



Mandate of the Special Rapporteur on the right to privacy

I write in my capacity as the United Nations (UN) Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2, in response to the call for inputs to a report on "the right to privacy in the digital age" published by the Office of the United Nations High Commissioner for Human Rights (OHCHR)¹.

Privacy is a fundamental human right recognized as such under international law. It is also a universal right, one which should be enjoyed everywhere by everybody, as such it should be respected everywhere by everybody, by States as well as by non-State actors, irrespective of the ethnicity, nationality, gender, religious, philosophical or political beliefs of any given individual or any other status. The recognition of the universal right to privacy is part of the set of fundamental norms established in the development of human rights law since World War II.

Due to its complexity, the right to privacy requires a comprehensive legal framework in order to operationalize it in a number of different contexts. These contexts may be as diverse as medical and health, insurance, statistics, national security, finance, police, social security, education and many others. Each context brings with it the need of a detailed and constantly up-dated understanding of how privacy could be threatened within that particular context and an identification of safeguards that protect it, and remedies available to citizens which may be specific to that context. The devil, literally, is in the detail, and privacy requires very detailed rules which spell out the level and modes of protection that privacy may be accorded in a particular context as well as the remedies that a citizen may resort to if his or her privacy is breached in that context. The importance of this level of detail is even greater in the case of privacy since there exists no universally accepted definition of privacy. In other words, people across the world have agreed that the right to privacy exists and that everybody is entitled to such a right but they have not spelt out precisely what the right is or what it entitles a person to in a wide variety of circumstances. This fact has both advantages and disadvantages: too narrow a definition of privacy would restrict its ability to be protected as circumstances and privacy-threats change and also as we develop our understanding of what constitutes privacy-infringing behaviour in a number of changing or new contexts.

The rules and remedies provided for at national law come together with those established under international law to constitute the international legal framework available for the protection of privacy. Those at the national level are most often to be found in an amalgam of principal and subsidiary legislation complemented by the case law of that particular country. The courts of all countries and especially those with constitutional competences interpret the extent – and occasionally the limits – of the right to privacy in accordance with their understanding of that country's constitution, the national law on privacy – if it exists – as well as, often enough, the precepts of international law on the subject. Very importantly, over the past forty years we have witnessed a huge growth in the impact of international law on national law in the sphere of privacy protection. We have seen the concerted development of international law at the regional level, most notably in Europe,

¹ <https://www.ohchr.org/EN/Issues/DigitalAge/Pages/ReportPrivacy.aspx>

which has then guided the development of national law and practices in diverse contexts where privacy may be threatened.

Moreover, privacy is not an absolute right. It is a qualified right. There exist a small number of very special occasions when limitations to the right to privacy may be introduced subject to a number of special measures which are normally best spelt out under international law as well as necessarily having a clear legal basis in domestic law. Some of these will be explored below in the context of security. The way that the right to privacy is qualified needs to be spelt out in great detail in a given context. If limitations to the right to privacy are not adequately defined the gaps in privacy protection will increase.

An additional but essential overall consideration is that constantly developing technologies pose important challenges for the protection of privacy: these technologies may reveal the most intimate behavior, wishes, preferences and indeed the very thoughts of individuals in ways that previously were not possible. Smartphones, credit cards and the Internet are three good examples of the types of technology that bring significant new challenges to the protection of privacy.

When dealing with technologies such as the Internet it is simplistic and naïve to be content with a statement that “whatever is protected off-line is protected on-line”. That is a hopelessly inadequate approach to the protection of privacy in 2018. International law such as Art. 12 UDHR and Art 17 ICPPR only provides an answer to the question “Why?” as in “Why should we protect privacy” i.e. because we have agreed that it is a universal fundamental human right. They however do not provide answers to the questions: When? Which? What? How? Who? When should privacy be protected? How should privacy be protected? Which are the privacy-relevant safeguards to be created in a particular context? Which new contexts pose the greatest risks to privacy? What should be done to protect privacy in given circumstances? Which are the remedies most appropriate and possible in those cases where, despite all the safeguards provided, a breach of privacy still occurs? Who has special duties and obligations in the case of privacy protection, in which circumstances, what measures are the minimum to discharge these obligations and how should such persons be held accountable? The answers to these and other questions can only be found if the international and national legal framework is detailed enough.

