A Concrete Proposal to Enshrine the Necessary and Proportionate Principles Explicitly in International Law

Presented to the 18-19 January 2018 meeting of the UN Special Rapporteur on the Right to Privacy

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On 30 June 2014, pursuant to Resolution 68/167 of the United National General Assembly, the United Nations High Commissioner for Human Rights (HCHR) published a report[2] on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale.

The Association for Proper Internet Governance (APIG) thanks and commends the High Commissioner for this courageous, frank, objective, well reasoned and balanced report.

We note in particular that paragraph 14 of the report rightly confirms what was expressed by Dilma Rousseff, President of Brazil, in her 24 September 2013 speech at the UN General Assembly: *"In the absence of the right to privacy, there can be no true freedom of expression and opinion, and therefore no effective democracy."*

We also notes that paragraph 26 of the report rightly states that mandatory third-party data retention appears neither necessary nor proportionate, thus confirming a recent ruling[3] of the European Court of Justice. Such data retention may not be consistent with human rights, unless strict limitations are placed on its use (see paragraph 27 of the report).

And we note that paragraphs 32 to 36 of the report convincingly demonstrate that states must respect the privacy of non-residents and non-nationals, contrary to what has been argued[4] by the United States of America

We note that the forthcoming ITU Plenipotentiary Conference provides an excellent opportunity to transpose into binding treaty language the recommendations made in the High Commissioner's report, and thus to confirm in clear and unambiguous language what is in fact already implied by international law.

Specifically, Article 37 of the ITU Constitution covers the secrecy of telecommunications. The current provisions appear to be too weak and should be strengthened. Thus, states should agree to amend paragraph 2 of Article 37, and to add new paragraphs 3 and 4, as follows (the revisions are shown as underlined red text):

> 1 Member States agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.
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> 2 Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their national laws or the execution of international conventions to which they are parties. However, any such

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[1] http://www.apig.ch/

[2] http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf

[3] http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d632e654e556ef4d8587bb898b9623b8c2.e34KaxiLc3qMb40Rch0SaxuOa310?text=&docid=150642&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=163210

[4] http://www.ohchr.org/Documents/Issues/Privacy/United%20States.pdf

communication shall take place only if it is held to be necessary and proportionate by an independent and impartial judge.

3 Member States shall respect the secrecy of telecommunications in accordance with both their own laws and the laws of the state of the originator of such correspondence.

4 Third parties shall not be required to retain telecommunications data or metadata. However, end-users may be required to retain data and metadata for a reasonable period of time and be requested to produce it if ordered to do so by an independent and impartial judge.

The proposed new paragraph 4 recognizes that mandatory third-party data retention is neither necessary nor proportionate, and thus violates human rights, but that law enforcement authorities have a legimitate right to seek information in certain cases. The approach proposed in the new paragraph 4 is the same as that used for tax compliance, compliance with accounting rules, etc.: the citizen is responsible to keep records and to produce them upon request; of course a citizen can refuse to produce the data, in particular if he or she knows that producing the data will incriminate him or her. In the case of telecommunications data and metadata, users may well outsource the data retention task to their telecommunications supplier, but the data would remain under the exclusive control of the user, who would be responsible to respond to court orders for discolure.

We recognize that it may be difficult to find consensus (or even the requisite qualified majority) to amend the ITU Constitution as proposed above.

An alternative approach would be for the ITU Plenipotentiary Conference to adopt a resolution (which can be done by simple majority) that interprets the current text. Since interpretation of treaties is the sovereign right of states, and since the Plenipotentiary Conference is the authoritative body for what concerns the ITU Constitution, such a resolution would, in practice, be equivalent to amending the text. A precedent of using an ITU Resolution to, in practice, change the understanding and effect of a provision of the Constitution is found in Resolution 114 (Marrakesh, 2002), "Interpretation of No. 224 of the ITU Constitution and No. 519 of the ITU Convention with regard to deadlines for submitting proposals for amendments."

A proposed Resolution regarding article 37 of the ITU Constitution is found in Annex 1 of this paper.

Yet another alternative would be for the Human Rights Council to adopt a Resolution that interprets the current text of the ITU Constitution. A proposed Resolution is found in Annex 2 of this paper.

Annex 1

Proposed ITU Resolution

Interpretation of Article 37 of the ITU Constitution on secrecy of telecommunications

The Plenipotentiary Conference of the International Telecommunication Union (Dubai, 2018),

considering

Article 37 of the ITU Constitution on Secrecy of telecommunications,

recalling

a) that Article 12 of the Universal Declaration of Human Rights provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence …",

b) that Article 17.1 of the International Covenant on Civil and Political Rights provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …",

recalling further

a) the 18 December 2013 General Assembly Resolution on the right to privacy in the digital age (A/RES/68/167),

b) paragraphs 14, 26, and 32 to 26 of the 30 June 2014 Report of the United Nations High Commissioner for Human Rights (A/HRC/27/37),

c) the 19 October 2017 Report of the Special Rapporteur on the right to privacy (A/72/43103),

resolves

that Article 37 of the ITU Constitution shall be interpreted as including the following provisions:

- at the end of paragraph 2, "However, any such communication shall take place only if it is held to be necessary and proportionate by an independent and impartial judge",
- after paragraph 2, "Member States shall respect the secrecy of telecommunications in accordance with both their own laws and the laws of the state of the originator of such correspondence",
- after the above paragraph, "Third parties shall not be required to retain telecommunications data or metadata. However, end-users may be required to retain data and metadata for a reasonable period of time and be requested to produce it if ordered to do so by an independent and impartial judge".

Annex 2

Proposed Human Rights Council Resolution

Interpretation of Article 37 of the ITU Constitution on secrecy of telecommunications

The Human Rights Council,

Considering Article 37 of the ITU Constitution on Secrecy of telecommunications,

Recalling that Article 12 of the Universal Declaration of Human Rights provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence …",

Recalling also that Article 17.1 of the International Covenant on Civil and Political Rights provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …",

Recalling further the 18 December 2013 General Assembly Resolution on the right to privacy in the digital age (A/RES/68/167),

Recalling further also paragraphs 14, 26, and 32 to 26 of the 30 June 2014 Report of the United Nations High Commissioner for Human Rights (A/HRC/27/37),

Recalling further also the 19 October 2017 Report of the Special Rapporteur on the right to privacy (A/72/43103),

Calls upon all States

To interpret Article 37 of the ITU Constitution as including the following provisions:

- at the end of paragraph 2, "However, any such communication shall take place only if it is held to be necessary and proportionate by an independent and impartial judge",
- after paragraph 2, "Member States shall respect the secrecy of telecommunications in accordance with both their own laws and the laws of the state of the originator of such correspondence",
- after the above paragraph, "Third parties shall not be required to retain telecommunications data or metadata. However, end-users may be required to retain data and metadata for a reasonable period of time and be requested to produce it if ordered to do so by an independent and impartial judge".