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**THE EXTENT TO WHICH VIDEO SURVEILLANCE IS COMPATIBLE
WITH HUMAN RIGHTS**

By

Mr Vojin DIMITRIJEVIC (Member, Serbia)

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The following text should be understood as complementary with the paper of Mr. Giovanni Buttarelli (CDL(2007)012).

The issue of video surveillance in public places, referred to by the Chairman of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe in his letter of 10 October 2006 raises in the first place questions related to the right described in the title of Art. 8 of the European Convention on Human Rights (ECHR) as "the right to respect for private and family life". Relevant to members of the Council of Europe is also the International Covenant on Civil and Political Rights, which in its title-less Art. 17 prohibits "arbitrary and unlawful interference with [anyone's] privacy, family, home, or correspondence".

The position to be taken depends on answers to several questions. Among them, are the following:

What, in the above context, is video surveillance?

What, in this context, is a public place?

What, in this context, is privacy or the private sphere?

Video surveillance is ultimately observation by human senses of the observer of someone else's behaviour, transmitted by closed circuit television (CCTV). There is a connotation in this expression that observation takes place without the person observed being aware of it (but not necessarily without his/her consent). There is a difference between mere observation in real time, which allows the observer to see and hear more than an average person in the vicinity of the object of observation without the aid of camera equipment. If, however, the observation is recorded and can be repeatedly seen, heard and analysed the human rights of the person observed are more likely to be affected.

A public place is an area which can be accessed by the general public freely and indiscriminately. It cannot be predicted who will be present in the public place at any given time. A private place, protected by the right to privacy, is a place where the number of present is limited by law or by circumstances to those who have the right or the possibility to enter it and remain there. Whereas a person cannot expect not to be noticed, recognised and observed at a public place, they have the right to presume that at private places other persons would be limited by number or quality and can thus adapt his/her conduct accordingly.

The private sphere covers the intimate aspects of a human being's personality, the right of everyone to be protected against unwarranted intrusion by government agencies, the media, or other institutions or individuals. The very broad sphere of private life is not always easy to define, but it certainly includes the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.¹ Moreover, some human rights usually not mention under the rubric privacy have an important element of that nature, such the freedom of thought, conscience and religion (Art 9 ECHR, Art . 18 CCPR).

¹ *X v. Iceland (1976)* 5 European Commission of Human Rights, 86.87. European Court of Human Rights, Case of Klass and Others: Judgment of 6 September 1978, Series A No. 28 (1979). Judgment of 26 March 1987 (Leander Case). A summary is given by the same court in its judgment in *P.G. and J.H. v. the United Kingdom* of 25 September 2001: "Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, *B. v. France*, judgment of 25 March 1992, Series A no. 232-C, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-1, p. 131, § 36). Article 8 also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, ..., opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). It may include activities of a professional or business nature (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and *Halford*, ... p. 1016, § 44). (Para. 56).

Preserving and protecting privacy at a public place poses some specific questions because of the presumption that everyone is aware that by entering a public place and remaining there he/she will be open to the public view and that all passers-by will be free to scrutinise their behaviour and draw corresponding conclusions. Intrusion or interference therefore occur when the invasion of privacy and its possible uses and abuses are not "normal", that is, not expected by every reasonable person appearing in a public place. In all cultures, before entering a public place a person adjusts his/her appearance and demeanour to the possibility of being seen by others.

Most known cases relating to the protection of the right to privacy concern alleged violations of the latter in places that are not public or by means that are not video-observation. Probably the most germane to the subject is the judgment of the European Court of Human Rights (ECtHR) in *Peck v. United Kingdom*.² A man suffering from depression walked alone down the street, with a kitchen knife in his hand, and attempted suicide. He was unaware that he had been filmed by a CCTV camera installed by the local authorities. The camera operator notified the police who arrived at the scene, where they took the knife and detained him suspecting mental derangement and eventually freed. Afterwards photographs were published taken from the CCTV footage supporting favourable publicity for police use of CCTV surveillance. Material obtained at that occasion was thereupon used on a number of media with little or no effort to conceal the applicant's face. The Court observed that, following the disclosure of the CCTV footage, the applicant's actions were seen to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen. The disclosure by the Council of the relevant footage therefore constituted a serious interference with the applicant's right to respect for his private life.

More explicit and richer in content is an *obiter dictum* in the judgment in *P.G. and J.H. v. the United Kingdom*.³:

57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or covert method (see *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V). The Court has referred in this context to the Council of Europe's Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, which came into force on 1 October 1985 and whose purpose is "to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him" (Article 1), such data being defined as "any information relating to an identified or identifiable individual" (Article 2) (see *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II, where the storing of information about the applicant on a card in a file was found to be an interference with private life, even though it contained no sensitive information and had probably never been consulted).

² *Peck v. United Kingdom*, 28 January 2003.

³ *Case of P.G. AND J.H. v. the United Kingdom* (Application no. 44787/98), 25 September 2001.

58. ... the Commission previously had regard, for the purpose of delimiting the scope of protection afforded by Article 8 against arbitrary interference by public authorities, to whether the taking of the photographs amounted to an intrusion into the individual's privacy, whether the photographs related to private matters or public incidents and whether the material obtained was envisaged for a limited use or was likely to be made available to the general public ... Where photographs were taken of an applicant at a public demonstration in a public place and retained by the police in a file, the Commission found no interference with private life, giving weight to the fact that the photograph was taken and retained as a record of the demonstration and no action had been taken to identify the persons photographed on that occasion by means of data processing ...

It is therefore clear that the right to privacy protects a human being on all occasions and pertains to his/her dignity in all places. It is also not likely that the mere observation of a person's appearance and conduct under normal circumstances will not cause grave concerns if it does not serve a purpose which can be detrimental to the privacy, honour and dignity of that person. The dangers to such values increase if the data obtained by surveillance are recorded, which also entails the danger that they can be put not only to illegal but also unexpected and perverse use, as exemplified in the *Peck* case. Camera surveillance in public places has therefore to be seen as the result of a restriction of the right to the respect for private life. Consequently it must conform to the requirements of Art. 8 para. 2 of the ECHR or, according to CCPR, be shown to be "lawful" and not "arbitrary". According to that provision, restrictions of this right must be legal, legitimate and socially necessary:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

To be sure, video surveillance in public places can serve some of the purposes enumerated in Art. 8, para. 2. and can be necessary in a democratic society. It still has to be very clearly regulated by law as a restriction of the right to privacy, which should take account of the specific problems related to the protection of that right in public places.

It can be recommended that states should clearly enact laws or amend their relevant legislation to cover the specific issue of video-surveillance in public places following *mutatis mutandis* the Directive 95/46/EC of the European Parliament and of the EU 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. They are mostly contained in its Chapter II on General Rules on the Lawfulness of the Processing of Personal Data, which in turn are based on Art. 5 of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. It provides that personal data undergoing automatic processing shall be obtained and processed fairly and lawfully; stored for specified and legitimate purposes and not used in a way incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are stored; accurate and, where necessary, kept up to date; preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

According to Art. 6 of the Directive, personal data must be:

- processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

- accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed...

Art. 7 provides that personal data may be processed only if

- the data subject has unambiguously given his consent;
- processing is necessary in order to protect the vital interests of the data subject;
- processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority;
- processing is necessary for the purposes of the legitimate interests pursued ..., *except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject*

The specific problem related to surveillance by CCTV in public places is related to securing that the subject, that is, the person observed, has "unambiguously given his consent". This can be effected by placing signs at appropriate places, as well as securing by other means that the public is aware of the practice of surveying all public places as well as the safeguards as to the treatment of the recorded material.