

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

Richard Hill

18 January 2018

Meeting of the UN Special  
Rapporteur on the Right to Privacy  
Rome, Italy

# Outline

- Basic principles
- Snowden's allegations
- A way forward
- Call for action
- Concrete proposal

“In the absence of the right to privacy, there can be no true freedom of expression and opinion, and therefore no effective democracy.”

Dilma Rousseff, President of Brazil, 24 September 2013  
speech at the UN

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” (emphasis added)

[Art. 12, The Universal Declaration of Human Rights](#)

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law 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.” (emphasis added)

[Art. 29.2, The Universal Declaration of Human Rights](#)

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

(emphasis added)

“2. Everyone has the right to the protection of the law against such interference or attacks.”

Art. 17, International Covenant on Civil and Political Rights

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, ...” (emphasis added)

US Declaration of Independence (1776)

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Amd. 4, US Constitution (art. 4 of Bill of Rights), drafted 1789  
approved 1791

“4. Liberty consists of the power to do whatever is not injurious to others; thus the enjoyment of the natural rights of every man has for its limits only those that assure other members of society the enjoyment of those same rights; such limits may be determined only by law.

5. The law has the right to forbid only actions which are injurious to society. Whatever is not forbidden by law may not be prevented, and no one may be constrained to do what it does not prescribe.

6. Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives in its formation; it must be the same for all, whether it protects or punishes. All citizens being equal before it, are equally admissible to all public offices, positions, and employments, according to their capacity, and without other distinction than that of virtues and talents.” (emphasis added)

[French Declaration of the Rights of Man and Citizen \(1789\)](#)

“In the absence of the respect for sovereignty,  
there is no basis for the relationship among  
Nations.”

Dilma Rousseff, President of Brazil, 24 September  
2013 speech at the UN

# Snowden's allegations

- US security agencies conduct widespread surveillance
  - Judicial supervision for US persons
  - Limited judicial supervision for surveillance abroad
  - Various methods used to defeat encryption
  - US-based companies must cooperate and cannot always disclose the cooperation
- Other nations' security agencies also conduct widespread surveillance
- Knowledgeable people knew about this, but not all ordinary Internet users knew

See Bernard E. Harcourt, *Exposed: Desire and Disobedience in the Digital Age*, Harvard University Press (2015), in particular Chapters 2 and 4

# Voluntary waiver of data privacy (1/2)

One example (contract agreed by click)

- We use the information that we receive for the services that we offer to you, and to other users such as your friends, our partners, advertisers who purchase publicity on the site, and developers of games, applications and web sites (emphasis added)

➤ So you are the product that they sell

See Bernard E. Harcourt, *Exposed: Desire and Disobedience in the Digital Age*, Harvard University Press (2015), in particular Chapters 1 and 7

# Voluntary waiver of privacy (2/2)

## **Your information is the product:**

- It can be used to target political campaigns
- State security agencies may be able to access it (and build profiles by cross-referencing)
- It can be a very profitable business

Regarding the second bullet, see Junichi P. Semitsu, “From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance”, *Pace Law Review*, Vol. 31, no. 2 (2011)

# Way Forward (1/4)

“The Nation also needs a strategy for cybersecurity designed to shape the international environment and bring like-minded nations together on a host of issues, such as technical standards and acceptable legal norms regarding territorial jurisdiction, sovereign responsibility, and use of force. ... differing national and regional laws and practices—such as laws concerning the investigation and prosecution of cybercrime; data preservation, protection, and privacy; and approaches for network defense and response to cyber attacks—present serious challenges to achieving a safe, secure, and resilient digital environment. Only by working with international partners can the United States best address these challenges, enhance cybersecurity, and reap the full benefits of the digital age.” (emphasis added)

[Cyberspace Policy Review, US Government \(March 2009\)](#)

# Way Forward (2/4)

“The United States needs to develop a strategy designed to shape the international environment and bring like-minded nations together on a host of issues ... [see previous slide] Addressing these issues requires the United States to work with all countries— including those in the developing world who face these issues as they build their digital economies and infrastructures— plus international bodies, military allies, and intelligence partners. ” (emphasis added)

[Cyberspace Policy Review, US Government \(March 2009\)](#)

# Way Forward (3/4)

“The United States is leading the way in an international dialogue to achieve greater cooperation among nations to defend against cyber threats. In partnership with like-minded nations and allies across the world, the United States has taken a lead role in international institutions, such as the United Nations, to make cybersecurity an international priority. ... In the U.N. Group of Governmental Experts (GGE) on cybersecurity, the United States is working to build understanding around the applicability of international law to conflict in cyberspace.” (emphasis added)

[Cybersecurity Progress after President Obama's Address \(14 July 2010\)](#)

# Way Forward (4/4)

“Our pursuit of cybersecurity will not -- I repeat, will not include -- monitoring private sector networks or Internet traffic. We will preserve and protect the personal privacy and civil liberties that we cherish as Americans.”

Barack Obama, President of the USA, *Remarks by the President on Securing Our Nation's Cyber Infrastructure* (29 May 2009)

Note: Prism started in 2007

# Call for action(1/3)

- Explicitly enshrine in international law best practices based on existing human rights obligations
  - Recall the 13 principles put forward by a large number of civil society organizations at:  
<https://en.necessaryandproportionate.org/text>

# Call for action (2/3)

Rough summary of the “necessary and proportionate” principles

- Any limitation to the right to privacy must be prescribed by law.
- Laws should only permit surveillance to achieve an aim that is legitimate in a democratic society
- Surveillance must be limited to what is strictly and demonstrably necessary
- Proportionality must be enforced by an independent judicial authority

# Call for action (3/3)

Rough summary of the “necessary and proportionate” principles

- There should be limited exceptions to user notification of surveillance
- States should be transparent about surveillance
- There should be public oversight

# Concrete proposal (1/3)

Revise Art. 37 of the ITU Constitution, on Secrecy of telecommunications, as follows:

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

# Concrete proposal (2/3)

Revise Art. 37 of the ITU Constitution, on Secrecy of telecommunications, as follows:

- 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.

# Concrete proposal (3/3)

- Alternatively, the ITU Plenipotentiary Conference adopts a Resolution that:
  - Resolves that Article 37 of the ITU Constitution shall be interpreted as including the provisions mentioned above
- Alternatively, the Human Rights Council adopts a Resolution that:
  - Calls upon all States to interpret Article 37 of the ITU Constitution as including the provisions mentioned above