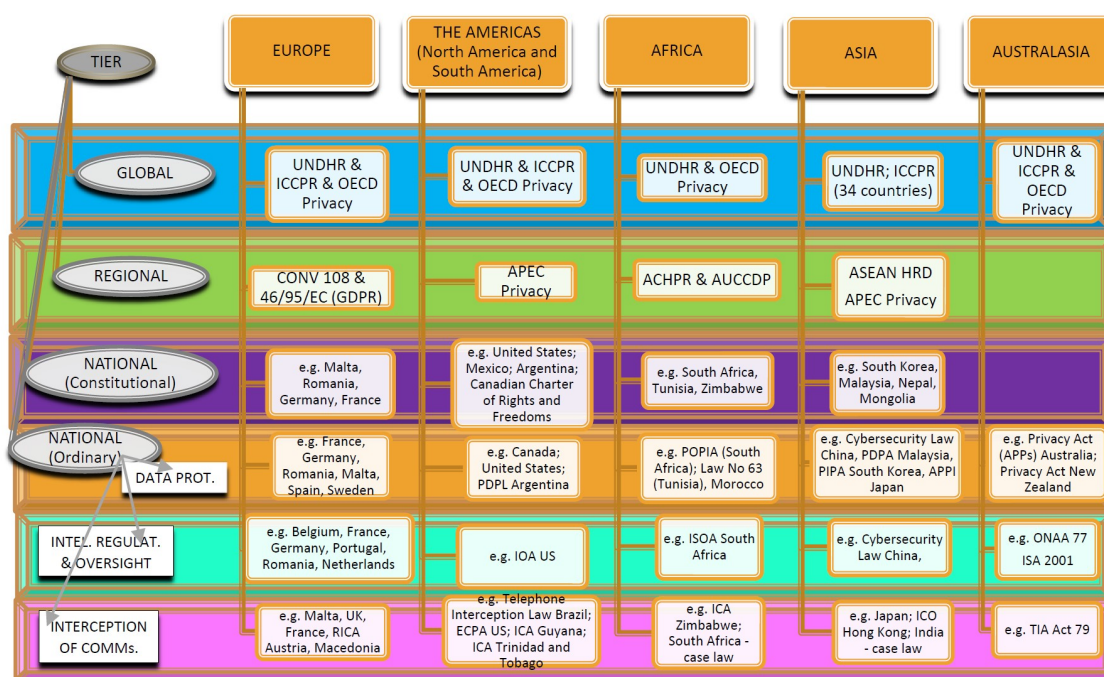
Over the past fifty years some countries and some inter-governmental organizations have taken the initiative to develop their legal framework with respect to privacy but others have not. As a consequence, in 2018 more than a third of United Nations Member States have no privacy laws at all² while most of the other 125 states have laws which cover some of the contexts where privacy may be threatened but not all. Some important threats to privacy especially those arising in the context of national security, intelligence and surveillance are inadequately regulated in most countries of the world. International law, especially in the form of some regional initiatives, helps provide a level of co-ordinated response to some privacy threats for some countries but these remain, at best, a significant minority. The result is a patchwork quilt, in many places crocheted in stitches which are far too open to keep in the warmth and which, in any case, is not large enough to cover all of the bed. This patchwork quilt can in no way be characterized as a comprehensive and sufficiently detailed legal framework through which persons anywhere and everywhere can enjoy the universal right to privacy. It is the duty of the Special Rapporteur on the right to privacy, in conformity with his mandate, to identify the lack of a comprehensive, detailed and universal legal

² Though this does not exclude the possibility that their constitutional courts could be seized of privacy-related matters.

framework as a serious obstacle to the protection of the right to privacy world-wide. The rest of this paper, for reasons of time and space, mostly focuses on the lack of an adequate legal framework in two often-related contexts: national security and the prevention, detection, investigation and prosecution of crime but this is not to say that all other contexts are well served by the international legal framework.

