including location data), i.e., the creation of very large datasets linking people through several communication hops, which can involve millions of people, constitutes a serious interference with the right to freedom of association. I commented on the implications of such trends in surveillance for psychological notions of identity in a recent report commissioned by the UK government ("**IB1/4/pp.984-1002**").

70. Immediately before the recent press disclosures, the UN Special Rapporteur on Freedom of Expression, Frank La Rue, published a report on surveillance of communications ("**IB1/4/pp.1003-1025**"), stating:

"23. In order for individuals to exercise their right to privacy in communications, they must be able to ensure that these remain private, secure and, if they choose, anonymous. Privacy of communications infers that individuals are able to exchange information and ideas in a space that is beyond the reach of other members of society, the private sector, and ultimately the State itself. Security of communications means that individuals should be able to verify that their communications are

received only by their intended recipients, without interference or alteration, and that the communications they receive are equally free from intrusion. Anonymity of communications is one of the most important advances enabled by the Internet, and allows individuals to express themselves freely without fear of retribution or condemnation...

...33. Modern surveillance technologies and arrangements that enable States to intrude into an individual's private life threaten to blur the divide between the private and the public spheres. They facilitate invasive and arbitrary monitoring of individuals, who may not be able to even know they have been subjected to such surveillance, let alone challenge it. Technological advancements mean that the State's effectiveness in conducting surveillance is no longer limited by scale or duration. Declining costs of technology and data storage have eradicated financial or practical disincentives to conducting surveillance. As such, the State now has a greater capability to conduct simultaneous, invasive, targeted and broad-scale surveillance than ever before."

71. Surveillance computers do not just surveil: they direct the attention of police and other authorities to "targets" identified by algorithm. At the time of disclosing details about the Tempora programme, the Guardian newspaper quoted an unidentified intelligence source as stating that "*The criteria are security, terror, organised crime. And economic well-being. There's an auditing process to go back through the logs and see if it was justified or not. The vast majority of the data is discarded without being looked at ... we simply don't have the resources.*"[30] If accurate, these are nevertheless relatively broad criteria. Further, as I explain below, the ever-expanding capacity of storage and sifting capabilities will lead to the temptation to expand search parameters to match capacity. The Guardian's Tempora report stated: "*An indication of how broad the dragnet can be was laid bare in advice from GCHQ's lawyers, who said it would be impossible to list the total number of people targeted because "this would be an infinite list which we couldn't manage"*".[31]

72. In areas such as counter-terrorism the aim is to prevent possible crimes by people who may commit them. But attempts to automatically identify very rare incidents or targets from a very large data set are highly likely to result in unacceptably large numbers of "false positives" (identifying innocent people as suspects) or "false negatives" (not identifying real criminals or terrorists). This is referred to scientifically as the "base-rate fallacy"; colloquially, as: "*if you are looking for a needle in a haystack, it doesn't help to throw more hay on the stack*". The fact that a supposedly sophisticated computer-generated algorithm replaces a coarse stereotype does little to prevent this. By being incomprehensible even to those that rely on it, and effectively unchallengeable by those that are targeted, such "data mining" can aggravate the risk of discrimination. A 2008 US

[30] Supra, note 1
[31] Supra, note 1

National Research Council report concluded: *"there is not a consensus within the relevant scientific community nor on the committee regarding whether any behavioral surveillance or physiological monitoring techniques are ready for use at all in the counterterrorist context given the present state of the science"* ("**IB1/4/pp.1026-1055**").[32]

73. Computer processing power is expected to continue develop following Moore's Law, doubling every 18-24 months – at least thirty-fold in the next decade, although by that point the fundamental limits of silicon engineering will be approaching. Computer storage capacity and communications bandwidth will likely continue increasing at least as quickly. These exponential increases will significantly enhance the capability of organisations to collect, store and process personal data, and further reduce the technical limits on intelligence and law enforcement agencies monitoring all aspects of day-to-day life that leave any digital trace.

Failures of oversight

74. In the light of the Guardian's revelations, the performance of the UK oversight bodies and officials has clearly been deficient. It is difficult for members of the public to have confidence that their privacy is being adequately protected by a system that operates with such little transparency. A global surveillance system of breathtaking scope has been built with no public debate, authorised under sweeping secret warrants from the Secretary of State, with opportunities only for classified discussion and scrutiny in-camera by the Intelligence and Security Committee, The system of internal GCHQ rules for human rights compliance is similarly designed and operated in secret, with nowhere near the level of detail of scrutiny published by the Interception of Communications Commissioner to command public confidence.

75. As regards oversight, it is notable that the Guardian reported, again citing original documentation, that the NSA was *"given guidelines for [Tempora's] use, but were told in legal briefings by GCHQ lawyers: "We have a light oversight regime compared with the US"*[33] and that *"when it came to judging the necessity and proportionality of what they were allowed to look for, would-be American users were told it was "your call"*". GCHQ legal advisers reportedly advised the NSA that *"The parliamentary intelligence and security committee, which scrutinises the work of the agencies, was sympathetic to the agencies' difficulties" and that "Complaints against the agencies, undertaken by the interception commissioner, are conducted under "the veil of' secrecy". And the*

[32] http://www.nap.edu/openbook.php?record_id=12452
[33] Supra, note 1

investigatory powers tribunal, which assesses complaints against the agencies, has "so far always found in our favour"".

76. Much greater transparency is needed for these surveillance activities, with publication of details of all programmes (with minimum withholding of information for the protection of sources and methods), allowing the media, civil society and individuals to understand and if necessary criticise government activity. For large-scale surveillance system authorisation, a parliamentary decision-making role – as seen in other countries, particularly Germany – would be appropriate.

77. A broader membership of oversight panels could be one way to improve their ability to challenge disproportionate surveillance – in particular including individuals with the technical expertise required to understand complex surveillance systems, which we know from now-declassified orders has been a severe challenge for the US's Foreign Intelligence Surveillance Court. Requirements for individuals (although not parliamentarians) to undergo highly intrusive security vetting before participating in oversight activities will reduce the diversity of those willing to do so.

STATEMENT OF TRUTH

I believe that the facts stated in this Witness Statement are true.

SIGNED: Ian Brown .....

Ian Brown

DATE: 27/9/13 .....

Application No: 58170/13

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

(1) BIG BROTHER WATCH;
(2) OPEN RIGHTS GROUP;
(3) ENGLISH PEN; AND
(4) DR CONSTANZE KURZ

Applicants

- v -

UNITED KINGDOM

Respondent

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① https://www.privacynotprism.org.uk/assets/files/privacynotprism/496577_app_No_58170-13_BBW_OIG_EP_CK_v_UK_Grounds.pdf

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JOINT APPLICATION UNDER ARTICLE 34

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CONTENTS

I. SUMMARY

1. The secret interception of communications by the State goes to the heart of the freedoms protected by Article 8 of the Convention (hereafter the "ECHR"). Provided its use is adequately circumscribed by published legal standards and proportionately used, such interception can be justified to protect the rights and freedoms of others. However, the necessarily secret nature of interception, coupled with the range and sensitivity of some internet communication creates serious risks of arbitrary state intrusion in many aspects of private life and correspondence, which necessarily include highly intimate aspects of the private sphere. Recent technical

developments mean that the State's capacity to capture, store and use private communications is greater than ever before.

2. In *Kennedy v United Kingdom* (2011) 52 EHRR 4 at [93], this Court recognised that the evident risk of arbitrariness in a secret power to intercept communications rendered it "essential" to have clear, detailed rules on interception, especially as the technology available for doing so is becoming continually more sophisticated. It observed at [94] that it would be contrary to the rule of law for the legal discretion granted for interception to be expressed in terms of an unfettered power. It also observed (at [160]) that "*indiscriminate capturing of vast amounts of communications is not permitted under the internal communications provisions of the Regulation of Investigatory Powers Act 2000*" ("**RIPA**"). The Court has also held that Article 8 jurisprudence must adapt to technological developments in *Weber v Germany* (2008) 46 EHRR SE5 at [93], and observed that in the context of rapidly developing telecommunications technology, legislative frameworks governing the safeguarding of private information and electronic correspondence must be *"particularly precise"* (*Uzun v Germany* (2012) 54 EHRR 121 at [61]).

3. This Application is made because recent reporting in the news media around the world indicates that technologies have now been developed, and have for some time been in use, which *do* permit the indiscriminate capture of vast quantities of communication data, which can then be passed between States, and which is not subject to any sufficiently precise or ascertainable legal framework and is beyond effective legal scrutiny.

4. The two programmes which are challenged by this Application are:

   4.1. The soliciting or receipt and use by the UK intelligence services ("**UKIS**"), of data obtained from foreign intelligence partners, in particular the US National Security Agency's "PRISM" and "UPSTREAM" programmes (hereafter "**receipt of foreign intercept data**"); and

4.2. The acquisition of worldwide and domestic communications by the Government Communications Head Quarters ("**GCHQ**") for use by UK Intelligence Services ("**UKIS**") and other UK and foreign agencies through the interception, under global and rolling warrants, of electronic data transmitted on transatlantic fibre-optic cables (the "**TEMPORA**" programme), (hereafter "**generic GCHQ intercept**"). As to generic GCHQ intercept based on tapping transatlantic cables, this is a form of *"external"* communication interception (although it can and does include persons in the UK) so that the general prohibition in RIPA on indiscriminate capture (at issue in *Kennedy*) does not apply.

5. There is now considerable information in the public domain about the operation of PRISM/UPSTREAM and TEMPORA. What is known about their operation is explained in the expert witness statements of Cindy Cohn, Legal Director of the Electronic Frontier Foundation, and Dr Ian Brown, Senior Research Fellow at the Oxford Internet Institute at the University of Oxford. This information has given rise to widespread concerns that have been voiced in a number of European States as well as in the US **[Annex 2/IB1/682-685; 983]**.

6. In summary, the Applicants contend that, in violation of Article 8 of the ECHR

6.1. In relation to receipt of foreign intercept material – i.e. the receipt, use, retention and dissemination of information received by UKIS from foreign intelligence partners which have themselves obtained it by communications intercept – the legal framework is inadequate to comply with the *"in accordance with the law"* requirement under Article 8(2).

6.2. In relation to GCHQ's own generic interception capability, the provisions contained in RIPA relating to external communications warrants allow UKIS to obtain general warrants permitting indiscriminate capturing of vast amounts of communication,

effectively on an indefinite basis. The legal provisions which permit generic warrants in relation to such external communications are insufficiently protective to provide an ascertainable check against arbitrary use of secret and intrusive state power.

6.3. Such legal provisions do not enable persons to foresee the general circumstances in which external communications may be the subject of surveillance (other than that any use may be made of communications if considered in the interests of national security – a concept of very broad scope in UK law); they do not require authorisations to be granted in relation to specific categories of persons or premises; they permit indiscriminate capture of communications data by reference only to its means of transmission; and they impose no significant restrictions on the access that foreign intelligence partners may have to such intercepted material. In short, there are no defined limits on the scope of discretion conferred on the competent authorities or the manner of its exercise. Moreover, there is no adequate degree of independent or democratic oversight. Indiscriminate and generic interception and the legal provisions under which it is carried out thereby breach the requirements that interferences with Article 8 must be *"in accordance with the law"* and must be proportionate.

7. This Court, and the former Commission, have found violations of Article 8 ECHR in the past in the context of surveillance and intelligence service activity by UK authorities, on the basis that UK law has not been sufficiently transparent, clear and precise. These judgments have driven reform in the UK: e.g. *Malone v UK* (1985) 7 EHRR 14; *Hewitt & Harman v UK* (1992) 14 EHRR 657; *Halford v UK* (1997) 24 EHRR 523; *Khan v UK* (2001) 31 EHRR 45; and *Liberty v UK* (2009) 48 EHRR 1.

8. In *Liberty*, this Court considered the *previous* law in the UK governing interception of *"external communications"* under the *Interception of Communications Act 1985*, and found the law to be insufficiently protective.

The Court has not yet had the opportunity to consider the current legislative regime under RIPA in the context of external communications. (As noted, *Kennedy* related to the interception of *"internal"* communications).

9. For the detailed reasons set out below, it is submitted that the Application should be declared admissible and the Court should find that violations of Article 8 are established in the circumstances set out in the Application.

II. STATEMENT OF FACTS

A. The Applicants

10. **Big Brother Watch** ("**BBW**") is a company limited by guarantee. It is a campaign group that was founded in 2009 to conduct research into, and challenge policies which threaten privacy, freedoms and civil liberties, and to expose the scale of surveillance by the state. It campaigns for more control over personal data, and better accountability mechanisms to hold to account those who fail to respect individual privacy, whether private companies or public authorities.

11. BBW is based in London. Its staff regularly liaise and work in partnership with similar organisations in other countries. They often communicate with persons and bodies around the world by email and Skype. As a vocal critic of excessive surveillance, and a commentator on sensitive topics relating to national security, BBW believes that its staff and directors may have been the subject of surveillance by or on behalf of the UK government. Moreover, it has contact with internet freedom campaigners and those who wish to complain to regulators around the world, so it is conscious that some of those with whom it is in contact may also fall under surveillance.

12. **English PEN** is a registered charity. It is the founding centre of a worldwide writers' association and has 145 centres in over 100 countries. It promotes freedom to write and read, and campaigns around the world on freedom of expression, and equal access to the media.

13. English PEN is based in London, and works in partnership with sister organisations around the world. It also works closely with individual writers at risk and in prison. Most of its internal and external communications are by email and by Skype and they are pan-global. Since many of those for and whom with English PEN campaigns express views on governments which may be controversial, English PEN believes that it, and those with whom it communicates, may be the subject of UK government surveillance, or may be the subject of surveillance by other countries' security services which may pass such information to the UK security services (and vice-versa). They work closely with writers and dissidents in many countries including, amongst others, Syria, Belarus, Turkey, Vietnam and Cameroon, and are gravely concerned that these persons' right to freedom of expression and security may be put at risk by surveillance.

