

## **We Only Spy on Foreigners: The Myth of a Universal Right to Privacy and the Practice of Mass Extraterritorial Surveillance**

The digital age brought with it a new epoch in global political life, one neatly coined by Professor Howard as the “*Pax Technica*”. In this new world order, Government and industry are “tightly bound” in technological and security arrangements which serve to push forward an information and cyber revolution of unparalleled magnitude. While the rise of information technologies tells a miraculous story of human triumph over the physical constraints that once shackled him, these very technologies are also the cause of grave concern. Intelligence agencies have been recently involved in the exercise of global indiscriminate surveillance, which purports to go beyond their limited territorial jurisdiction, and sweep in “the telephone, internet, and location records of whole populations”. Today’s political leaders and corporate elites are increasingly engaged in these kind of programs of bulk interception, collection, mining, analysis, dissemination, and exploitation of foreign communications data, that are easily susceptible to gross abuse and impropriety.

While the human rights community continues to adamantly uphold the myth system of a universal right to privacy, in actuality the *Pax Technica* has already erected a different operational code in which “our” right to privacy and “theirs” is routinely discerned. This distinction is a common feature in the wording of electronic communications surveillance laws and the practice of signals intelligence collection agencies, and it is further legitimized by the steadfast support of the laymen general public.

In this piece I will offer some push back to this human rights agenda, trying to justify, in a limited sense, certain legal differentiations in treatment between domestic and foreign surveillance. These justifications, as I will show, are grounded in practical limitations in the way foreign surveillance is conducted both generally, and in the digital age more specifically. I will further make a controversial claim, that in fighting this absolutist battle for universality, human rights defenders are losing the far bigger war over ensuring privacy protections for foreigners in the global mass surveillance context. Accepting that certain distinctions are in fact legitimate, would create an opportunity to step outside the bounded thinking of a one-size-fits-all European Court of Human Rights surveillance jurisprudence, and would allow a much needed conversation on what tailored human rights standards might look like for foreign surveillance activities.

My analysis proceeds in three parts. In the first section of my paper I examine the myth system and the operational code surrounding foreign surveillance. I compare the arguments raised by the vast majority of the international community and legal scholarship as they relate to privacy protections and the principle of non-discrimination, and compare them with the vast practice of States in the organization of their foreign surveillance apparatuses. I then present the way this debate is reflected in a ground-breaking case, currently pending, before the ECtHR surrounding GCHQ-NSA global mass surveillance programs.

In the second section of the paper, I shift the focus to various arguments that have been raised in the literature to justify a differentiation in legal treatment between surveillance at home, and surveillance abroad. I will first examine claims from the *political right* which seem to suggest that privacy in the digital age has no intrinsic value of its own, or that it should not be obligatorily applied in an extraterritorial setting. I will then address claims from the *political left*,

who have erroneously focused their attention solely on historical biases to discredit the differentiation. I will propose, instead, three new arguments in defence of the need for establishing different legal regimes for domestic and foreign surveillance: (1) disparity in the political-jurisdictional reach of State agencies; (2) disparity in the technological reach of State agencies; and (3) disparity in harms from a potential abuse of power.

Having established that setting different human rights regimes for domestic and foreign surveillance is something that States not only do, but something that they *ought to do*, the final section of the paper offers a preliminary proposal for a new human rights framework for extraterritorial mass surveillance programs, one which bridges the gap between the practice of the spooks and the of deep-seated commitments human rights organizations.