The UN Special Rapporteur: Advancing a global privacy treaty?

Graham Greenleaf, Professor of Law & Information Systems, UNSW Australia

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On 1 July 2015 the President of the Human Rights Council of the United Nations, Mr Joachim Rücker (Germany) recommended to the Secretary–General of the UN the appointment of Mr Joseph Cannataci as the first holder of a new position, Special Rapporteur on the Right of Privacy. This brief article[1] surveys the role the UN has played in the protection of privacy to date, and considers what roles (if any) the Special Rapporteur could play in advancing the development of a global privacy treaty.

The United Nations and privacy protection

The UN's *International Covenant on Civil & Political Rights 1966* (ICCPR) includes in Article 17 the requirement that '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' and that 'everyone has the right to the protection of the law against such interference or attacks.' These are largely the same requirements as are found in Article 8 of the European Convention on Human Rights (ECHR). Most countries have ratified the ICCPR, except a few in Asia, with China the exception among major countries.[2] Because the ICCPR is a treaty binding in international law, Article 17 is the world's most widely adopted privacy obligation.[3]

The UN Human Rights Committee (UNHRC), which administers the ICCPR and other UN human rights treaties, issued General Comment 16 (1988) which interprets Article 17 as requiring many (but not all) of the basic data protection rights typically found in data privacy legislation.[4]

The 1st Optional Protocol to the ICCPR allows individual citizen of member states that have adopted the Protocol to make 'communications' (complaints) to the UNHRC that their country has not adhered to its ICCPR obligations (including Article 17), and empowers the UNHRC to make recommendations to Member States (but not binding decisions, unlike the ECtHR under Article 8, ECHR). The Protocol has been ratified by 115 UN Member States, including most of Latin America, Africa, Canada & Australasia. Only a few complaints have been made concerning Article 17, so relatively little jurisprudence has developed. However, an adverse

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[1] This article is based on the author's opening presentation to the Privacy Laws & Business Annual Conference, St John's College, Cambridge, 5 July 2015.

[2] UN Treaties Collection, *International Covenant on Civil and Political Rights*; <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en>; 168 parties as at 12/05/2015.

[3] For further details of this and the following sections concerning the UN, see G Greenleaf *Asian Data Privacy Laws* (OUP, 2014), pgs 38-42 and 547-48; and L Bygrave *Data Privacy Law: An International Perspective* (OUP, 2014), pgs 51-53 and 82-86.

[4] *General Comment No. 16* (Art. 17) 08/04/1988 <http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd >

Electronic copy available at: http://ssrn.com/abstract=2672549

finding against Australia in *Toonen v Australia*[5] was based on Article 17 (resulting in a change to Australian legislation), and in other cases the Committee has taken an 'expansive view' of the scope of Article 17.[6]

In addition, the UN General Assembly, in its *Guidelines for Regulation of Computerized Data Files* (1990) recommend adoption of the full set of basic data privacy principles. One hundred and nine countries have now adopted such laws,[7] though not directly as a result of UN influence.

The new UN Privacy Rapporteur

Following the series of revelations commenced by Edward Snowden from June 2013 of State surveillance practices by various countries, and security agencies' access to data held by private companies, the UN General Assembly passed Resolution 28/16 'The right to privacy in the digital age' (December 2014). It called on Member States to provide 'an effective remedy' to those affected by 'unlawful or arbitrary surveillance', and it encouraged the Human Rights Council to identify 'principles, standards and best practices' for protection of privacy. The UN Human Rights Council responded by deciding (by Resolution in April 2015) to appoint a Special Rapporteur on the Right of Privacy for 3 years. The Resolution states that the Rapporteur's mandate includes 'To identify possible obstacles to the …protection of the right to privacy, to identify, exchange and promote principles and best practices at the national, regional and international levels, and to submit proposals and recommendations to the [Council] …'.[8]