14. **Open Rights Group** ("**ORG**") is a company limited by guarantee. It was founded in 2005 and is one of the UK's leading campaign organisations defending freedom of expression, innovation, creativity and consumer rights on the internet. It is based in London and regularly liaises and works in partnership with other organisations in other countries. It is a member organisation of European Digital Rights (EDRi), a network of 35 privacy and civil rights organisations founded in June 2002, with offices in 21 different countries in Europe. Most of its internal and external communications are by email and Skype. For similar reasons to those expressed by BBW and English PEN, it believes that its electronic communications and activities may be subject to foreign intercept conveyed to UK authorities, or intercept activity by UK authorities.

15. **Dr Constanze Kurz** is based in Berlin. She holds a doctoral degree in computer science and works at the University of Applied Sciences in Berlin. She is an expert on surveillance techniques and has co-authored technical analyses for the German Constitutional Court in controversial cases concerning data retention, anti-terrorism databases and computerised

voting. From 2010 to 2013, she was a member of the "*Internet and Digital Society*" Commission of Inquiry of the German Bundestag.

16. Dr Kurz is also spokeswoman of the German "Computer Chaos Club" (CCC) which campaigns to highlight weaknesses in computer networks which risk endangering the interests of the public. It undertakes direct action. For example, it drew public attention to the security flaws of the German *Bildchirmtext* computer network by hacking into it and causing it to debit DM 134,000 in a Hamburg bank in favour of the club. The money was returned the next day in front of the press. On another occasion, on 8 October 2011, the CCC published an analysis of the Staatstrojaner sofware, which was a 'trojan' computer surveillance programme used by the German police. Former Wikileaks spokesman Daniel Domscheit-Berg was a member of CCC for a number of years, though he was expelled in 2011.

17. Dr Kurz has been outspoken in relation to the recent disclosures regarding UK internet surveillance activities, which continue to be a subject of significant concern in the German media. She fears that she may well have been the subject of surveillance either directly by GCHQ or by US or other foreign security services who may have passed that data to the UK security services, not only because of her activities as a freedom of expression campaigner and hacking activist, but also because GCHQ and others may wish to learn from her and persons with whom she communicates, habitually in encrypted communications.

B. Circumstances of the Case

i. Background to Complaint Concerning Receipt of Foreign Intercept Data: Media Disclosures Concerning Receipt of PRISM and UPSTREAM Data by the United Kingdom Government

18. The UKIS is able to receive intelligence obtained by intercept from security services in other States. The Applicants' concern in relation to this has been triggered by recent media coverage of the existence of an extraordinarily

wide surveillance capability on the part of the US National Security Agency ("**NSA**") and the apparent sharing of the product of US intercept with the UK security services.

19. This coverage was generated by a leak of NSA documentation by Edward Snowden, a former NSA systems administrator. The existence of the programmes referred to in those slides has been confirmed by President Obama and by James Clapper, the US Director of National Intelligence.[1]

PRISM

20. PRISM is an intelligence-gathering operation run by the NSA which enables it to access a wide range of internet communication content (such as emails, chat, video, images, documents, links and other files) and metadata from US corporations including some of the largest internet service providers such as Microsoft, Google, Yahoo, Apple, Facebook, Youtube and Skype.

21. Metadata consists of "*structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource*".[2] In the context of private communications this includes, but is not limited to, information which allows a person or location to be identified as well as the time, length and date of the communication to be determined. By piecing different items of such information together, it is possible to build-up a detailed picture of a person's life (as noted by Dr Ian Brown at §§9-14 of his witness statement **[Annex 2/511-513]**).

22. The scale of the PRISM operation is potentially vast, because global internet data takes the cheapest, not the most physically direct path. Thus a substantial volume of *worldwide* data passes through the servers of United States communications providers, even if neither party to a communication is located in the United States. This is illustrated by the following model in the NSA Slides:

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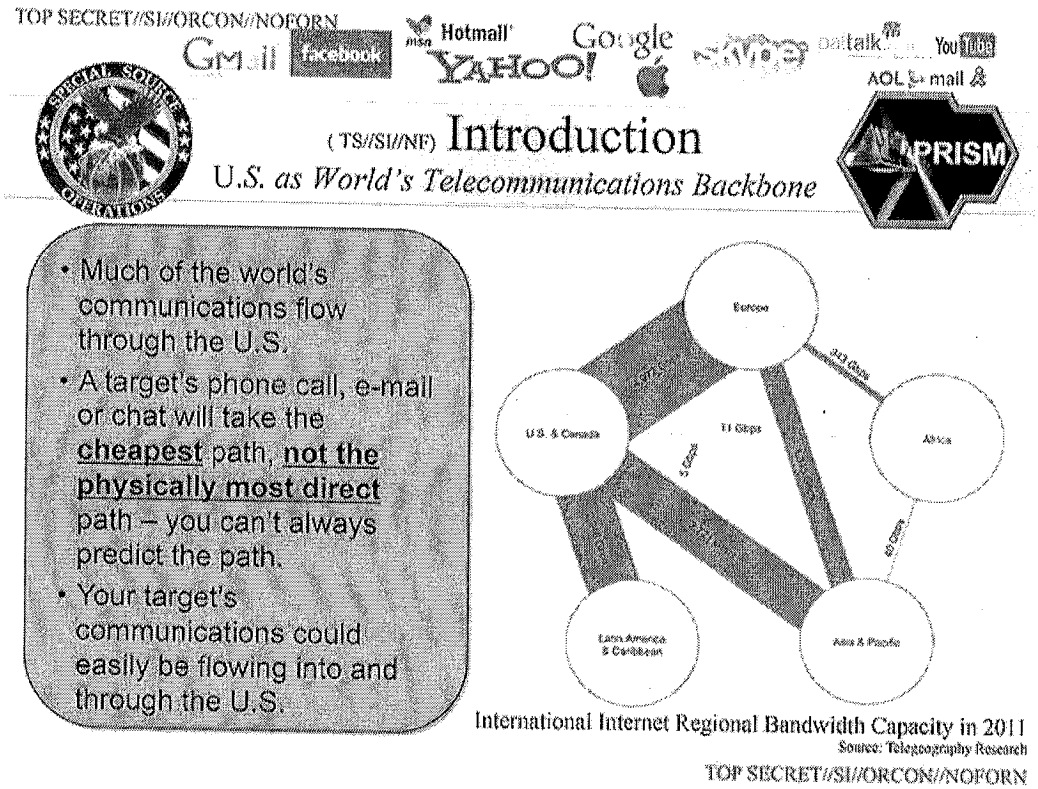
[1] "*Transcript: Obama's Remarks on NSA Controversy*", 7 June 2013 **[Annex 1/CC1/202-207]**; and "*DNI Statement on Activities Authorized Under Section 702 of FISA*" 6 June 2013 **[Annex 1/CC1/121D]**

[2] See "*Understanding Metadata*" (2004), the United States National Information Standards Organization, at p.1. **[Annex 3/1084-1103]**



Newspaper reports indicate that over 2,000 PRISM-based "*reports*" of communications are issued every month by the NSA and more than 77,000 intelligence reports had been made based on that data by June 2013 **[Annex 1/CC1/134-140]**[3]. It is also reportedly of great value to the NSA as the slides acknowledge that PRISM is the resource "used most" in NSA reporting **[Annex 1/CC1/134]**.

23. The US government has confirmed the existence of the programme, and states that such interception has a basis in United States law: section 702 of the *Foreign Intelligence Surveillance Act 1978* (**"FISA"**) (US Code §1881(a)) **[Annex 1/CC1/304-314]**. That provision permits the making of renewable one year authorisations for generalised foreign surveillance without a warrant, in circumstances where the intended target is not believed to be "a US person" – i.e. a person in the United States. Ms Cindy Cohn, Legal Director of the Electronic Frontier Foundation, has given a witness statement in support of this application **[Annex 1]** in which she explains the

[3] "*NSA Prism program taps in to user data of Apple, Google and others*", Glenn Greenwald and Ewen MacAskill, *The Guardian*, 7 June 2013 **[Annex 1/CC1/134-140]**

limitations of the legal protections of privacy in that statute. In summary, these apply solely to persons in the US or *"US Persons"* (citizens and certain residents), and are aimed at ensuring that such persons are not intentionally or inadvertently targeted by the programme. However, FISA does not limit the extent of permitted state surveillance of non-US persons at all – any surveillance of such persons which has been authorised (on a generic basis) is permitted. Thus, any surveillance of communications between two persons both located outside the United States, whose communication happens to be routed through the United States, is permitted absolutely. Moreover, communication where one party is located inside the United States and is thus a US-person is also permitted, without any requirement to show *"probable cause"* in respect of such an individual, provided the accessing of data falls within a broadly-framed section 702 *"authorisation"* for data collection.

UPSTREAM

24. The NSA also operates a second interception programme under section 702 of FISA called "UPSTREAM". This provides access to nearly all the traffic passing through fibre optic cables owned by US communications services providers such AT&T and Verizon.

25. As Ms Cohn states [**Annex 1/70**], between them, PRISM and UPSTREAM provide very broad access to the communications content and metadata of non-US Persons, to which the provisions of the Fourth Amendment (the US Constitution privacy guarantee) do not apply.[4] These two programmes provide for the bulk seizure, acquisition, collection and storage of all or nearly all of the considerable quantity of global communications content and metadata of non-US persons that passes through the US. They also provide for the searching of that content and metadata with little or no restriction once the material is determined not to be related to a US person, and in the case of many exceptional categories, even if it does.

[4] Under the FISA law, 50 U.S.C. §1801 (i) "United States person" means "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101 (a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section."

Receipt of PRISM and UPSTREAM intercept by the UKIS

26. The Edward Snowden documents made public by *The Guardian* newspaper show that GCHQ has had access to PRISM material since at least June 2010. It has also reported that GCHQ generated at least 197 intelligence reports from that material in 2012 alone. The NSA documents made public by *The Guardian* state for instance that, *"special programmes for GCHQ exist for focused Prism processing"*[5] **[Annex 2/IB1/605B]**.

27. It is unclear whether GCHQ's access to this material is limited to solicited material (i.e. where GCHQ specifically requests information from the NSA) or whether it includes unsolicited information-sharing. It appears that both are possible. There is no publicly available information about what is done with such material once received.

28. The PRISM and UPSTREAM disclosures have exposed the absence of legal controls on GCHQ and the other UKIS in relation to the receipt of data from overseas intelligence partners which have themselves obtained the data by intercepting communications

29. GCHQ has not denied the use of PRISM generated material. It has merely stated that it:

> "takes its obligations under the law very seriously. Our work is carried out in accordance with a strict legal and policy framework which ensures that our activities are authorised, necessary and proportionate, and that there is rigorous oversight, including from the Secretary of State, the interception and intelligence services commissioners and the intelligence and security committee."[6]

30. However, it has not specified the *"legal [...] framework"* which in its view governs receipt of material from NSA interceptions.

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[5] *"UK gathering intelligence via covert NSA operation"*, Nick Hopkins, *The Guardian*, 7 June 2013 **[Annex 2/IB1/605A-605D]**

[6] *"GCHQ tapped fibre-optic cables for data, says newspaper"*, *The Guardian*, 22 June 2013 **[Annex 2/IB1/678A-678C]**

ii. Background to Complaint Concerning Generic GCHQ Intercept: the TEMPORA Programme

31. The disclosures based on Edward Snowden's leaked documentation have also provided details about a UK surveillance programme called TEMPORA. TEMPORA is a means by which GCHQ can access electronic traffic passing along fibre-optic cables running between the UK and North America. The data collected include both internet and telephone communications. GCHQ is able to access not only metadata but also the content of emails, Facebook entries and website histories[7]. Data is accessed without the need for reasonable suspicion in relation to the activities of any particular targeted persons. It is referred to as *"special source exploitation"* and has reportedly been operational for 18 months.

32. In a process known as *"buffering"* GCHQ is said to be authorised by the Secretary of State to store information for 3 days for content and 30 days in the case of data (although the Applicants presume that these periods are extended if the data is considered to have intelligence value)[8].

33. The TEMPORA programme is authorised by certificates issued under section 8(4) of RIPA, granted to GCHQ. This relates to *"external communications"*, being communications that are either sent or received outside the British Isles.

34. GCHQ has confirmed that the programme has 10 *"basic"* certificates including one *"global"* certificate relating to GCHQ's support station at Bude in Cornwall. These certificates are said to be reviewed and apparently have been renewed every 6 months. This creates a *"broad, overall legal authority which has to be renewed at intervals"*[9].

35. However, the certificates upon which this *"broad, overall"* authority are said to be based reportedly authorise the interception of *any* transatlantic cable

[7] *"GCHQ taps fibre-optic cables for secret access to world's communications"*, Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davies and James Ball, *The Guardian*, 21 June 2013 **[Annex 2/IB1/658-663]**
[8] *Ibid*
[9] *"The legal loopholes that allow GCHQ to spy on the world"*, Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davies and James Ball, *The Guardian*, 21 June 2013 **[Annex 2/IB1/664-668]**

data as long as the purpose of the intercept comes within one of a number of very broadly framed criteria such as *"terrorism"*, *"organised crime"* and the *"economic well-being"* of the UK. Media reports suggest that the authorisation certificates do not list the search terms or impose any detailed restrictions on the information that can be intercepted or searched. *The Guardian* has reported that:

> "The categories of material have included fraud, drug trafficking and terrorism, but the criteria at any one time are secret and are not subject to any public debate. GCHQ's compliance with the certificates is audited by the agency itself, but the results of those audits are also secret.
>
> An indication of how broad the dragnet can be was laid bare in advice from GCHQ's lawyers, who said it would be impossible to list the total number of people targeted because *"this would be an infinite list which we couldn't manage."*[10]

36. There is also a suggestion that private companies have been cooperating with GCHQ on the basis of licence conditions which compel them to co-operate, and to refrain from revealing the existence of any such warrant or certificate of authorisation[11].

