Statement regarding the Report of the Office of the UN High Commissioner for Human Rights on The right to privacy in the digital age of 30 June 2014, A/HRC/27/37

The Just Net Coalition[1] (JNC) was formed at a civil society meeting in New Delhi in February 2014. It comprises several dozen organisations and individuals from different regions globally concerned with internet governance, human rights and social justice, and the relationship between them.

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 Just Net Coalition (JNC) thanks and commends the High Commissioner for this courageous, frank, objective, well reasoned and balanced report. JNC notes that the report confirms an element of our Delhi Declaration[3], namely that *"All people have the right to privacy, and to use the Internet without mass surveillance. Any surveillance, on grounds of security concerns or otherwise, must be for strictly defined purposes and in accordance with globally accepted principles of necessity, proportionality and judicial oversight."* We reiterate in this context our disappointment[4] that a clear statement to that effect was not included in the NETmundial outcome document.

JNC notes 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."*

JNC 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[5] 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).

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1 http://justnetcoalition.org

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

3 http://justnetcoalition.org/delhi-declaration

4 http://justnetcoalition.org/jnc-response-netmundial-outcome-document

5 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

And JNC notes 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[6] by the United States of America. We recall in this context that both NETmundial[7] and the WSIS+10 High Level[8] Event clearly stated that states and governments are responsible for protecting human rights online as well as offline.

JNC notes with approval the statements on the High Commissioner's report by the Electronic Freedom Foundation's[9] and Article 19[10] and it associates with those statements.

JNC also notes the statements by Privacy International[11] and the Center for Democracy and Technology[12] but finds them less forthright and convincing, in particular because Privacy International implies that the High Commissioner's report makes ground-breaking findings, whereas we believe that it confirms well-known international law; and both Privacy International and the Center for Democracy and Technology imply that certain current practices "may" be illegal whereas we believe that they are flagrantly illegal.

JNC calls on all states, including states that, to date, have resisted calls to curtail mass surveillance—in particular the USA, UK, and Sweden—**to embrace to the High Commissioner's report and to accept its recommendations in full and without reservation.** Constructive and objective criticism of the report is of course, welcome.

JNC notes 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. That is, we are of the view that it would be appropriate to consider specifying key principles clearly and specifically in international law, so that national legislators will have clear guidance when enacting national laws; that clear guidance should help to avoid the current situation, where some national laws are not consistent with international law.

In this light we offer below some proposals that, we trust, will lead to constructive discussion of the issues.

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:

> 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 judicial authority. Further, an independent oversight body shall

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6 http://www.ohchr.org/Documents/Issues/Privacy/United%20States.pdf

7 http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf

8 http://www.itu.int/wsis/implementation/2014/forum/inc/doc/outcome/362828V2E.pdf

9 https://www.eff.org/deeplinks/2014/07/un-human-rights-report-and-turning-tide-against-mass-spying

10 http://www.article19.org/resources.php/resource/37622/en/un:-human-rights-watchdog-slams-governments'-mass-surveillance-programmes

11 https://www.privacyinternational.org/blog/un-privacy-report-a-game-changer-in-fighting-unlawful-surveillance

12 https://cdt.org/press/top-un-human-rights-official-us-mass-foreign-surveillance-programs-may-be-illegal/

ensure transparency and accountability of any such communications, and the frequency and extent of any such communications shall be publicly reported at least annually.

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, applying whichever has the stronger privacy protections.

4 Third parties shall not be required to retain telecommunications data or metadata.

The term "originator" in paragraph 3 above refers to the person or entity that initiates the communication, that is, the sender of the communication.

The proposed new paragraph 4 recognizes that mandatory third-party data retention is neither necessary nor proportionate, and thus violates human rights. Of course law enforcement authorities have a legitimate right to seek information in certain cases, but that right should be enforced through existing laws, on the basis of the principle that "offline laws apply equally online". For example, there are obligations to retain records for tax compliance, compliance with accounting rules, etc.: the citizen is responsible to keep certain (but not all) 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. That is, we propose that retention of telecommunications data and metadata be treated exactly the same as retention of other data: there should be no general requirement for systematic retention of records of all electronic communication, just as there is no general requirement for systematic retention of all correspondence.

JNC calls on all states to support those proposed changes to the ITU Constitution, and, at the same time, to recognize that, as stated in our Delhi Declaration, *"All people have the right to freedom of expression and association online. Any restrictions, on grounds of security concerns or otherwise, must be for strictly defined purposes and in accordance with globally accepted principles of necessity, proportionality and judicial oversight."*

In that light, it may be appropriate to consider modifying article 19 of the International Covenant on Civil and Political rights, as follows:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are held to be necessary and proportionate by an independent and impartial judicial authority:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public)~~, or of public health or morals~~.

And it may be appropriate to consider modifying paragraph 2 of Article 34 of the ITU Constitution as follows:

2 Member States also reserve the right to cut off, in accordance with their national law, any other private telecommunication which is~~may appear~~ dangerous to the security of the State or contrary ~~to its laws,~~ to public

order ~~or to decency~~. However, any such cut off shall take place only if it is held to be necessary and proportionate by an independent and impartial judicial authority.

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