Mr Joseph Cannataci from Malta was selected by the President of the Council on 1 July 2015 as his nominee to the General Assembly for Rapporteur. He preferred Mr Cannataci to the Estonian first choice of a consultative committee, to the displeasure of the USA.[9] This followed representations by many 'stakeholders' in data privacy including data protection authorities and NGOs who argued that Cannataci had the greatest experience in data privacy issues of the shortlisted candidates. Cannataci chairs a policy and technology law Centre in the Netherlands, and has a distinguished academic career and wide privacy policy experience.[10] His appointment has been widely welcomed by civil society.[11]

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[5] *Toonen v. Australia* (1994) Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>.

[6] Bygrave *Data Privacy Law* p 85, citing *Coeriel & Aurik v the Netherlands* (1994) 15 HRIJ 422

[7] Greenleaf, G 'Global Tables of Data Privacy Laws and Bills (4th Ed, January 2015)' (2015) 133 *Privacy Laws & Business International Report,* 18-28.

[8] For the resolution and its history, see A Fujimura-Fanselow 'UN Human Rights Council Creates Special Rapporteur on Right to Privacy' <http://www.ijrcenter.org/2015/04/22/un-human-rights-council-adopts-resolution-to-create-special-rapporteur-on-the-right-to-privacy/>.

[9] Reuters report 'Estonian blocked as UN's first digital privacy investigator' *The Guardian*, 4 July 2015 <http://www.theguardian.com/world/2015/jul/04/estonian-blocked-as-uns-first-digital-privacy-investigator>.

[10] University of Groningen Prof. J A Cannataci *Curriculum Vitae* <http://www.rug.nl/staff/j.a.cannataci/cv>

[11] See announcement by 23 NGOs at <https://www.privacyinternational.org/?q=node/617>. Separate announcements were made by the Electronic Privacy Information Center (EPIC) and Electronic Frontier Foundation (EFF) in the USA.

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Mixed progress toward a global privacy standard

In the forty years since the first data privacy laws enacted in the early 1970s, national (or 'bottom-up') progress in enactment of data privacy legislation has been strong and accelerating, with 109 countries now having enacted such laws. Expansion continues to accelerate, with at least 22 more countries having official data privacy Bills in some stage of enactment. From 2015, more than half the laws are from outside Europe.[12] The standards adopted in these laws are, on average, closer to the 'European' standards embodied in the EU data protection Directive of 1995 than they are to the 'basic' standard of the 1980 OECD guidelines,[13] and this has not changed with recent laws or Bills being enacted. The world is 'voting with its feet' for data privacy laws with moderate 'European' standards.

In contrast, a formal international instrument (or 'top-down' standard) has been slow to emerge. In my view, an international agreement will have the best prospect for broad adoption if it respects and reflects the standards that have emerged from national legislation. Candidates are few. Article 17 of the UN's ICCPR does not by itself include the details needed in a global standard. The OECD privacy Guidelines are not a binding international agreement, cover only 33 countries, and (even after their 2013 'updating') embody '1980s' standards that are considerably lower than most countries have enacted in their laws. The 'adequacy' mechanism of the EU Directive seems unilateral in nature, does not involve reciprocal obligations of free flow of data, and after 20 years has only resulted in a handful of positive findings concerning non-European countries.[14] In comparison with the global 'bottom-up' expansion of national data privacy laws, 'top-down' adherence to international agreements has appeared more like a snail race.

In comparison, Council of Europe (CoE) data protection Convention 108 (together with its 2001 Additional Protocol) appears to be the best (perhaps the only) prospect for a global agreement. Forty six CoE member states have ratified the Convention (only Turkey absent). Five non-European countries are in the process of acceding to it (only Uruguay has completed the accession process), since the CoE started actively promoting 'globalisation' in 2010. For an international treaty, having nearly half the potential countries that could join as Member States is a good starting point for 'globalisation'. The standards embodied in Convention 108 (and its Additional Protocol) are a moderate version of 'European' standards, and this is likely to continue after its 'modernisation' process is complete. Adherence to these standards by the CoE, both in the accession processes, and in subsequent monitoring of enforcement by all Parties, is the Convention's greatest challenge: unless it is achieved, other countries will not (and should not) risk the privacy of their citizens to the 'free flow of personal data' obligations of Convention membership. One deficiency of Convention 108 is that citizens of non-European countries have no equivalent of Article 8 of the European Convention on Human Rights by which they can complain that their country does not adhere to data privacy standards.