The current international legal framework

The diagram below attempts to sketch out the international legal framework for the protection of privacy which exists so far:



The diagram above is intended primarily to illustrate the tiered structure of the international legal framework but limitations of space do not permit one to clearly see that the tiers in Asia and Africa contain many more gaps and vacant spaces than those in Europe and North America. These gaps are however summarized in the overview text below.

Gaps in protection from government-led surveillance.

The surveillance of citizen behavior on the internet can be broadly categorized into two main types: Government-led surveillance, and, surveillance or monitoring of citizens behavior by private corporations that track citizens browsing, purchasing and other activities on the internet.

This overview analysis is focused on Government-led surveillance and the gaps in protection which currently exist in the international legal framework.

The surveillance and/or monitoring and/or profiling of citizens by corporations will be the subject of a separate report.

What do we understand by a comprehensive legal framework?

A comprehensive legal framework protecting citizens' privacy in cyberspace is one which provides both safeguards and remedies for all facets of the citizens' presence in cyberspace, irrespective of the fact if the threat to privacy comes from inside that citizen's country or from outside it.

Tension has continued to build up in cyberspace, with the privacy of many responsible citizens being put at risk by the behavior of State actors in the form of cyber-surveillance, cyber-espionage and elements of cyber-war.

Problem Statement

In cyberspace, the citizen may be surveilled in both a domestic situation by his or her own Government, or else in a transborder/transnational situation by a Government which is not his/her own. The case studies referenced below outline a fraction of some of the ways in which a citizen in one country finds him/herself subject to infringement of their privacy by their own Government or another State actor.

Where a citizen is subject to surveillance by his/her own Government then the safeguards and remedies must normally be sought within domestic law. Where a citizen is subject to surveillance by a State which is not his own, obligations of both the State conducting the surveillance and the State where that person is physically located are relevant; yet a remedy becomes harder to seek, because in practice most states accord the citizens of other States a lower level of protection than that accorded to their own citizens, in breach of the prohibition of discrimination found in articles 4, and 26 of the ICCPR.

For individuals not to suffer interferences in their right to privacy, they firstly need to benefit from safeguards which exist within domestic law, in other words, their Government should be subject to a whole set of regulatory procedures provided for by the law of that State, and which would include precautionary measures designed to ensure that surveillance cannot be initiated until or unless, it is proven to an independent and competent authority that this surveillance is legal, necessary and proportionate to objective pursued, "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" (UDHR, Art. 29(2)).

Summary overview of protection gaps

In summary: the United Nations has 193 sovereign Member States and two non-member observer States, all of them capable of having their own independent systems/structures such as domestic legislation and data protection authorities.

More than 33 percent of United Nations Member States, i.e. over 70 countries, have no privacy law at all.

Out of the remaining 125 United Nations Member States which do have one form of privacy law or another, (for an outline of these states please see article by Professor Graham Greenleaf in Appendix Two attached) less than 65 have certain key fundamental characteristics such as a truly independent data protection authority or truly strict enforceable safeguards and remedies. Thus, these laws are not homogeneous and the level of protection of privacy differs quite widely from one country to the next.

The types of laws mentioned in Graham Greenleaf's article are mostly those intended to cover the use of personal data by companies or state departments outside the law

enforcement and national security sector. Most of them are therefore not intended to adequately and comprehensively cover the use of surveillance by intelligence agencies.

More than 80 percent of the United Nations Member States do not have any law which protects privacy by adequately and comprehensively overseeing and regulating the use of domestic surveillance.

100 percent of existing State legislations concerning the oversight of domestic intelligence within United Nations Member States require amendment and reinforcement.

75 percent of United Nations Member States have no system of detailed safeguards or remedies to which they can readily turn to for cases of surveillance upon their citizens by other states. Even where remedies for citizens exist within the courts of those States, these courts often lack jurisdiction over the surveillance behavior of other State actors.

25 percent of United Nations Member States – those within the European region encompassed by the Council of Europe, have agreed to a basic principle in the application of privacy law to state security: by agreeing to Article 9 of Convention 108 they have accepted that measures can only limit the right to privacy where these measures are provided for by law and are necessary and proportionate in a democratic society.