37. The scale of the TEMPORA programme is unprecedented. As reported by *The Guardian*, in a paper written for NSA analysts entitled *"A Guide to Using Internet Buffers at GCHQ"*, the author noted that TEMPORA *"represents an exciting opportunity to get direct access to enormous amounts of GCHQ's special source data"*[12].

38. In a presentation in 2011, a GCHQ legal adviser told NSA analysts *that a reason for* using TEMPORA material was that, "[the UK] *ha[s] a light oversight regime compared with the US.*"[13] Indeed, *The Guardian* reported on internal GCHQ documents from 2011 which recorded one of the UK's *"unique selling points" as* being *"the UK's legal regime"*, given that GCHQ is *"less constrained by NSA's concerns about compliance"*[14].

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[10] See n.7 above.
[11] *"BT and Vodafone among telecoms companies passing details to GCHQ"*, James Ball, Luke Harding and Juliette Garside, *The Guardian*, 2 August 2013 **[Annex 2/IB1/719-722]**. These requirements were presumably imposed under RIPA ss.11-12 and *Interception of Communications*, Code of Practice (2007), paragraphs 2.7-2.10
[12] See n.7 above.
[13] See n.7 above.
[14] *"GCHQ: Inside the Top Secret World of Britain's Biggest Spy Agency"*, Nick Hopkins, Julian Borger and Luke Harding, *The Guardian*, 1 August 2013 **[Annex 2/IB1/723-736]**

39. US agencies have been given extensive access to TEMPORA information. Reportedly, at least 250 and as many as 850,000 US Government employees and private companies working in partnership with the US Government have access to this information[15]. One US training slide revealed by *The Guardian* newspaper stated: "*... You are in an enviable position – have fun and make the most of it.*"[16]

40. The NSA is also reported to have had 250 analysts working full-time on TEMPORA-derived data as of May 2012[17]. No information has been made available as to whether there are appropriate safeguards for this international data-sharing. As explained below, none are included in the relevant legislative provisions. Further disclosures have revealed that the NSA has paid up to £100 million over three years to GCHQ to secure access to its programmes. Accordingly "*GCHQ must pull its weight and be seen to pull its weight*" (as noted in a GCHQ strategy briefing)[18]. In *The Guardian* newspaper for 21 June 2013 it was reported that GCHQ had set over 40,000 search terms for trawling TEMPORA-obtained data, and the NSA had itself set over 31,000 search terms relating to matters and persons of interest to the US Government[19].

iii. Public Statements by the UK Government

41. Following some of the disclosures referred to above, the Secretary of State for Foreign and Commonwealth Affairs (the Rt. Hon. William Hague MP) gave a statement to Parliament on 10 June 2013. (Hansard HC, 10 June 2013, Col. 32-42) **[Annex 2/IB1/826-830]**. In relation to use of PRISM-generated data by GCHQ, Mr Hague stated:

> "It has been suggested that GCHQ uses our partnership with the United States to get around UK law, obtaining information that it cannot legally obtain in the United Kingdom. I wish to be absolutely clear that that

[15] See n.7 & n.14 above.
[16] See n.7 above.
[17] See n.7 above.
[18] "*Exclusive: NSA pays £100m in secret funding for GCHQ*", Nick Hopkins and Julian Borger, *The Guardian*, 1 August 2013 **[Annex 2/IB1/714-718]**
[19] See n.7 above.

accusation is baseless. Any data obtained by us from the United States involving UK nationals are subject to proper UK statutory controls and safeguards, including the relevant sections of the Intelligence Services Act, the Human Rights Act 1998, and the Regulation of Investigatory Powers Act." (emphasis added)

42. By reference to this statement, the Secretary of State was asked, by the Rt. Hon. Douglas Alexander MP, the Shadow Foreign Secretary, to:

> "set out the relevant sections of those Acts, and confirm whether this explanation means that any data obtained by us from the US, involving UK nationals, are authorised by ministerial warrants and overseen by the intercept commissioner, as set out by RIPA?" (Col. 35)

43. The Secretary of State responded:

> "The right hon. Gentleman was right to say that he supports information sharing with our allies. The position on the legal framework is exactly as I set out in my statement: any data obtained by us from the United States about UK nationals are subject to the full range of Acts, including section 3 of the Intelligence Services Act 1994 and the RIPA provisions, set out in sections 15 and 16, which regulate that information gathering must be necessary and proportionate and regulate how the agencies must handle information when they obtain it."

44. Mr Alexander also asked some specific questions:

> "Specifically, what legal framework applies in the following two cases?
>
> First, when a request is made by the UK to an intelligence agency of an international ally for the interception of the content of private communications, will he confirm whether this process is governed by individual warrants signed by the relevant Secretary of State and approved by the intercept commissioner as set out in part I of RIPA?
>
> Secondly, will he address the specific issue of when a request is made by the UK to an intelligence agency of an international ally, not to seek intercept, but instead to search existing data held by that agency on the contents of private communications, and, in particular, the legal process that will be adopted in such an instance? In that circumstance, will he confirm whether this process is also governed by individual warrants signed by the relevant Secretary of State and approved by the intercept commissioner as set out in part I of RIPA?" (Cols. 35 - 36)

45. The Secretary of State refused to provide any information as to the legal regime that applies in relation to these matters. He answered the questions in the following terms:

> "On the right hon. Gentleman's further questions about how authority is given, I cannot give him, for reasons that I cannot explain in public, as detailed an answer as he would like. I would love to give him what could actually be a very helpful answer, but because circumstances and procedures vary according to the situation, I do not want to give a categorical answer – in a small respect circumstances might differ occasionally. But I can say that

ministerial oversight and independent scrutiny is there, and there is scrutiny of the ISC in all these situations, so, again, the idea that operations are carried out without ministerial oversight, somehow getting around UK law, is mistaken. I am afraid that I cannot be more specific than that."

46. The First and Second Applicants wrote a letter to the Secretary of State and other UK Government agencies dated 3 July 2013 **[Annex 3/1056-1079]** setting out the alleged breaches of the Convention referred to herein (see further paragraphs 181-182 below). In a response to that letter dated 26 July 2013 **[Annex 3/1081-1083]**, the Treasury Solicitor on behalf of the UK Government stated that,

> "As regards your complaints relating to the possible receipt of intelligence from the United States intelligence agencies: in addition to the statutory scheme in RIPA, SIS and GCHQ must also comply with the Intelligence Services Act 1994, and must in particular do so when obtaining and disclosing information. The agencies must also act compatibility with the HRA and the Data Protection Act 1998."

iv. Report of the Intelligence and Security Committee, 17 July 2013

47. On 17 July 2013, the Intelligence and Security Committee of Parliament ("**ISC**") published a "*Statement of GCHQ's Alleged Interception of Communications under the US PRISM Programme*" **[Annex 2/IB1/831-833]**. The report confirmed GCHQ access to PRISM material. It stated:

> "1. Over the last month, details of highly classified intelligence-gathering programmes run by the US signals intelligence agency - the National Security Agency (NSA) - have been leaked in both the US and the UK. Stories in the media have focussed on the collection of communications data and of communications content by the NSA. These have included the collection of bulk 'meta-data' from a large communications provider (Verizon), and also access to communications content via a number of large US internet companies (under the PRISM programme)."
>
> ...
>
> 4. Stories in the media have asserted that GCHQ had access to PRISM and thereby to the content of communications in the UK without proper authorisation. It is argued that, in so doing, GCHQ circumvented UK law. This is a matter of very serious concern: if true, it would constitute a serious violation of the rights of UK citizens."

48. The report continued:

> **"Our investigation**
> 5. The ISC has taken detailed evidence from GCHQ. Our investigation has included scrutiny of GCHQ's access to the content of communications, the

legal framework which governs that access, and the arrangements GCHQ has with its overseas counterparts for sharing such information. We have received substantive reports from GCHQ, including:

- a list of counter-terrorist operations for which GCHQ was able to obtain intelligence from the US in any relevant area;
- a list of all the individuals who were subject to monitoring via such arrangements who were either believed to be in the UK or were identified as UK nationals;
- a list of every 'selector' (such as an email address) for these individuals on which the intelligence was requested;
- a list of the warrants and internal authorisations that were in place for each of these individual being targeted;
- a number (as selected by us) of the intelligence reports that were produced as a result of this activity; and
- the formal agreements that regulated access to this material.

We discussed the programme with the NSA and our Congressional counterparts during our recent visit to the United States. We have also taken oral evidence from the Director of GCHQ and questioned him in detail."

49. The ISC concluded, without providing any further information as to the applicable legal regime or safeguards, that there had been no violation of UK law.

"• We have reviewed the reports that GCHQ produced on the basis of intelligence sought from the US, and we are satisfied that they conformed with GCHQ's statutory duties. The legal authority for this is contained in the Intelligence Services Act 1994.

- Further, in each case where GCHQ sought information from the US, a warrant for interception, signed by a Minister, was already in place, in accordance with the legal safeguards contained in the Regulation of Investigatory Powers Act 2000."

50. In a section on "Next Steps" the ISC recorded that:

"6. Although we have concluded that GCHQ has not circumvented or attempted to circumvent UK law, it is proper to consider further whether the current statutory framework[FN] governing access to private communications remains adequate.

7. In some areas the legislation is expressed in general terms and more detailed policies and procedures have, rightly, been put in place around this work by GCHQ in order to ensure compliance with their statutory obligations under the Human Rights Act 1998. We are therefore examining the complex interaction between the Intelligence Services Act, the Human Rights Act and the Regulation of Investigatory Powers Act, and the policies and procedures that underpin them, further. We note that the Interception of Communications Commissioner is also considering this issue."

The footnote reference in the above passaged identified the *Intelligence Services Act 1994* (c.5) ("**ISA**"), RIPA and the HRA.

51. The ISC report thus raised expressly questions about the adequacy of the applicable regime.

52. Moreover, the terms of the ISC report were necessarily limited since the ISC had only looked at intelligence information which GCHQ had specifically requested from the US, in relation to particular individuals who were subject to interception warrants in the UK. It did not look at other information received from the NSA by GCHQ or other UK government agencies. This was not clear from the terms of the ISC report, but was confirmed by the ISC's Chairman, Sir Malcolm Rifkind MP, in a subsequent press briefing[20].

C. Relevant Domestic Law and Practice

53. The relevant legislative provisions are provided in full in Annex 4 to this application.

i. The Intelligence Services Act 1994 and Security Service Act 1989

54. The UKIS are comprised of three agencies: the Secret Intelligence Service ("**SIS**"), Government Communications Headquarters ("**GCHQ**") and the Security Service.

55. Section 1 of the *Intelligence Services Act 1994* ("**ISA**") (see Annex 4) provides a statutory basis for the operation of the SIS and inter alia provides a statutory basis for the receipt of information from foreign agencies:

> "**1. The Secret Intelligence Service.**
> (1) There shall continue to be a Secret Intelligence Service (in this Act referred to as "the Intelligence Service") under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be –
> (a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and
> (b) to perform other tasks relating to the actions or intentions of such persons.

[20] "*Inquiry into snooping laws as committee clears GCHQ*", Julian Borger, *The Guardian*, Thursday 18 July 2013 **[Annex 2/IB1/834-836]**

(2) The functions of the Intelligence Service shall be exercisable only –

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom; or

(c) in support of the prevention or detection of serious crime."

56. Section 2 of ISA provides for the control of SIS operations by a Chief of the service appointed by the Secretary of State. He is responsible for the efficiency of the service and section 2(2) provides that:

"... it shall be his duty to ensure -

(a) that there are arrangements for securing that no information is obtained by the Intelligence Service except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary -

(i) for that purpose;

(ii) in the interests of national security;

(iii) for the purposes of the prevention or detection of serious crime; or

(iv) for the purpose of any criminal proceedings ..."

Subsection 2(4) requires the Chief of the Intelligence Service to make an annual report on the work of UKIS to the Prime Minister and Secretary of State, but these reports are not published.

57. Section 3 of ISA sets out the authority for the operation of GCHQ:

"**3. The Government Communications Headquarters.**

(1) There shall continue to be a Government Communications Headquarters under the authority of the Secretary of State; and, subject to subsection below, its functions shall be –

(a) to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material; and

(b) to provide advice and assistance about –

(i) languages, including terminology used for technical matters, and

(ii) cryptography and other matters relating to the protection of information and other material,

to the armed forces of the Crown, to Her Majesty's Government in the United Kingdom or to a Northern Ireland Department or to any other organisation which is determined for the purposes of this section in such manner as may be specified by the Prime Minister.'

(2) The functions referred to in subsection (1)(a) above shall be exercisable only –

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or

(c) in support of the prevention or detection of serious crime.

(3) In this Act the expression "GCHQ" refers to the Government Communications Headquarters and to any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions."

58. Section 4(2) ISA requires the Director of GCHQ

"... to ensure -

(a) that there are arrangements for securing that no information is obtained by GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose or for the purpose of any criminal proceedings ..."

59. Section 1 of the *Security Service Act 1989* (see Annex 4) provides statutory foundation for the Security Service and *inter alia* provides a power for the receipt of information from foreign intelligence agencies:

"**1.– The Security Service.**

(1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.

(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

(4) It shall also be the function of the Service to act in support of the activities of police forces, the Serious Organised Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.

(5) Section 81(5) of the Regulation of Investigatory Powers Act 2000 (meaning of "prevention" and "detection"), so far as it relates to serious crime, shall apply for the purposes of this Act as it applies for the purposes of the provisions of that Act not contained in Chapter I of Part I."

60. Section 2 is a similar provision to s.2 ISA, in that it provides for a Director-General, charged with a:

> "**2.– The Director-General.**
> [...]
> (2) [...] duty to ensure –
> (a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings; and [...]"

Similarly, subsection 2(4) requires the Director-General to make an annual report on the work of Security Service to the Prime Minister and Secretary of State.

ii. The Regulation of Investigatory Powers Act 2000

61. The domestic law regulating the interception and reception of communications is principally set out in RIPA (see Annex 4). The *"main purpose"* of RIPA, as stated in the accompanying Explanatory Notes to that Act, is to *"ensure that the relevant investigatory powers are used in accordance with human rights"*. A summary of the statute's key provisions is set out at paragraphs 43-49 of the *Liberty* case.

