Privacy and Surveillance

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Abstract

Information and Communications Technologies provide powerful tools for collecting, storing and processing personal data. Such tools can be used by both the private sector and the Government, and in both cases they should comply with strict standards on the protection of the fundamental right to privacy. Edward Snowden?s denunciations of mass spying by the United States National Security Agency gave rise to a global general interest in the surveillance of citizens worldwide. Although PRISM-based programs and rules have been a reality for many years, Snowden's episode does not lose its relevance. States, civil society organizations and technical community has now a precious opportunity to set a needed path for the construction of global solutions to this issue within the Internet governance ecosystem. The purpose of this submission is to contribute to this discussion.

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In addition to enhancing the dissemination of ideas and opinions and allowing for the creation and manifestation of diversity, Information and Communications Technologies

also provide powerful tools for collecting, storing and processing personal data. Such tools can be used by both the private sector and the Government, and in both cases they must comply with strict standards on the protection of the fundamental right to privacy. Internationally, this right is provided for in article XII of the Declaration of Human Rights, which protects one from any arbitrary or illegal interference with its private life and assures the protection of law against such interferences and attacks. Similar provision is given under article 17 of the International Covenant on Civil and Political Rights, among others. Different national and regional laws also include the right to privacy with more or less details. In Brazil, privacy protection is an indelible clause ("cláusula pétrea") of the Brazilian Federal Constitution of 1988, covering the inviolability of the communications (articles 5, X and XII), and is part of the Brazilian Internet Use and Governance Principles approved by CGI.Br - Comitê Gestor da Internet no Brasil, (Brazilian Internet Steering Committee) in 2009.Its strict relation with the exercise of freedom of expression, with the access to the information and with the base principles of a democratic society was reaffirmed in the recent UN resolution "The Right to Privacy in the Digital Age", proposed by Brazil and Germany and supported by 55 co-sponsorsing countries.Edward Snowden's denunciations of mass spying by the United States National Security Agency gave rise to a global general interest in the surveillance of citizens worldwide. Although PRISM-based programs and rules have been a reality for many years, such as the Echelon Program or the Communications Assistance for Law Enforcement Act (CALEA), Snowden's episode is quite relevant for some reasons.The first and most important of them is the opportunity that is opened for reviewing such practices in reply to the coordinated international reaction. The second one is the increased understanding that any reaction implies recognition of the global scale of the network, and therefore the international effort to set parameters and control mechanisms for surveillance. The third one consists of evidences that the fight against spying goes through telecommunication networks, different Internet layers, hardware and software.The question, therefore, is how to protect the privacy and the personal data in this context.The current international Internet governance ecosystem lacks a proper body with authority to discuss and coordinate solutions from the perspective of human rights protection. Multistakeholder spaces such as the Internet Governance Forum (IGF) or the UN Commission on Science and Technology for Development (CSTD) could be structured as bodies responsible for coordinating discussions and actions and entitled to make recommendations to other international bodies towards more effective privacy protection globally.Given the current international law and human rights perspective, CGI.br also considers that the definition of parameters for ensuring privacy of communications must be based on some fundamentals: - Initially, the principle of legality must be respected, i.e., the need for clear and accurate legal provision for cases where communication surveillance is admitted must be ensured. These law provisions must confer such powers only upon authorization by the competent judicial authority and for a legitimate aim clearly delimited that serves to the protection of relevant legal interests required in democratic societies. Communications surveillance may not be established based on discrimination of race, color, religion, gender, language,

nationality, social origins, political opinions, or other similar criteria.- Such limitations to privacy in communications must be necessary, adequate and proportional considering the legitimate goals intended to be achieved. “Necessary”, because it must be the only means or the least offensive alternative to human rights able to effectively achieve the intended legitimate aim. “Adequate” because it is necessary that it is proper to achieve this specific aim. “Proportional”, because it must always be considered that the practice of surveillance is harmful to the exercise of fundamental rights and to democracy. In such context, the adoption of these practices must entail the balancing of the seriousness involving the breach of privacy in relation to the legitimate aim intended to be achieved, with the establishment of measures and differentiated degrees of intrusion for criminal investigations and other investigations.- The limitations to the right to privacy on communications must be determined by a competent and impartial judicial authority that is independent from other authorities that conduct the surveillance proceedings. Court order shall be issued in the due process, subject to the procedures provided for by law, publicly known and in line with the protection of human rights. Full legal defense cannot be excluded also, and user notification may be waived or postponed only in specific cases set forth by law- Transparency of the States in the use and scope of the techniques and powers related to communications surveillance is required. Periodic reports must give information about refused and approved requests, about what is the service provider that has received them and about the type of investigation. The applicable legislation and the procedures put in place by the service providers, regarding those requests, also must be publicly available. The practice of surveillance by the State must be under the supervision of other entities. The compliance of these measures, however, doesn’t avoid the concern that the surveillance on communications may compromise the integrity, security and privacy of the communication system. - Finally, it is relevant to establish protection related to the international cooperation on the provision of data and against the illegitimate access to the information of users. In the first case, among others, it is important to assure international standards with high level of human rights protection by means of agreements clearly documented, publicly available, and subjected to the guarantees of procedural fairness. In the second case, it’s necessary that countries are encouraged to consider on their legal systems the appropriated responsibility to improper usage and providing of data, as well as stipulate defense mechanisms to the individuals affected. The legal protection of privacy may also imply the guarantee of data destruction or its return to the individuals as soon as the material obtained through surveillance procedures has accomplished the purpose for which it has been collected.

These fundamentals are inspired by a proposal developed by different international civil society organizations and supported by more than 400 entities around the world, entitled “International Principles on the Application of Human Rights to Communications Surveillance” (available at https://en.necessaryandproportionate.org).