This however means that it is only the very highest principles that have been agreed to, even in European states with more developed legislation on the right to privacy and this is mostly applied in the case of domestic intelligence. The situation relating to foreign intelligence is much more fluid, elastic. What actually constitutes a necessary and proportionate measure in a democratic society then needs to be translated into very detailed legislation and this is still very much work-in-progress all across Europe. Belgium, the Netherlands and the United Kingdom are some of the European states currently reviewing their legislation in order to improve compliance with basic principles in a detailed manner. France has done so in 2015 but intends to re-visit its legislative framework in the near future.

Even where legislation exists regarding the oversight of intelligence it is often largely silent on what happens when personal data is shared across borders and what further safeguards should be put in place in such cases.

In the absence of more detailed regulation, several United Nations Member States have to rely on their existing legislative and judicial frameworks, often at the national constitutional or the regional level in order to develop remedies and safeguards on the hoof. This works slowly but relatively well at the European levels where the European Court of Justice and the European Court of Human Rights often have pan European reach with their judgments about surveillance and privacy³. This however is not a completely satisfactory

³ *The Snowden revelations – 6 June 2013 – ongoing reverberations across Europe*

The revelations over mass surveillance and other privacy –intrusive programmes carried out by the signals intelligence arms of the United Kingdom and United States intelligence communities have not really receded. They have been followed by legislative changes in both countries, sometimes imposing more constraints and safeguards, on other occasions legitimizing existing practices. The unilateral nature of transborder forays by United States and/or United Kingdom agencies into Belgium, Brazil, France, Germany and other countries led to a great deal of concern which still finds its reverberations in various fora, international and otherwise. Both countries are still struggling to find the right formula to frame their behaviour in cyberspace such that, for example, the legislative measures of the United Kingdom would be found necessary and proportionate by either the European Court of Human Rights or the European Court of Justice. The United Kingdom's intelligence services were found to be in default on several counts by the UK's own Investigatory Powers Tribunal while the United Kingdom law on bulk collection of metadata has been declared disproportionate by the European Court of Justice on the 21st December 2016. An important decision in this respect is also being expected in a case first heard by the European Court of Human Rights on 7th November 2017, *Big Brother Watch and Others v. the*

solution since it is one ex post. Very preferably citizens wish to have their privacy protection provided ex ante and this, especially to protect themselves against or minimize intrusion. In order to resolve problems of jurisdiction in cyberspace, this can be only provided by detailed international law which does not yet exist in the surveillance sector, including in the European region. If the remedies are unclear and imperfect in Europe where the European Court of Human Rights has relatively worked well with over 100,000 cases decided since it was established in 1959, the situation outside Europe is even more concerning. In the Americas, the Inter-American Court of Justice established in 1979 has cross-country reach, as so has in Africa the recently set-up (2006) African Court for Human and People's Rights. Both courts strive but struggle. The United States signed but never ratified the American Convention on Human Rights and, unlike the European human rights system, individual citizens of Member States of the Organization of American States cannot take their cases directly to the Inter-American Court, having to refer first to the Inter-American Commission on Human Rights. Likewise, only seven African states have signed the protocol empowering their regional court to receive petitions from non-governmental organizations and individuals. These limitations substantially weaken the reach of these regional courts. Moreover, in Asia or the Pacific there is no regional court to turn for infringements of privacy whether caused by domestic intelligence or foreign intelligence.

The United Nations Human Rights Committee plays a very important role in the protection of human rights, but once again is largely an ex post forum and cannot be expected to provide in-depth regulation and governance structures, which are the required minimum adequate legal response to questions like transborder data flows and cross-border espionage and surveillance.

In order to better understand the protection needs in the privacy area, one has to take the Yahoo cases⁴ cited below and ask "which ex ante safeguards should have been applied by

United Kingdom (no. 58170/13), Bureau of Investigative Journalism and Alice Ross v. the United Kingdom (no. 62322/14) and 10 Human Rights Organisations and Others v. the United Kingdom (no. 24960/15).