62. Part I of RIPA regulates *"communications"*. Chapter I of Part I RIPA regulates the interception of communications. Chapter II of Part I regulates the obtaining of *"communications data"* from telecommunications providers.

Part I, Chapter I RIPA:

63. The scope *rationae materiae* of Chapter I is set out in three provisions. Section 1(1) RIPA provides:

> "It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of ... (b) a public telecommunications system."

64. Section 2(2) defines "*interception*" in the following terms:

> "a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, he -
>
> (a) so modifies or interferes with the system, or its operation,
>
> (b) so monitors transmissions made by means of the system, or
>
> (c) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,
>
> as to make some or all of the contents of the communication available, while being transited, to a person other than the sender or intended recipient of the communication".

65. Section 2(4) sets out the geographical reach of Chapter I:

> "For the purposes of this Act the interception of a communication takes place in the United Kingdom if, and only if, the modification, interference or monitoring ... is effected by conduct within the United Kingdom."

66. Section 1(5) defines "*lawful authority*" as follows:

> "(5) Conduct has lawful authority for the purposes of this section if, and only if-
>
> (a) it is authorised by or under section 3 or 4;
>
> (b) it takes place in accordance with a warrant under section 5 ("an interception warrant"); or
>
> (c) it is in exercise, in relation to any stored communication, of any statutory power that is exercised (apart from this section) for the purpose of obtaining information or of taking possession of any document or other property."

67. Thus, interception of communications is not unlawful if it is authorised by a warrant issued by the Secretary of State under section 5.

68. Section 8 sets out the requirements of the content of warrants:

> "**8.— Contents of warrants.**
>
> (1) An interception warrant must name or describe either-
>
> (a) one person as the interception subject; or
>
> (b) a single set of premises as the premises in relation to which the interception to which the warrant relates is to take place.
>
> (2) The provisions of an interception warrant describing communications the interception of which is authorised or required by the warrant must comprise one or more schedules setting out the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying the communications that may be or are to be intercepted.

(3) Any factor or combination of factors set out in accordance with subsection (2) must be one that identifies communications which are likely to be or to include–

(a) communications from, or intended for, the person named or described in the warrant in accordance with subsection (1); or

(b) communications originating on, or intended for transmission to, the premises so named or described.

(4) Subsections (1) and (2) shall not apply to an interception warrant if–

(a) the description of communications to which the warrant relates confines the conduct authorised or required by the warrant to conduct falling within subsection (5); and

(b) at the time of the issue of the warrant, a certificate applicable to the warrant has been issued by the Secretary of State certifying–

(i) the descriptions of intercepted material the examination of which he considers necessary; and

(ii) that he considers the examination of material of those descriptions necessary as mentioned in section 5(3)(a), (b) or (c).

(5) Conduct falls within this subsection if it consists in–

(a) the **interception of external communications** in the course of their transmission by means of a telecommunication system; and

(b) any conduct authorised in relation to any such interception by section 5(6).

(6) A certificate for the purposes of subsection (4) shall not be issued except under the hand of the Secretary of State."

(emphasis added)

69. The combined effect of sections 8(4) and 8(5)(a) RIPA is that the limitations and safeguards on the ambit of an interception warrant for interception of *internal* communications, which satisfied this Court in Kennedy, do not apply in relation to a warrant for interception of *external* communications which may be generic by reference to a described class of intercept material. This is explained further by Ian Brown at §§52-55 of his Witness Statement **[Annex 2/530-32]**.

70. Moreover, such a generic warrant has a long shelf-life. By virtue of s.9(1)(a) and 9(6)(ab) RIPA, a standard warrant endorsed under the hand of the Secretary of State with a statement *"that the issue of the warrant is believed to*

be necessary on grounds falling within section 5(3)(a) or (c)", lasts for a period of six months. Without such a statement, it lasts 3 months (s.9(6)(c)). This can be renewed for further periods of six months (s.9(1)(b)) so long as the Secretary of State certifies that the warrant remains necessary.

71. Section 15 RIPA imposes a requirement on the Secretary of State to put in place arrangements for securing the *"general safeguards"* set out in that section regarding the use of intercepted material, in particular restrictions on the extent of disclosure of that material.

72. Section 16(1) and (2) RIPA provide that an interception warrant in respect of *"external communications"* may only be *"referable to an individual"* in the UK or *"have as its purpose, or one of its purposes, the identification of material contained in communications sent by him, or intended by him"* if the Secretary of State certifies that this is necessary.

73. Section 17 restricts the disclosure of the existence or content of warrants granted under Chapter I. Section 18(1)(c) disapplies this restriction in relation to proceedings in the Investigatory Powers Tribunal (set out below).

Chapter II RIPA:

74. Chapter II of RIPA concerns the *"acquisition and disclosure of communications data"*. The scope *rationae materiae* of Chapter II is set out in section 21. Section 21(1) RIPA provides:

> "This Chapter applies to (a) any conduct in relation to a [...] telecommunications system for obtaining communications data, other than conduct consisting in the interception of communications in the course of their transmission by means of such a service or system, and (b) the disclosure to any person of communications data."

75. Chapter II of RIPA only applies to conduct in relation to a telecommunications system for obtaining (i) metadata (under section 21(4)(a) or (b)) or (ii) other data, including content data, which is held by a person providing a *"telecommunications service"* (under section 21(4)(c)). It does not apply to content data which is provided by any other type of

person, such as a foreign intelligence agency. Content data and metadata are explained in the Witness Statement of Ian Brown at §§8-14, 31 **[Annex 2/510-513, 521-522]**

Scrutiny of Investigatory Powers:

76. Part IV of RIPA provides for "scrutiny" of investigatory powers.

77. RIPA provides for the appointment of two Commissioners to supervise the activities of the intelligence services:

    77.1. Section 57 RIPA provides for the appointment of an "*Interception of Communications Commissioner*". The Commissioner is charged with supervising the exercise of functions under - *inter alia* - Chapters I and II of the Act, and notifying the Prime Minister by a report if he notes any contraventions of the Act (s.58). The Prime Minister must place such reports before the Houses of Parliament (s.58(6)) although he may redact information which he considers sensitive (s.58(7)).

    77.2. Section 59 RIPA provides for the appointment of an "*Intelligence Services Commissioner*", who is charged with supervising the exercise of functions of the intelligence services under ISA. The Commissioner must also provide reports to the Prime Minister (s.60). The Prime Minister must place such reports before the Houses of Parliament (s.60(4)), which may also be redacted (s.60(5)).

78. The Intelligence Services Commissioner has also accepted an extra-statutory role in monitoring compliance with the "*Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the passing and Receipt of Intelligence Relating to Detainees*". ("**Consolidated Guidance**"). The Consolidated Guidance was published by the UK Government in July 2010.

79. In his 2011 Annual Report, (13 July 2012 (HC 497) p.28 **[Annex 3/1104-1154]**, the Commissioner stated that by agreement his extra-statutory role had been limited to occasions where UKIS or the Armed Forces had,

> "- been involved in the interviewing of a detainee held overseas by a third party (this may include feeding in questions or requesting the detention of an individual).
> - had received information form a liaison service (solicited or not) where there is reason to believe it originated from a detainee.
> - Had passed information in relation to a detainee to a liaison service."

80. As stated at p.11 of the 2011 Annual Report, the Intelligence Service Commissioner's extra-statutory remit can be extended by direction from the Prime Minister. However, it presently does not so extend and therefore does not apply to the receipt or use of intelligence from foreign intelligence partners.

81. Section 65 provides for a Tribunal, the Investigatory Powers Tribunal ("**IPT**"), which is given jurisdiction for determining claims related to the conduct of the intelligence services, including proceedings under the *Human Rights Act 1998* ("**HRA**") (s.65(2)). In *R(A) v B* [2009] UKSC 12; [2010] 2 AC 1, the Supreme Court of the United Kingdom held that the IPT has exclusive and final jurisdiction for such proceedings (p.36 at [38] per Lord Brown of Eaton-under-Heywood JSC).

82. Section 68(1) provides that the IPT shall have power to determine its own procedure. Section 68(4) provides that,

> "Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either –
> (a) a statement that they have made a determination in his favour; or
> (b) a statement that no determination has been made in his fabour."

83. Section 69(1) provides for the Secretary of State to make rules governing the exercise of the IPT's jurisdiction. The rules (the *Investigatory Powers Tribunal Rules S.I. 2000/2665*) provide for a statement of reasons to be provided to a

complainant only where a complaint is upheld and this is subject to the obligation not to disclose any information that is contrary to the public interest to disclose:

> **"Disclosure of Information**
> **6.—(1)** The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.
> [...]
>
> **Notification to the complainant**
> 13.—(1) In addition to any statement under section 68(4) of the Act, the Tribunal shall provide information to the complainant in accordance with this rule.
> (2) Where they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact.
>
> (3) Where they make a determination:
> (a) that the bringing of the section 7 proceedings or the making of the complaint is frivolous or vexatious;
> (b) that the section 7 proceedings have been brought, or the complaint made, out of time and that the time limit should not be extended; or
> (c) that the complainant does not have the right to bring the section 7 proceedings or make the complaint;
> the Tribunal shall notify the complainant of that fact.
>
> (4) The duty to provide information under this rule is in all cases subject to the general duty imposed on the Tribunal by rule 6(1)."

84. The IPT rarely upholds complaints. The official figures are as follows:

Year	Complaints	Complaints Upheld
2012	168	0
2011	180	0
2010	164	6 (5 were joint complainants)
2009	157	1
2008	136	2
2007	66	0
2006	86	0
2005	80	2 (joint complainants)
2004	90	0
2003	110	0
2002	137	0
2001	95	0
TOTAL	**1469**	**11 (7 complainants were joint complainants in 2 cases)**

Sources: Hansard HC Debates, 23 April 2009: Column 858W;
Hansard HC Debates, 11 January 2010: Column 701W;
Annual Reports of the Investigatory Powers Tribunal (2010-2012);

Codes of Practice:

85. Section 71 RIPA requires the Secretary of State to issue Codes of Practice relating to the exercise and performance of the powers and duties under, *inter alia*, Chapters I and II of the Act. These Codes shall be taken into account by persons exercising the powers under the Act or by Commissioners or the IPT (s.72).

86. The Secretary of State has issued such codes, including the *Interception of Communications: Code of Practice* **[Annex 2/IB1/921]** and the *Acquisition and Disclosure of Communications Data: Code of Practice* **[Annex 3/1161-1222]**.

87. Chapter 6 of the *Interception of Communications* Code concerns "*Safeguards*". It states, *inter alia*, as follows:

> "6.1 All material (including related communications data) intercepted under the authority of a warrant complying with section 8(1) or section 8(4) of the Act must be handled in accordance with safeguards which the Secretary of State has approved in conformity with the duty imposed upon him by the Act. These safeguards are made available to the Interception of Communications Commissioner, and they must meet the requirements of section 15 of the Act which are set out below. In addition, the safeguards in section 16 of the Act apply to warrants complying with section 8(4). Any breach of these safeguards must be reported to the Interception of Communications Commissioner.
> [...]
> *Dissemination of Intercepted Material*
> 6.4 The number of persons to whom any of the material is disclosed, and the extent of disclosure, must be limited to the minimum that is necessary for the authorised purposes set out in section 15(4) of the Act. This obligation applies equally to disclosure to additional persons within an agency, and to disclosure outside the agency. It is enforced by prohibiting disclosure to persons who do not hold the required security clearance, and also by the need-to-know principle: intercepted material must not be disclosed to any person unless that person's duties, which must relate to one of the authorised purposes, are such that he needs to know about the material to carry out those duties. In the same way only so much of the material may be disclosed as the recipient needs; for example if a summary of the material will suffice, no more than that should be disclosed." (emphasis added)

88. The latter Code provided guidance in relation to the provision of information *to* foreign agencies:

> "**Acquisition of communication data on behalf of overseas authorities**
>
> 7.11 Whilst the majority of public authorities which obtain communications data under the Act have no need to disclose that data to any authority

outside the United Kingdom, there can be occasions when it is necessary, appropriate and lawful to do so in matters of international co-operation.

7.12 There are two methods by which communications data, whether obtained under the Act or not, can be acquired and disclosed to overseas public authorities:

- Judicial co-operation
- Non-judicial co-operation

Neither method compels United Kingdom public authorities to disclose data to overseas authorities. Data can only be disclosed when a United Kingdom public authority is satisfied that it is in the public interest to do so and all relevant conditions imposed by domestic legislation have been fulfilled.

[...]

Non-judicial co-operation

7.15 Public authorities in the United Kingdom can receive direct requests for assistance from their counterparts in other countries.

These can include requests for the acquisition and disclosure of communications data for the purpose of preventing or detecting crime. On receipt of such a request the United Kingdom public authority may consider seeking the acquisition or disclosure of the requested data under the provisions of Chapter II of Part I of the Act.

7.16 The United Kingdom public authority must be satisfied that the request complies with United Kingdom obligations under human rights legislation. The necessity and proportionality of each case must be considered before the authority processes the authorisation or notice.

Disclosure of communications data to overseas authorities

7.17 Where a United Kingdom public authority is considering the acquisition of communications data on behalf of an overseas authority and transferring the data to that authority it must consider whether the data will be adequately protected outside the United Kingdom and what safeguards may be needed to ensure that. Such safeguards might include attaching conditions to the processing, storage and destruction of the data.

[...]

