

## Report Summary: Analysis of the traditional principles of jurisdiction and their relationship to online surveillance

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Online mass surveillance challenges many traditional international legal principles, not only because of its nature, but because of the way it is operated: in cyberspace. In order to deal with online surveillance, and minimize its implications on the enjoyment of fundamental rights, it is necessary to rethink and re-interpret traditional legal frameworks. Amongst the many relevant issues, this report focuses particularly on one: the question of jurisdiction in the context of surveillance. More specifically, two types of surveillance activities will be analyzed: the interception of communications and the access to data located in another State's territory.

The question of jurisdiction and online surveillance will be examined from two different angles. Part I of the report addresses the question of jurisdiction under general international law and how traditional principles are understood/transposed in the context of digital technology, more specifically in the context of online surveillance. Part II looks at the notion of jurisdiction under international human rights law, and how cyberspace questions traditional approaches to the question of extraterritorial application of human rights treaties. Each part begins with the relevant legal framework before assessing the question of online surveillance.

The notion of jurisdiction under general international law is based on the territoriality doctrine, allowing extraterritorial assertions of jurisdiction in specific cases supported by recognized permissive rules. Cyberspace questions the relevance of the territoriality principle as a viable ground for sharing regulation (or at least the feasibility of its concrete application).

Different types of surveillance impinge upon different jurisdictional issues.

Domestic interception of communications does not raise, in term of jurisdiction, any particular problem. It is a typical application of the territoriality principle. Transnational and extraterritorial interceptions are however more challenging. Interestingly, States do not seem to engage on this debate, preferring to stay silent on the legal basis on which they rely to legislate on this kind of activities, especially when they involve an extraterritorial reach.

Another activity to consider is State accessing unilaterally data located outside its territory. Are States allowed to do so? Law enforcement agencies regularly request access to data, exercising thus the State's enforcement jurisdiction. The prohibition of extraterritorial exercise of enforcement jurisdiction limits the room for maneuver of a State in terms of pre-charge and pre-trial investigation. But assessing what is considered territorial or extraterritorial in the context of surveillance proved to be more difficult than expected, and courts struggle to do so.

This report does not look at the content of the right to privacy in the context of online surveillance, but seeks to answer the preliminary question of whether these provisions even apply to (extraterritorial) surveillance in the first place. To answer this question, the report analyses the notion of 'jurisdiction' in the context of human rights treaties, and more specifically the jurisdictional clauses they contain. The second part of the analysis turns to the question of jurisdiction under international human rights treaties in relation to online surveillance, and how cyberspace challenges the traditional standards.

The traditional criterion of "effective control" is difficult to transpose to the context of online surveillance.

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Most of the cases that have dealt with the “effective control” test have unfolded in the context of detention or have involved at least some form of physical power and control over the plaintiff. Surveillance however requires no control over a person. Intercepting or storing a foreigner’s data for surveillance purposes is radically different to holding that person in detention. Can thus surveillance activity even be conceptualized as a form of control over a specific person or group of persons?

The international community has to find concrete solutions to the general lack of conceptual clarity on these issues. It will lead to a clearer regulatory framework enhancing individuals’ protection and securing States in the respect of their jurisdiction and sovereignty.