⁴ The following two cases are being cited for purposes of illustrating a problem area but are not here being represented as facts proving certain types of behaviour by the United States or Russian authorities. The Special Rapporteur on the right to privacy reserves the right to investigate these cases separately through Letters of Allegation and until doing so remains neutral on the accuracy or otherwise of media and governmental reports on the subject:

Case 1: Privacy of 500 million Yahoo! users infringed – 15 March 2017

Formal indictments were brought in the United States of America by the Justice Department, which announced on 15 March 2017 that the "indictments of two Russian spies and two criminal hackers in connection with the heist of 500 million Yahoo user accounts in 2014, marking the first United States criminal cyber charges ever against Russian government officials. The indictments target two members of the Russian intelligence agency FSB, and two hackers hired by the Russians. The charges include hacking, wire fraud, trade secret theft and economic espionage, according to officials."

While this case remains sub judice and therefore the evidence available has not yet had time to be exhaustively evaluated by the court in question, the nationality of the accused and the locus of the judicial proceedings are almost immaterial for the purposes of this observation. The point here is that the spread of the damage was global, possibly the largest or one of the largest intrusions in history on the private e-mail accounts of five hundred million Yahoo! users spread across the planet. If it transpires that the men indicted were not responsible after all, we are still left with the problem of the nature and scale of the attack in addition to the instability induced by public accusations made against Russia. If the guilt of the accused is eventually proved beyond reasonable doubt then the problem would be compounded by the involvement of state officials who may or may not have been acting on instructions. Either way the suspicion of their acting as agents of the Russian state is already a destabilising factor in international relations and threatening all forms of peace, above and beyond cyber-peace. The violation of the personal space of hundreds of millions of internet users has not, to date, attracted much attention but it remains a source of major concern to those involved, over and above the charges actually made in the indictment.

which country in order to protect citizens in, say France, from having their Yahoo e-mail account privacy infringed and what ex post remedies are available to that same French citizen?” The answers to these questions can only be provided by a detailed international law regime which has yet to be worked out. The Human Rights Committee’s interpretative advice of ICCPR’s article 17 should be a last resort; it cannot be the primary mechanism designed to protect the privacy of billions of people who use the Internet on a daily basis.

Thus it should be glaringly evident from the above summary that huge gaps exist in the legal protection of privacy at both the national and international levels. Unless and until it will be possible for any citizen, anywhere, irrespective of passport held, to enjoy privacy protection without borders and privacy remedies across borders, then it cannot be said that “a clear and comprehensive legal framework exists”. In order to create such a clear and comprehensive legal framework it is essential that an international legal regime regulating issues of jurisdiction in cyberspace be properly developed, with a commonly agreed set of principles to establish what state behavior in cyberspace and that especially related to surveillance and cyber-espionage, is acceptable, why and when.

Case 2: Privacy of 500 million (?) Yahoo! users breached by United States agency (reported 4th October 2016)

If you’re a Yahoo! e-mail user, if it’s not one government hacking into your e-mail account or scanning your incoming e-mail, then it’s another. Or at least un-contradicted media reports so suggest. For some time during the period 2014-2016, hundreds of millions of Yahoo! e-mail users apparently not only suffered the most massive hack in history as already mentioned above (allegedly by a combination of Russian criminal and state-connected persons) but also had their incoming mail scan-read on the orders of a United States Government agency. There are multiple causes for concern here. Firstly, all those Yahoo! users within the United States may arguably claim that such searches violated their Fourth Amendment rights under the United States constitution, although the scan-reading was carried out in terms of lower-level United States law (FISA). Secondly, it should be clear to all concerned that well more than half of those five hundred million Yahoo users are not United States citizens and would need to seek recourse elsewhere for protection of their fundamental and universal right to privacy...but where to do so is the obvious question. Even if this were ever to be considered a proportional measure – and that is a contentious point in its own right, unless there were to be an international agreement that this would constitute appropriate state behaviour in cyberspace, hundreds of millions of citizens world-wide yet again find themselves without any effective safeguards or remedies when it comes to their fundamental right to privacy.