7.21 The DPA recognises that it will not always be possible to ensure adequate data protection in countries outside of the European Union [...] and there are exemptions to the principle [...] There may be circumstances when it is necessary, for example in the interests of national security, for communications data to be disclosed to a third party country, even though that country does not have adequate safeguards in place to protect the data. That is a decision that can only be taken by the public authority holding the data on a case by case basis." (emphasis added)

iii. The Data Protection Act 1998

89. The *Data Protection Act 1998* (c.29) ("the **DPA**") (see Annex 4) transposes into the law of the UK Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with

regard to the processing of personal data and on the free movement of such data (Official Journal of the European Communities, L.281 of 23.11.1995) ("**Data Protection Directive**"). The DPA applies to the "*processing*" of "*personal data*" of "*data subjects*", by "*data controllers*" or "*data processors*".

90. The "processing" of data includes (s.1(1)):

> "obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including ... (b) retrieval, consultation or use of the information or data, (c) disclosure of the information or data by transmission, dissemination or otherwise making available...".

91. The Act's key principles (known as "*the data protection principles*"), are set out in Part I of Schedule 1 (s.4(1)), which must be interpreted in accordance with Part II of Schedule 1 (s.4(2)). The principal rule of the Act is that, "[...] *it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller*" (s.4(4)).

92. The data protection principles are, in summary (as set out in Schedule 1 of the DPA):

> "**1.** Personal data shall be processed fairly and lawfully;
> **2.** Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
> **3.** Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
> **4.** Personal data shall be accurate and, where necessary, kept up to date.
> **5.** Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
> **6.** Personal data shall be processed in accordance with the rights of data subjects under this Act.
> **7.** Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
> **8.** Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."

93. However, section 28 provides an exclusion in the context of national security matters:

> "**28.– National security.**
> (1) Personal data are exempt from any of the provisions of –
> (a) the data protection principles,
>
> (b) Parts II, III and V, and
>
> (c) sections 54A and section 55,
>
> if the exemption from that provision is required for the purpose of safeguarding national security.
>
> (2) Subject to subsection (4), a certificate signed by a Minister of the Crown certifying that exemption from all or any of the provisions mentioned in subsection (1) is or at any time was required for the purpose there mentioned in respect of any personal data shall be conclusive evidence of that fact.
> [...]"

94. The Data Protection Directive itself provides in Article 13.1(a) for an exception in respect of measures necessary to safeguard national security. This reflects Article 4.2 of the Treaty on the European Union (Official Journal C 83/13) that "*national security remains the sole responsibility of each Member State*".

iv. The Human Rights Act 1998

95. Section 1 of the *Human Rights Act 1998* (see Annex 4) gives legal effect to Convention rights in UK law. It defines the Convention Rights as those scheduled to the Act, which include Article 8 ECHR. Section 2 requires a court or tribunal determining a question which has arisen in connection with a Convention right to take into account any judgment, decision, declaration or advisory opinion of this Court.

96. Section 3 requires that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. If, however, in any proceedings in which a court is determining whether a provision is compatible with a Convention right, and is satisfied that it is not, it may make a declaration of that incompatibility under section 4.

97. A declaration of incompatibility can only be made by the judicial bodies defined at s.4(5):

> "(5) In this section "court" means –
> (a) the Supreme Court;
> (b) the Judicial Committee of the Privy Council;
> (c) the Court Martial Appeal Court;
> (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
> (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal;
> (f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court."

98. Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with the Convention save in circumstances identified in section 6(2). A person who claims a public authority has acted or proposed to act in a way which is made unlawful by section 6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal.

v. The Justice and Security Act 2013

99. Section 10 ISA (repealed) established the ISC to oversee the work of the UKIS, including the three main intelligence agencies. The Committee was made up of Parliamentarians appointed by the Prime Minister but was not a Committee of Parliament. It was formally part of the Cabinet Office and was insufficiently independent to provide effective oversight.

100. In its 2010/2011 Annual Report the ISC undertook a *"root-and-branch"* examination of its powers, processes and the legislative framework and concluded that *"the current arrangements are significantly out of date and it is time for radical change. The status quo is unsustainable"* (§22). When examining the ISA, it concluded that "[t]*he legislation* [...] *contains safeguards that – whilst they were thought necessary in 1994 – are now outdated* [...]. *The 1994 Act therefore requires updating"* (§273).

101. Part I of the *Justice and Security Act 2013* ("**JSA**") (see Annex 4) has made some reforms. Section 1 provides:

> **"1.– The Intelligence and Security Committee of Parliament**
> (1) There is to be a body known as the Intelligence and Security Committee of Parliament (in this Part referred to as *"the ISC"*).
>
> (2) The ISC is to consist of nine members who are to be drawn both from the members of the House of Commons and from the members of the House of Lords.
>
> (3) Each member of the ISC is to be appointed by the House of Parliament from which the member is to be drawn.
>
> (4) A person is not eligible to become a member of the ISC unless the person –
> (a) is nominated for membership by the Prime Minister, and
> (b) is not a Minister of the Crown.
>
> (5) Before deciding whether to nominate a person for membership, the Prime Minister must consult the Leader of the Opposition.
>
> (6) A member of the ISC is to be the Chair of the ISC chosen by its members."

102. Section 2 JSA identifies the functions of the ISC:

> **"2.– Main functions of the ISC**
> (1) The ISC may examine or otherwise oversee the expenditure, administration, policy and operations of –
> (a) the Security Service,
> (b) the Secret Intelligence Service, and
> (c) the Government Communications Headquarters.
>
> (2) The ISC may examine or otherwise oversee such other activities of Her Majesty's Government in relation to intelligence or security matters as are set out in a memorandum of understanding.
>
> (3) The ISC may, by virtue of subsection (1) or (2), consider any particular operational matter but only so far as –
> (a) the ISC and the Prime Minister are satisfied that the matter –
> (i) is not part of any ongoing intelligence or security operation, and
> (ii) is of significant national interest,
> (b) the Prime Minister has asked the ISC to consider the matter, or
> (c) the ISC's consideration of the matter is limited to the consideration of information provided voluntarily to the ISC (whether or not in response to a request by the ISC) by –
> (i) the Security Service,
> (ii) the Secret Intelligence Service,
> (iii) the Government Communications Headquarters, or
> (iv) a government department.
> (4) The ISC's consideration of a particular operational matter under subsection (3)(a) or (b) must, in the opinion of the ISC and the Prime

Minister, be consistent with any principles set out in, or other provision made by, a memorandum of understanding.

(5) A memorandum of understanding under this section –
(a) may include other provision about the ISC or its functions which is not of the kind envisaged in subsection (2) or (4),
(b) must be agreed between the Prime Minister and the ISC, and
(c) may be altered (or replaced with another memorandum) with the agreement of the Prime Minister and the ISC.

(6) The ISC must publish a memorandum of understanding under this section and lay a copy of it before Parliament."

103. Section 3 provides that the ISC must provide an annual report to Parliament, which it must send to the Prime Minister beforehand (s.3(3)) and which it must redact if the Prime Minister considers that sensitive information is at risk of being disclosed (s.3(4)).

104. Schedule 1 to the JSA sets out further rules concerning the ISC's procedures and constitution. Paragraph 4 also establishes the rules in relation to access to information by the ISC.

vi. Definition of "national security"

105. For the purposes of this Application, it is important to appreciate that English courts have taken an extensive view of the definition of *"national security"* which goes beyond the general international understanding of that term. In considering whether to make a warrant in the interests of national security, a British Minister will naturally apply the broad definition adopted by the English courts.

106. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 the House of Lords considered the question of what constitutes "national security" in UK law. The Special Immigration Appeals Commission had upheld Mr Rehman's appeal form a deportation order on the basis that in alleging that Mr Rehman was associated with an organization involved in terrorism activities on the Indian sub-continent, the Secretary of State had failed to show that he was a threat to the national security of the UK. The Court of Appeal and the House of Lords overturned this finding, holding

that the concept of *"national security"* is *"protean"* and a question of *"policy"* that falls to be determined by the Secretary of State. As such, under English law 'national security' is capable of including action taken to assist other countries to combat risks *to them* and therefore overlaps with foreign policy.

107. Giving the judgment of the Court of Appeal, Lord Woolf stated that the Government, *"correctly submitted that "national security" is a protean concept, "designed to encompass the many, varied and (it may be) unpredictable ways in which the security of the nation may best be promoted"."* (at §35).

108. Lord Slynn stated at §17 (at p.183A):

> "I would accept the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combatting international terrorism is capable of promoting the United Kingdom's national security, and that such co-operation itself is capable of fostering such security "by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states". There is a very large element of policy in this which is, as I have said, primarily for the Secretary of State."

109. Lord Hoffmann stated at §53 (at p.193A):

> "The decision as to whether support for a particular movement in a foreign country would be prejudicial to our national security may involve delicate questions of foreign policy. And, as I shall later explain, I agree with the Court of Appeal that it is artificial to try to segregate national security from foreign policy. They are all within the competence of responsible ministers and not the courts."

110. The English courts have continued to rely upon this broad definition of national security, and went further to elide it with the concept of 'good foreign relations' in *R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756. That case concerned a decision to terminate a criminal investigation into serious allegations of bribery against a UK company involved in selling weapons to Saudi Arabia. The Saudi Arabian Government had indicated that the criminal investigation would adversely affect intelligence and diplomatic cooperation with the UK. The Court of Appeal accepted that this constituted a threat to national security. In the judgment of the Court at §139 it was stated:[21]

[21] The issue was directly addressed by the House of Lords, though see Baroness Hale at §53

"National security is, to a significant extent, dependent upon co-operation with other states. That co-operation is dependent on fostering or maintaining good relations. ... It is all too easy for a state which wishes to maintain good relations with another state whose official is under investigation to identify some potential damage to national security should good relations deteriorate, all the more so where that other state is powerful and of strategic importance."

111. During the recent parliamentary debates on the Justice and Security Bill, Baroness Manningham-Buller, the former Director General of the Security Service, explained that the UK Government's conception of what constitutes a threat to national security has considerably broadened and includes, for instance, action taken to combat pandemics and energy security:

> "When I joined the Security Service, national security meant to us something pretty narrow following the Attlee instructions at the end of the war to the intelligence community. It involved the military protecting the UK from the threat of military attack and the security and intelligence services protecting it from espionage, sabotage, terrorism and threats to parliamentary democracy from the extreme right and extreme left—fascism and communism. That understanding of national security, articulated in the Attlee declaration, informed the first tranche of legislation: the Security Service Act, the first Interception of Communications Act, the Intelligence Services Act and Regulation of Investigatory Powers Act. It was an understanding which certainly was not articulated in law but was well understood within the community.
> The previous Government—and I do not blame them for this—said, "Hold on, the security and safety of the citizen is much wider than these issues". Therefore they drew up, under the previous Prime Minister, a national security strategy which was much broader and included things such as pandemics and added cyberthreats, energy security and so on and this Government have built on that early national security strategy and now have quite a long national security strategy that covers a wide range of issues." (HC. Deb 17 July 2012 Hansard Col. 124)

112. Resisting efforts to define the term in the Bill, the Government Minister, James Brokenshire, stated that:

> "It has been the considered policy of successive Governments and the practice of Parliament not to define the term "national security". That is in order to retain the flexibility needed to ensure that the term can adapt to changing circumstances." (HC. Deb 31 Jan 2013 Hansard Col 130).

III. STATEMENT OF VIOLATIONS OF THE CONVENTION

A. Applicability of Article 8

113. This Application concerns two distinct but related interferences with the right protected by Article 8 ECHR. Firstly, in relation to receipt of foreign intercept. In that regard, the obtaining or receiving, analysis, use, storage and disposal of intercept data by UK agencies as part of the operation of secret surveillance constitutes an interference with an individual's private life: e.g. *Hewitt & Harman v UK* at [34]-[35]; *Liberty v United Kingdom* at [56]. Secondly, in relation to GCHQ's own generic intercept, obtaining this data is obviously an interference with Article 8, but so too is "*transmission of data to and their use by other authorities*". This constitutes a "*separate interference with the applicants' rights under Art.8*" (e.g. *Weber v Germany*, at [78]).

114. The present challenge relates to the inadequacies of the protection afforded by the legal regime in the UK which is said to govern these two strands of activity, which *prima facie* interfere with rights protected by Article 8 ECHR. For reasons set out in paragraphs 11-18 above, all the Applicants in this case have reasonable grounds for believing that they are likely to have been subject to generic surveillance by GCHQ and/or that the UK security services may be in receipt of foreign intercept which relates to their electronic communications.

115. In any event, in such circumstances, the Court has held that general challenges to the legislative regime under Article 8 are permitted:

> "... in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them, the Court has permitted general challenges to the relevant legislative regime" (*Kennedy v United Kingdom* (2011) 52 EHRR [119], emphasis added)

The Applicants also bring this claim on behalf of others affected by the surveillance of which they complain.

116. The Applicants do not therefore need to establish that their communications have actually been the subject of interception or that their information has otherwise been obtained by agencies of the UK Government.

B. The Requirements of "in accordance with law" in this Context

117. The requirement that any interference with private life must be in *"accordance with the law"* under Article 8(2) will only be met where three conditions are satisfied. First, the measure must have some basis in domestic law. Secondly, the domestic law must be compatible with the rule of law and thirdly the person must be able to foresee the consequences of the domestic law for him.

118. In the context of interception of communications by a security service, the Court has recognised (e.g. in *Kennedy* at [152]) that such surveillance is necessarily secret, so the requirement of foreseeability cannot mean the ability of an individual to foresee precisely whether or not he or she will be subject to surveillance or the precise terms which will be used to determine subjects of surveillance. However, what is required is a framework which enables a citizen to understand with sufficient particularity the types of person and conduct in relation to whom surveillance may occur; the safeguards which exist and govern dissemination and sharing of such material; the framework which exists to guard against arbitrary or disproportionate use of such material; and checks on the authority required to permit such surveillance and limits on the time for which such surveillance may occur. What is required is a legal framework which provides an ascertainable check against arbitrary use of secret and intrusive state surveillance.

C. Why Receipt of Foreign Intercept Material by the United Kingdom is not 'in accordance with the law'

i. Absence of Sufficient Legal Basis

119. The receipt, analysis, use and storage of data received from foreign intelligence agencies that has been obtained by interception do not have an adequate basis in UK law.