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[12] Greenleaf 'Global Tables of Data Privacy Laws and Bills (4th Ed, January 2015)' <http://ssrn.com/abstract=2603529>.

[13] G Greenleaf 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' (2012) 2(2) *International Data Privacy Law* and on SSRN <http://ssrn.com/abstract=1960299>.

[14] Canada; Argentina; Israel; Uruguay; New Zealand; US 'Safe Harbor'; some limited PNR schemes.

A new opportunity to advance a global standard

The UN Rapporteur's task of identifying principles and best practices for protecting of privacy at the international level is a very challenging one. Adoption of a new UN data privacy Treaty from scratch is very unlikely, and would be likely to have low standards from the outset if it required a consensus of major UN members. On the other hand, perhaps the Rapporteur could bring the UN from behind in relation to data privacy protection, in part by using the existing UN mechanisms relevant to privacy, and other related mechanisms, to help build a global dara privacy standard. The Rapporteur could consider recommending measures (consistent with his mandate) to advance a global privacy standard, such as the five following.

1. That the standards of Council of Europe (CoE) data protection Convention 108 are now international 'best practice', consistent with ICCPR Art.17.

2. That the UN Human Rights Committee could consider updating its 1989 'General Comment' on Art. 17 to clarify the relationship between Art. 17 and CoE Convention 108. The International Conference of Data Protection and Privacy Commissioners (ICDPPC) in 2013 recommended creation of a 3rd Optional Protocol to the ICCPR, to adopt an international privacy standard (consistent with Art. 17), but a revision of the General Comment is a simpler and more feasible approach..

3. That UN Member States should consider applying to ratify Convention 108, once their laws meet that standard. Whether individual States decide to do so must always depend upon the CoE maintaining high standards for new accessions to the Convention and for adherence of all existing parties to those standards.

4. That the CoE should require non-European countries who wish to accede to Convention 108 to also accede to the ICCPR 1st Protocol. Four of the five non-European countries currently in the process of acceding to Convention 108 are parties to the Protocol (Uruguay, Mauritius, Senegal and Tunisia), but Morocco is not as yet.

5. That the UN Human Rights Committee should accept 'communications' (complaints) from individuals in Member States, that Convention 108 is not observed by their country. This would apply to States parties to both (a) the ICCPR 1st Optional Protocol and (b) Convention 108. Such a complaint facility would place citizens of non-European states that have ratified both in a position closer to European citizens (who have the benefit of ECHR Art. 8).

Conclusions

Although much of the Special Rapporteur's time will no doubt be absorbed by post-Snowden surveillance issues, part of his mandate is to explore ways ahead for the development of international instruments to protect data privacy. All paths to a global privacy instrument involve complexities and uncertainties, and potential risks to individual privacy, because such an instrument must both protect individual privacy to a sufficient extent and in return allow flows of personal data between complying Parties. Proposals are needed as to how the Rapporteur's mandate may realistically be used to advance progress toward such a goal.

This brief article has argued that an international agreement should respect and reflect the standards that have already emerged from 109 examples of national legislation, and that Council of Europe Convention 108 is the best (perhaps the only) prospect for a global agreement which is consistent with those standards. Its moderate standards make it a realistic and desirable option, but compliance with these standards, both at and after

accession, must be rigorously monitored, in order for this to benefit citizens' privacy. The UN Special Rapporteur may be able to make concrete contributions toward ensuring both progress and balance.