120. In his statement to Parliament on 10 June 2013, the Foreign Secretary asserted that such a legal basis exists in domestic law. He said that "*any data obtained*" from third countries relating to UK nationals was subject to "*statutory controls and safeguards*" (above §41-45). He identified sections 15 and 16 of RIPA; the HRA and the ISA. The ISC made a similar statement (above §49-50). In a letter to the First and Second Applicants, the UK Government has also identified the DPA.

121. However the legal provisions identified fail to provide any basis for the regulation of the receipt of information from foreign intelligence agencies:

121.1. Sections 1 (SIS) and 3 (GCHQ) of the ISA and section 1 of the *SSA 1989* (Security Service) provide powers for those agencies to "obtain and provide" information, including to and from foreign intelligence services. However, the legal safeguards which attend those powers are very limited. There is no direct legal control on the purposes for which they may be used other than that the heads of the agencies are under duties to ensure that there are arrangements for securing that no information is obtained except insofar as "necessary" for purposes specified in s2(2)(a) and s4(2)(a) ISA and s.2 SSA 1989 respectively.

121.2. However, these purposes are extremely broadly defined. For the Chief of SIS, they include (a) the purposes of discharging the functions of SIS; (b) the interests of national security; (iii) for the purposes of prevention or detection of serious crime; or "*for the purposes of any*

criminal proceedings" (emphasis added). The functions of the SIS are obtaining and providing information in the interests of national security, the economic wellbeing of the UK, or in support of the prevention or detection of serious crime. For the Director-General of the Security Service they include (a) the purposes of discharging the functions of the Security Service; (b) the purposes of (i) the prevention or detection of serious crime or (ii) "*the purpose of any criminal proceedings*". (The breadth of the concept of national security is addressed below.)

121.3. The legal framework contains no check on the Chief of SIS or the Director-General's assessment of what may be regarded as "necessary". For example, neither needs a warrant to receive material.

121.4. Nor do the ISA, SSA give any information as to what the "*arrangements to secure*" that no information is obtained for unlawful purposes should consist of, or how any person is to establish if such arrangements exist. Unlike the position in relation to an individual warrant, it is hard to see why a person should not be able to know what the arrangements are to safeguard against arbitrariness or misuse of this secret power to obtain information. There are no Codes of Practice that regulate this power.

121.5. Contrary to what the UK Government suggests, Chapter 1 of RIPA does not apply to the receipt of intercept evidence from the NSA. Its provisions are restricted to interception of communications by UK authorities. The Foreign Secretary expressly referred to sections 15 and 16 of RIPA. However these sections set out restrictions on the interception of communications contained in Chapter I of RIPA which do not apply. Moreover, contrary to the apparent suggestion of the ISC (§50 above) there is no requirement for a warrant for the receipt of such information under Chapter 1 of RIPA.

121.6. Chapter 2 of RIPA also does not apply to the receipt of intelligence from foreign agencies as it only concerns "*communications data*", which is defined in section 21(4) of the Act as data which is held by a person providing a telecommunications service (i.e., usually, metadata). Moreover, the power relates to obtaining information from a "*postal or telecommunications operator*": s.22(4), 25(1). Foreign Government agencies are not postal or telecommunications operators.[22]

121.7. Although the Treasury Solicitor on behalf of the UK Government has also claimed that the DPA provides protections (above at §46), that statute contains an explicit exemption from the data protection principles in the context of processing data in the interests of national security (section 28). The Treasury Solicitor's reference to this legislation does not, therefore, identify any basis in law for the regulation of the receipt and use of communications, as required by Article 8.

121.8. Article 8 of the Convention, as given effect by the HRA, does not itself prescribe any law regulating how information is procured, received, stored, disseminated, used or disposed of. On the contrary, Article 8 has been interpreted as requiring that domestic legislation sets out such restrictions in an open and transparent form: *Halford v UK* 1997 24 EHRR 523, *Khan v UK* (2001) 31 EHRR 45, *Liberty v UK* (2009) 48 EHRR 1; *Kennedy v UK* (2011) 52 EHRR 4.

122. The consequence is that in UK law there is an absence of legislative controls or safeguards in relation to:

122.1. The circumstances in which UKIS can request foreign intelligence agencies to intercept communications to provide information to UKIS.

[22] Further, the data which has been supplied by the NSA is content data as well as metadata. It includes, for example, information about internet users' search history and the content of their e-mails. Chapter II only applies to metadata.

122.2. The circumstances in which UKIS can request access to stored data held by foreign intelligence agencies that has been obtained from interception.

122.3. The extent to which UKIS can use, analyse, disseminate, store (etc) intercept data solicited and/or received from foreign intelligence agencies and the circumstances in and process by which such data must be destroyed.

123. The Foreign Secretary's refusal to provide any answer to the two questions asked by the Rt. Hon. Douglas Alexander MP (§§42-45 above) reinforces the conclusion that *if* any regulations or guidelines exist in relation to (a) requests of foreign Governments to carry out interception of communications under their law (the first question); and (b) requests for information held by foreign Governments (the second question), such provisions are secret and unpublished.

124. The absence of legal safeguards is particularly concerning in the context of the receipt of data such as that obtained under the PRISM and UPSTREAM programmes, because US law itself contains no significant safeguards in relation to communications outside the US not relating to US persons (see statement of Cindy Cohn at §§54-55, 60 **[Annex 1/87-88, 90]**).

125. In these circumstances the requirements that an interference with Article 8 rights be 'in accordance with the law' are not made out.

126. In *Halford v United Kingdom* (1997) 24 EHRR 523 §50-51 a telephone interception was held not to be in accordance with law because *"domestic law did not provide any regulation of the interceptions of calls made"*. In *MM v United Kingdom*, App. No. 24029/07 13 November 2012, the Court described its finding in *Khan v. the United Kingdom*, no. 35394/97, § 27, ECHR 2000 V as a case where it found a violation of Article 8 *"because there existed no statutory system to regulate their use and the guidelines applicable at the relevant*

time were neither legally binding nor directly publicly accessible". These observations are directly applicable.

127. In its report in July 2013 the ISC recognised that there is a question as to whether "*the current statutory framework ... remains adequate*". It drew attention to the fact that in some areas the legislation was "*expressed in general terms and more detailed policies and procedures*" have had to be put in place (above §50-52). These concerns, although grossly understated, represent an implicit acknowledgement of the absence of applicable safeguards in the governing statutory regimes.

ii. Quality of Law

128. In *Telegraaf Media Nederland Landelijke Media BV v The Netherlands*, App. No. 39315/06, 22 Nov 2012, the Court summarised the law at §90:

> ""in accordance with the law" not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. The law must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by Article 8 § 1 and Article 10 § 1. Especially where, as here, a power of the executive is exercised in secret, the risks of arbitrariness are evident. Since the implementation in practice of measures of secret surveillance is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power."

129. It follows that,

> "the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Weber and Saravia*, cited above, §§ 93-95 and 145; *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, § 76, ECHR 2006-VII; *Liberty and Others v. the United Kingdom*, no. 58243/00, §§ 62-63; 1 July 2008; *Kennedy v. the United Kingdom*, no. 26839/05, § 152, 18 May 2010)."

130. For the reasons given above, UK law does not comply with these requirements insofar as it relates to the receipt of information from foreign intelligence partners, that has been obtained by means of interception. The discretion to obtain, retain and share the product of foreign intercept gives

the individual inadequate protection against arbitrary and disproportionate interference with his right to respect for private life.

131. There are, moreover, no restrictions on the UKIS by-passing the legal safeguards required in respect of the interception of communications data set out in Chapter 1 of RIPA, by obtaining information derived from interception from foreign agencies, such as the NSA, even where this could have been obtained by the UK agency pursuant to a warrant under sections 5 and 8(1). Indeed, RIPA actually encourages UK agencies to consider this: section 5(5) requires that when considering whether a warrant is necessary, consideration must be given to *"whether the information ... could reasonably be obtained by other means."*

132. The ISC report stated that *"in each case where GCHQ sought information from the US"* a UK warrant had also been issued, presumably in relation to specific individuals within the UK (above §49). This appears to have been entirely fortuitous, and is not said to be the product of any legal requirement. Moreover, the warrant would not, of course, have extended to or necessarily referred to the receipt of information from US intelligence services and therefore could not have imposed any restrictions on the receipt or use of such material. Indeed, the warrant may have been restricted in ways that could be by-passed by the method of obtaining information on a target from the PRISM or UPSTREAM programmes. In short, the fact that warrants may have been in place in relation to individuals who were the subject of specific requests for information from the NSA does not provide any comfort that adequate restrictions are in place on the obtaining and use by the UKIS of material from the NSA or other foreign intelligence agencies. See further Witness Statement of Ian Brown at §20 **[Annex 2/516-517].**

133. Insofar as there are any safeguards in place relating to receipt of information from foreign agencies these are unpublished. The UK Government has refused to provide any details about the internal

procedures that apply. In *Liberty v UK*, the Court noted, in finding a violation of Article 8, that:

> "66. ... According to the Government (see paragraphs 48-51 above), there were at the relevant time internal regulations, manuals and instructions applying to the processes of selection for examination, dissemination and storage of intercepted material, which provided a safeguard against abuse of power. The Court observes, however, that details of these "arrangements" made under section 6 were not contained in legislation or otherwise made available to the public.
>
> 67. The fact that the Commissioner in his annual reports concluded that the Secretary of State's "arrangements" had been complied with (see paragraphs 32-33 above), while an important safeguard against abuse of power, did not contribute towards the accessibility and clarity of the scheme, since he was not able to reveal what the "arrangements" were. In this connection the Court recalls its above case-law to the effect that the procedures to be followed for examining, using and storing intercepted material, *inter alia*, should be set out in a form which is open to public scrutiny and knowledge."

134. In *MM v United Kingdom*, op cit, the Court stated:

> "194 In *Malone*, cited above, §§ 69-80, it found a violation of Article 8 because the law in England and Wales governing interception of communications for police purposes was "somewhat obscure and open to differing interpretations" and on the evidence before the Court, it could not be said with any reasonable certainty what elements of the powers to intercept were incorporated in legal rules and what elements remained within the discretion of the executive. As a result of the attendant obscurity and uncertainty as to the state of the law the Court concluded that it did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities (see also *Liberty and Others*, cited above, §§ 64-70).
>
> 195. The Court considers it essential, in the context of the recording and communication of criminal record data 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 their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness (see *S. and Marper*, cited above, § 99, and the references therein).

135. None of these requirements of Article 8 have been complied with in this case.

136. There is only one context in which policies relating to the use and receipt of foreign intelligence have been made published: the *Consolidated Guidance* regulating the procurement and receipt of information from foreign

intelligence agencies in the context of risks of torture and other serious human rights abuses. This was drawn-up and published following allegations of UK complicity in torture and ill-treatment of detainees after the terrorist attacks on 11 September 2001 (above §78). This detailed policy sets out, for instance, the circumstances in which approval for the receipt of information obtained from a person held in foreign custody, or where such information is solicited. However, this policy is limited and does not extend to the receipt of information obtained by foreign intelligence agencies by intrusive intercept or surveillance, such as under section 702 of FISA.

137. Furthermore, there is no effective oversight of the receipt, use, storage etc. of information so obtained:

137.1. The Intelligence Services and the Interception of Communications Commissioners' jurisdictions are limited to assessing compliance with certain provisions of RIPA and, in the case of the former, the *Consolidated Guidance*. The Prime Minister could widen the remit of the Intelligence Commissioner's jurisdiction to cover receipt of information from foreign interception, but he has not done so. Moreover, the findings of their reports are not binding.

137.2. The ISC's jurisdiction is also limited. It had never addressed the issue in any of its reports until the PRISM information was make public in the UK and US media. Indeed, it appears that it was not aware of it (see Witness Statement of Ian Brown §45 **[Annex 2/527-528]**). Its function is reactive, and it does not approve or even necessarily know about, the matters that are the subject of complaint in these proceedings. Moreover, its report demonstrates the severe limitations on the ISC's role and function. In particular,

a. The ISC failed to identify with any clarity what legal provisions it considers to be applicable, other than a general reference to the ISA, the HRA and RIPA.

b. It did not identify any internal processes or safeguards, relating to authorization, storage, dissemination, disposal etc. of data. Nor were such issues identified in its report even in general terms.

c. It did not provide any reasoned basis for its conclusion that GCHQ had complied with its statutory duties or for its conclusion that it had not "*circumvented or attempted to circumvent*" UK law.

d. It did not invite or consider any representations other than those of the Intelligence Services and the NSA.

e. It is a Committee made up of Members of Parliament who are not themselves necessarily lawyers (and who are not judges) and therefore not in a position to pronounce authoritatively on the legality of GCHQ's practices.

f. It chose not to examine the conduct of SIS or the Security Service despite the fact that it is such agencies that are likely to have principal responsibility for using the data received by GCHQ, and being in a position to obtain information from foreign agencies themselves. There is no means of requiring the ISC to examine such matters.

For these reasons, the ISC's jurisdiction is clearly incapable of compensating for clear and published legal safeguards.

138. The IPT likewise does not provide any sufficient legal protection. The limits role are address at paragraphs 171-173 below.

139. In summary, there is no legislation (or other legal provisions) in the UK that can be said to "*give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort*" to the measures referred to (*Uzun v Germany* (2012) 54 EHRR 121).

D. Breach of Article 8 in Respect of Generic GCHQ Intercept on the Basis of Non-Specific Blanket, Rolling Warrants for Interception of External Communications

i. Quality of Law

140. Although RIPA section 8(1) and (2) sets out protections and requirements for targeting of interception warrants, section 8(4) of RIPA dis-applies the protections in subsections 8(1) and 8(2) to external communications. External communications are defined as those sent or received outside the UK, whether or not they relate to British nationals. Section 8(4) thus permits, what has been described as generic intercept of communications, simply on the basis of the means by which it happens to have been transmitted.

141. The TEMPORA programme has been established under warrants issued under RIPA section 8(4) relating to external communications. As explained above, this programme involves GCHQ accessing all external communications passing along transatlantic fibre-optic cables without restriction. Media reports (set out in Dr Brown's evidence at §52 **[Annex 2/ 531]**) indicate that this surveillance is undertaken on the basis of ten generic warrants. The authority for this GCHQ generic surveillance is apparently renewed at six monthly intervals.

142. Whether taken separately or together, the effect of the following features of the statutory regime that applies to external communication warrants is that it is not compliant with Article 8:

142.1. The restrictions and safeguards that apply to internal warrants are not applicable to external warrants.

142.2. They are not approved by a judge or an authority that is independent of the UKIS whether before or after they have been issued and / or the oversight regime does not provide an adequate

guarantee that interception and use of the data does not go beyond what is strictly necessary.

(a) Insufficiency of statutory restrictions and safeguards

143. The Court has developed the following "*minimum standards*" that should be set out in "*statute law*" as "*clear, detailed rules*", rather than internal or other forms of law; (i) the nature of the offences which may give rise to an interception; (ii) a definition of the categories of people liable to have their communications intercepted; (iii) a limit on the duration of interception; (iv) the procedure to be followed for examining, using and storing the data obtained; (v) the precautions to be taken when communicating the data to other parties; (vi) the circumstances in which communications must be destroyed. See *Weber* at [92] and [95]. See also *Huvig v France* (1990) 12 EHRR 528; *Aman v Switzerland* (2000) 30 EHRR 843; *Valenzuela Contreras v Spain* (1999) 28 E.H.R.R. 483; and *Prado Bugallo v Spain* (App. 58496/00, 18 February 2003).

144. Whilst there are some, minimal, statutory conditions applicable to external communications warrants, upon analysis and as demonstrated by the public disclosures about the TEMPORA regime, the provisions of RIPA fail to comply with the requirements of Article 8.

145. First, the requirements of targeting on a person or place set out in sections 8(1)-(3) are disapplied. Section 8(4) therefore permits, "*blanket strategic monitoring*" of communications where at least one sender or recipient of the communication is outside the British Isles: C. Walker, *Terrorism and the Law* (OUP, 2011) at [2.58] p.70 [**Annex 3/1155-1156**].

146. Secondly, whilst the Secretary of State is required to provide "*the descriptions of material the examination of which he considers necessary*"(s.8(4)(b)(i)) there are no limits on the breadth of this description. The description could therefore be that of "all traffic passing along a specified cable running between the UK and the US": see Ian Brown §52

[Annex 2/531]. It does not have to be limited to particular individuals, a particular group, a particular threat or a particular time period. In practice, all communications are being intercepted, as if the UK Government was opening every letter that was sent from or passed through the British Isles. This is no different to the breadth of descriptions under the previous legislation, examined in the *Liberty* case (at [64]).

147. Thirdly, whilst the Secretary of State is required to certify that he considers the examination of the material necessary for the purposes set out in s.5(3), these purposes are extremely broad and provide only the most minimal restrictions: "*in the interests of national security*", for the "*purpose of preventing or detecting serious crime*", "*for the purpose of safeguarding the economic well-being of the United Kingdom*" or for preventing or detecting serious crime pursuant to an international mutual assistance agreement: section 8(4)(b)(ii). The concept of national security, which is especially relevant to this application, is vague and unforeseeable in scope:

147.1. The UK courts have described the concept of national security as "*protean*" and have accepted a very broad definition that includes damage to international relations. They have held that it overlaps with foreign policy and that there is a very large area of discretion for the Government to determine what constitutes action that is in the interests of national security (see §§107-110 above). For its part, the UK Government has afforded an increasingly wide meaning to the concept of national security and has indicated that it will not provide any definition because it should be able to adapt to changing circumstances (see §§111-112 above). As such, the concept of national security, as a matter of UK law, is obscure, not defined in law or in policy, and its scope and application are vague and unforeseeable.

147.2. The effect is that UKIS can intercept communications and use such communications for purposes that go far wider that the protection of the UK against threats of terrorism, espionage or military action. It appears to be capable of being used, for example, to assist foreign

Governments in order to maintain good relations with them, or to advance the UK's policy in relation to protection from disease. There is no requirement that the individuals whose communications are intercepted and analysed are suspected of any conduct which amounts to a crime in the UK or are directed at the UK.

147.3. In Kennedy v UK, the Court held that the term "*national security*" had an understood meaning and, for instance, was used in the Convention itself (at [159] cf. the criticism of the term in Liberty v UK at [65]). However, with respect, the Court in that case did not consider the authorities referred to in §§107-110 above, or the stated position of the UK Government referred to at §§111-112. Reliance was placed on a definition offered by the Interception of Communications Commissioner in his Annual Report for 1986, which (i) is not authoritative or binding and, (ii) which is out of date. It is not the case that national security has any understood meaning in UK law and, on the contrary, is deliberately vague and 'protean'.

147.4. Furthermore, the definition of "*serious crime*" is insufficiently clear to enable subjects to know the type of activity which may attract authority to intercept or subject to surveillance.

148. Fourthly, whilst section 9(1) provides for the expiry of an interception warrant unless renewed, in practice this is no control on warrants for blanket strategic warrants, which will always be renewed as they are not based on any particular individuals or specific threat, but general threats to national security (etc): Ian Brown §53 **[Annex 2/531]**. As in the case of Gillan and Quinton v UK (2010) 50 EHRR 45, (at [81]) the alleged statutory temporal restriction has failed, so that a "*rolling programme*" of indefinite authorisation is effectively in place.

149. Fifthly, the "*general safeguards*" contained in section 15 RIPA are of very limited scope. They require the Secretary of State to ensure that arrangements are in place to secure that the number of persons to whom

intercepted material is disclosed and the extent of copying is "*limited to the minimum that is necessary for the authorised purposes*": section 15(1), (2). The material must be destroyed if there are no longer grounds for retaining it for "*authorised purposes*": s.15(3) However, "*authorised purposes*" are extremely wide (s.15(4)) and include where the information is or "*is likely to become*" necessary for any of the purposes specified in s.5(3). These include the interests of national security.

150. Thus, information can be used for any purpose relating to national security and can be kept even if it is not of any current utility. Moreover, it does not require the continuing or future utility of the information to be connected to the particular basis on which it was obtained, but can be retained so long as it is thought likely to be of any future utility to national security in general. There is also no requirement, in RIPA or the Code, which stipulates when the material should be reviewed (the Code refers to review "*at appropriate intervals*" §6.8).

151. Sixthly, the "*safeguards*" contained in section 16 are limited in scope to protecting persons who are within the British Isles who are the intelligence target by limiting the reach of a section 8(4) warrant with respect to such persons. Section 16 is intended to ensure that material obtained under a section 8(4) warrant is not examined if it is material that could be obtained by obtaining a section 8(1) warrant (i.e. it is material relating to an individual in the British Isles). However, section 16:

- imposes no restrictions on the interception or examination of data that has been sent by a person in the UK where the examination is not targeted at that person - the communications of persons who are communicating *with* the target from within the UK can be freely examined so long as this falls within the general umbrella of "national security".
- imposes no restrictions on the examination of personal data of persons not present in the UK, whether they are British citizens or citizens of other states, including where the selection of data is targeted at them.

- permits (by section 16(3)) the examination of material targeted at a person in the UK—that is, material that could be obtained by a warrant under section 8(1)—where the Secretary of State certifies this is necessary for national security for a permitted maximum period of 6 months. No guidance is given as to how the Secretary of State will assess such "necessity".
- The implications of these points are made clear in the evidence of Ian Brown at §§40-42, 53-55 **[Annex 2/524-526; 531-532]** and by the examples he gives.

152. It is therefore clear that the "*safeguards*" in RIPA that relate to external warrants are manifestly deficient. The broad nature of "national security" means that they do not define with any precision the nature of the offences which may give rise to an interception or examination of communications or the categories of people liable to have their interceptions intercepted. There is no effective limit on the interception and the law does not set out the procedure to be followed for examining the communications or the precautions to be taken when supplying them to third parties, such as the NSA. The circumstances in which the communications must be destroyed, whilst specified, are so broad as to effectively permit the retention of enormous amounts of intercepted information.

153. This Court's judgment in *Liberty v UK* points strongly to the provisions under consideration being incompatible with Article 8. In that case, the Court considered the analogous provisions under section 3(2) *Interception of Communications Act 1985* ("ICA") relating to external communications which applied before RIPA came into effect (described in the Court's judgment at §§22-27). Those provisions were in materially identical terms to RIPA and in two respects were more protective.[23]

[23] Section 3(3) of the ICA contained an additional limitation on an external interception warrant: such a warrant could not specify an address in the in the British Isles for the purposes of including communications to or from that address in the certified material, unless,

"3(3)(a) [T]he Secretary of State considers that the examination of communications sent to or from that address is necessary for the purpose of preventing or detecting acts of terrorism; and
(b) communications sent to or from that address are included in the certified material only in so far as they are sent within such a period, not exceeding three months, as is specified in the certificate."

154. The Court held that the provisions of the ICA relating to interception of external communications were insufficient to comply with Article 8. The Court first accepted that the power to intercept external communications contained in section 3(2) (now RIPA s.8(4)) *"allowed the executive an extremely broad discretion"* (at §§64-65). Warrants could cover *"very broad classes"* of communication such as all submarine cables having one terminal in the UK carrying external communications to Europe (or the United States). Thus any person who sent or received any form of telecommunication outside the British Isles could have such communication intercepted. The discretion granted was, therefore, *"virtually unfettered"*. Precisely the same reasoning applies in this case.

155. Following the judgment in Liberty v UK, the Joint Parliamentary Committee on Human Rights wrote to the Home Secretary asking what steps the Government was taking to comply with the judgment and, moreover, whether it was satisfied that the new legislation, RIPA, had rectified the deficiencies identified by the European Court on Human Rights. The Home Secretary's response stated that he was satisfied that RIPA together with the Code of Practice rectified the defects but that it would continue to keep the matter under review.

156. The Joint Committee on Human Rights also asked **[Annex 3/1157-1159]**:

> "In particular, is the Government is satisfied that publicly accessible information on the current procedure for "selecting for examination, sharing, storing and destroying intercepted material" is available, and if so where can it be found?"

157. The Home Secretary's answer was that, *"Information is found with the Act itself, the code of practice, and the Interception Commissioner's annual reports."*

158. However, as explained above, RIPA is in material the same effect in relation to external communications as was the legislation at issue in Liberty v UK,

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Furthermore, the maximum period that material targeted on a person in the British Isles could be examined pursuant to an external communications warrant was three months (rather than six months) in national security cases.

and the Court in that case also dismissed the Interception Commissioner's Annual reports as being capable of rectifying the deficiencies in the legal regime (at §67).

159. There is, in any event, no reference in the Commissioner's annual reports to the TEMPORA programme. The question therefore arises whether the Code of Practice, issued under section 71 of RIPA, is sufficient to compensate for the deficiencies in the legal regime in *Liberty v UK*. The answer to that is clearly that it is not.

160. Chapter 5 of the Code relates to external warrants. Much of Chapter 5 sets out the provisions of the RIPA. It does provide some additional requirements which, in the context of targeted warrants, might be of some protection to innocent individuals affected by a warrant, such as that applications for a warrant must identify any *"unusual degree of collateral intrusion"*: §5.2. However these are not of any protection in the context of warrants issued under section 8(4): Ian Brown §53 **[Annex 2/531]**.

161. The Code does not require search terms to be set out or information that could indicate the extent of a data trawl that will be involved. Nor is there any restriction on search terms being specified by foreign intelligence partners such as the NSA or search results being shared with them. There is no process for the approval of search terms or the oversight of the use of the authorization given under section 8(4) by intelligence operatives in the UK or in foreign agencies. There is thus, *"a lack of regulations specifying with an appropriate degree of precision the manner of screening of the intelligence obtained through surveillance...."*: *Association for European Integration and Human Rights v Bulgaria* (App. No. 62549.00, 28 June 2007), §86.

162. Chapter 6 of the Code sets out conditions on storage, dissemination and destruction of information but these do not impose any limits on the scope and duration of the warrants.

163. In *Kennedy v UK* the Court considered RIPA in the context of *internal* communications. It found that those provisions did not violate Article 8. However at §160 and §162 the Court made clear that its reasoning was limited to internal communications. Central to its conclusion was that,

> "in internal communications cases, the warrant itself must clearly specify, either by name of by description, one person as the interception subject or a single set of premises as the premises in respect of which the warrant is ordered. Names, addresses, telephone numbers and other relevant information must be specified in the schedule to the warrant. Indiscriminate capturing of vast amounts of communications is not permitted under the internal communications provisions of RIPA." (at [160], emphasis added).

164. The RIPA regime relating to interception of external communications remains, therefore, defective and insufficient to comply with Article 8 in that "*indiscriminate capturing of communications*" is permitted. Adequate changes have not been made since *Liberty v UK*.

(b) Absence of independent authorization / effective oversight

165. As the Court recently reaffirmed in the *Telegraaf Media* case, op cit at §98, "*[i]n a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge*". In an appropriate context, and where other safeguards are sufficient, the Court has been prepared to accept that "*independent supervision*" is adequate.

166. In *Klass and Others v Germany* (1978) 2 EHRR 214, the Court held that the practice of seeking prior consent for surveillance measures from the G10 Commission, an independent body chaired by a body chaired by a president who was qualified to hold judicial office and which had power to order immediate termination of the measure, was adequate. The Commissioners under RIPA are not comparable to this practice. Indeed, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Frank La Rue), in a report to the UN Human Rights Council in April 2013, recently noted the lack of judicial oversight in the UK (at §54) and the attendant risk of "*de facto* [] *arbitrary*

approval of law enforcement requests" (UN Doc. A/HRC/23/40 at §56 **[Annex 2/IB1/1016]**).

167. Given the inadequate nature of the safeguards, as set out above, in this context only judicial approval of an external communications warrant could satisfy Article 8. But in any event, there is no approval of such warrants before or after they have been issued. It is a matter that is entirely within the province of the executive.

168. The approach taken under RIPA is also to be contrasted with the approach taken in the US under FISA. Whilst the regime also suffers from deficiencies, it is at least the case that external communications interceptions under section 702 of FISA are subject to approval by the FISA Court, an independent judicial body, as described in the witness statement of Ms Cindy Cohn §39 **[Annex 1/82]**

169. In *Kennedy*, this Court was impressed by the ability for warrants to be challenged in the IPT and the oversight offered by the Interception of Communications Commissioner. However, at least in the context of external warrants, such protections cannot satisfy the requirements of Article 8 (§§166-167).

170. The role of the Interception of Communications Commissioner is supervisory and he has no powers to prohibit or quash an interception warrant. It relates to all bodies who have powers to intercept communications and not just to the UKIS [24]. He examines, *ex post*, warrants on a random basis. There is no evidence that the Interception of Communications Commissioner has ever examined the TEMPORA programme and he has not set out any conditions on the use and examination of material obtained from bulk collection of all external communications. Whilst the Commissioner fulfills a valuable 'watchdog'

[24] As the Special Rapporteur noted in April 2013, "over 200 agencies, police forces and prison authorities are authorized to acquire communications data under the Regulation of Investigatory Powers Act, 2000. As a result, it is difficult for individuals to foresee when and by which State agency they might be subjected to surveillance" (A/HRC/23/40) (§56) **[Annex 2/IB1/1003-1055]**.

role, he cannot be said to compensate for the absence of judicial or independent authorisation of extremely intrusive interception warrants, particularly in the context of external communications that are subject to minimal statutory conditions and limitations.

171. The IPT does have the power to quash an interception warrant or require data to be destroyed. However, it does not constitute a substitute for independent approval of external communications warrants. Under section 65(2) of RIPA the jurisdiction of the tribunal is limited to determining complaints referred to them by members of the public. Since the granting of external communications warrants under section 8(4) such as under the TEMPORA system are not disclosed, individuals are not in a position to challenge such warrants. It is only in the highly unusual circumstances of a leak of information relating to such a warrant that the tribunal could be seized of the matter; and in such a case the individuals whose communications have in fact been examined would not know of this or be likely to challenge it.

172. Indeed, notwithstanding the leaks relating to the TEMPORA programme, the UK Government has refused to confirm or deny the existence of the program or provide any information about external communications warrants granted (in contrast to the approach of the US Government in respect of the PRISM programme).

173. Furthermore, other than a very small number of judgments relating to points of law, the IPT has not published any of its 1469 determinations. Where it dismisses a complaint – as it has done in all but 7 of the cases (see §84 above) – it is precluded from giving any reasons for its decision: RIPA section 68(4) and IPT Rules s.13(1). If it upholds a complaint, its reasons must not reveal any information that is contrary to the public interest which, given the UK Government's policy of neither confirming or denying the existence of any interception warrants obtained by UKIS, would in all likelihood mean that no reasons would be given for such a finding.

174. Nothing which is publicly available suggests that there are any safeguards on the use or further dissemination of data which GCHQ has intercepted and which it or the UK security services share with the NSA or others, who are not themselves bound by Convention standards.

175. Finally, the ISC has not examined the TEMPORA issue. Pursuant to section 2(1) JSA, the ISC has limited authority to examine ongoing operational matters. Its report in July 2013 was limited to consideration of the issue of receipt of information from the PRISM programme by GCHQ.

ii. Generic GCHQ intercept of external communications: Lack of proportionality

176. The generic GCHQ intercept of external communications merely on the basis of the happenstance that they have been transmitted by transatlantic fibre-optic cables is an inherently disproportionate interference with the private lives of the thousands - perhaps millions - of people whose private data has been intercepted and examined by the UKIS for no better reason than its means of transmission.

177. The following are all facts and matters which illustrate the obvious disproportionality of the generic interception of external communications:

177.1. The absence of safeguards analogous to those set out in section 8(1) and 8(2) RIPA in relation to intercept of internal communications, which require authorisation to be targeted on a particular individual or individuals or premises;

177.2. The absence of sufficiently precise criteria for determining when intercepted external communications will be further analysed does not allow such intercept to be used only for targeted and sufficiently important purposes;

177.3. The excessive number of search terms reportedly used and persons reportedly with access to TEMPORA material is inherently disproportionate and the absence of any limits on these or who may supply or authorise them in the legislation;

177.4. Intercept of communication simply because of the means by which it has been transmitted is excessively broad and insufficiently linked with the ostensible purposes for which such intercept occurs. For example, communications sent by persons and from locations not under suspicion are intercepted and then subjected to the search machinery, rendering their communications liable to be further analysed, reported upon and subject to further action;

177.5. Generic external intercept occurs on the basis of an over-broad definition of national security which elides the concept with 'good international relations';

177.6. There are no sufficiently clear safeguards to guard against abuse of the power to intercept and use external communications data either by GCHQ or by foreign security service counterparts, some of whom have been granted direct access to TEMPORA material, who may not be bound by Convention standards; and

177.7. There is no judicial oversight of this process or other satisfactory independent accountability for the reasons set out above.

178. In effect, the power to obtain and use external communications data by means of intercept is unfettered in published law, as long as it is thought broadly to be in the interests of nation security or other of the specified generic purpose. There are no adequate criteria by which a court or tribunal could assess the legality of use of any particular intercept material even if the courts had jurisdiction to do so, which they do not.

IV. STATEMENT RELATIVE TO ARTICLE 35 (1) OF THE CONVENTION

179. The Applicants do not have any effective remedy for the complaints raised in this application in the UK.

180. The first two Applicants sought to bring a claim in the Administrative Court of England and Wales challenging the UK Government's reliance on sections 1 and 3 of the ISA as providing the legal basis for receipt and use of information from foreign intelligence partners. They contended that those provisions provide insufficient protection to comply with Article 8 of the Convention.

181. As required by the UK's Civil Procedure Rules, they sent a *"pre-action protocol"* letter to the UK Government on 3 July 2013 setting out the complaints raised herein and seeking declarations of incompatibility under section 4 of the HRA relating to inadequacies in sections 1 and 3 of the Intelligence Services Act, section 1 of the Security Service Act and/or section 8 of RIPA **[Annex 3/1056-1079]**.

182. In a letter of response dated 26 July 2013 **[Annex 3/1081-1083]**, the UK Government stated that the Applicants could not bring any complaint before the UK courts alleging a violation of Article 8 ECHR because the effect of section 65(2) of RIPA is to exclude the High Court's jurisdiction to hear complaints against UKIS under the HRA. The Government contended that the Article 8 complaints could only be raised in the IPT and, moreover, the High Court would decline to exercise jurisdiction in relation to any associated common law claims that the Applicants might seek to bring given the IPT's statutory jurisdiction. The Treasury Solicitor's letter relied upon *R (A) v B* [2010] 2 AC 1 in which the UK Supreme Court held that the effect of section 65(2) is that the IPT has exclusive jurisdiction to consider complaints under section 7 HRA.

183. Given the position of the UK Government, and the Supreme Court authority of *R (A) v B*, the Applicants were not required to instigate

proceedings in the Administrative Court to exhaust their domestic remedies under Article 35.

184. Article 35 also does not require the Applicants to bring their complaints before the IPT. This court has previously held that the IPT does not provide an effective remedy for complaints concerning the adequacy of the legislative regime in the UK and is not a 'remedy' that has to be exhausted before complaint can be made to this Court. In *Kennedy v. UK* the Court held that applicants did not need to bring complaints in the IPT before making a complaint to this Court. The Court,

> "109 ... recall[ed] that where the Government claims non-exhaustion it must satisfy the Court that the remedy proposed was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. While the Government relies on the *British-Irish Rights Watch* case to demonstrate that the IPT could have issued a general ruling on compatibility, it does not address in its submissions to the Court what benefit, if any, is gained from such a general ruling. The Court recalls that it is in principle appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention in order that the Court can have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries. However, it is important to note in this case that the applicant's challenge to the RIPA provisions is a challenge to primary legislation. If the applicant had made a general complaint to the IPT, and if that complaint been upheld, the tribunal did not have the power to annul any of the RIPA provisions or to find any interception arising under RIPA to be unlawful as a result of the incompatibility of the provisions themselves with the Convention.
>
> No submissions have been made to the Court as to whether the IPT is competent to make a declaration of incompatibility under s.4(2) of the Human Rights Act . However, it would appear from the wording of that provision that it is not. In any event, the practice of giving effect to the national courts' declarations of incompatibility by amendment of offending legislation is not yet sufficiently certain as to indicate that s.4 of the Human Rights Act is to be interpreted as imposing a binding obligation giving rise to a remedy which an applicant is required to exhaust. 26 Accordingly, the Court considers that the applicant was not required to advance his complaint regarding the general compliance of the RIPA regime for internal communications with art.8(2) before the IPT in order to satisfy the requirement under art.35(1) that he exhaust domestic remedies."

185. The Court continued:

> "110 The Court takes note of the Government's argument that art.35(1) has a special significance in the context of secret surveillance given the extensive powers of the IPT to investigate complaints before it and to access confidential information. While the extensive powers of the IPT are relevant

where the tribunal is examining a specific complaint of interception in an individual case and it is necessary to investigate the factual background, their relevance to a legal complaint regarding the operation of the legislative regime is less clear. In keeping with its obligations under RIPA and the Rules, 27 the IPT is not able to disclose information to an extent, or in a manner, contrary to the public interest or prejudicial to national security or the prevention or detection of serious crime. Accordingly, it is unlikely that any further elucidation of the general operation of the interception regime and applicable safeguards, such as would assist the Court in its consideration of the compliance with the regime with the Convention, would result from a general challenge before the IPT."

186. The Court noted in *Kennedy* that no submissions had been made to it as to whether the IPT could make a declaration of incompatibility under the HRA. In fact, it is clear from section 4(5) of the HRA (see §97 above) that the IPT is not included on the list of bodies that can make such a declaration and the Applicants would need to make an application to the High Court, which avenue, as the UK Government has asserted, has been removed by s.65(2) of RIPA.

187. Furthermore, such a declaration does not in any event result in the invalidation of the legislation in question, and this Court has held that it therefore does not constitute an effective remedy in any event: *Burden v United Kingdom* (2008) 47 EHRR 38. This was confirmed in *Malik v United Kingdom* (Application no.32968/11) [2013] ECHR 794 (28 May 2013) in which the Court held that complaints about the general compatibility of powers set out in primary legislation and the adequacies of the statutory regime do not have first to be ventilated in the UK courts or tribunals where the remedy of invalidation is sought.

188. The passages cited above explain why the IPT would not have provided an effective remedy for the Applicants' complaints and why a complaint to that tribunal did not have to be made before bringing this application.

189. In addition to these points, there are also further compelling considerations:

189.1. The IPT, although chaired by a High Court judge, is not a court of law. And RIPA s.67(8) provides that, *"determinations, awards, orders and*

other decisions of the Tribunal ... shall not be subject to appeal or be liable to be questioned in any court." In R (A) v B the Supreme Court recognised that s.67(8), "*constitutes an ouster* (and, indeed, unlike *Anisminic*, an unambiguous ouster) *of any jurisdiction of the courts over the IPT.*" (at [23] (Lord Brown of Eaton-under-Heywood). Therefore, there is no appeal or means of judicially reviewing any decision of the IPT even on the interpretation of the Convention. No authoritative determination of a point of law or compliance of UK law with the Convention can therefore be obtained from the IPT.

189.2. In any event, in its letter dated 26 July 2013, the UK Government pointed out that the IPT has previously considered section 8(4) of RIPA and in an open ruling dated 9 December 2004 (IPT/01/77) has expressed the view that it is compatible with the Convention. Therefore this Court already has the benefit of the IPT's views on this issue, and there is no value in the Applicants pursuing a complaint to obtain a further ruling on that point. Indeed, this ruling was expressly provided to the Court in *Liberty* and examined in detail at paragraphs [13]-[15] and [40] of that judgment.

189.3. Moreover, insofar as the complaint may be said to relate to the absence of primary legislation setting out adequate safeguards on the use of surveillance powers, and the failure of the UK Parliament to enact such laws, there is likewise no remedy available in UK law. As a matter of UK Constitutional Law, the UK Parliament is not to be equated with the British Government. (see for example *Halsbury's Laws of England*, Constitutional Law & Human Rights vol. 8(2) para 15 **[Annex 3/1160]**). The Government is not responsible as a matter of national law for the absence of legislation. An action cannot therefore be maintained against a Secretary of State for Parliament's failure to legislate. This is reflected in the HRA. The cause of action established by section 6 of the HRA for acts or omissions by public authorities that are contrary to Convention rights, "*does not include either Houses of Parliament or a person exercising functions connected with proceedings in*

Parliament": s.6(3). Therefore an action against Parliament for failure to ensure that an adequate regime of primary legislation is in place is not permitted under the HRA.

190. For all these reasons, and on the authority of *Kennedy* and *Malik*, *op cit*, the Applicants are not required to pursue actions in the High Court in England or in the IPT and have satisfied the requirements of Article 35(1).

V. STATEMENT OF THE OBJECT OF THE APPLICATION

191. The Applicants seek:

(i) declarations that their rights under Article 8 of the Convention have been violated and that UK law is not in conformity with the Convention in the respects set out herein; and

(ii) payment of their legal costs and expenses both in the domestic proceedings and in these proceedings under the Convention.

VI. OTHER INTERNATIONAL PROCEEDINGS

192. None.

VII. LIST OF ANNEXED DOCUMENTS

1. Annex 1 - Witness Statement of Cindy Cohn and Exhibit CC1
2. Annex 2 - Witness Statement of Ian Brown and Exhibit IB1
3. Annex 3 - Additional Materials Referenced in Application
4. Annex 4 - Statutory Materials

VIII. DECLARATIONS AND SIGNATURES

193. See Application Form.

30 September 2013