

NECESSARY AND PROPORTIONATE

INTERNATIONAL PRINCIPLES ON THE APPLICATION OF HUMAN RIGHTS TO COMMUNICATIONS SURVEILLANCE



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with dignity.

Republic of the Philippines
COMMISSION ON HUMAN RIGHTS

Preamble

- Privacy is a fundamental human right, and is central to the maintenance of democratic societies. It is essential to human dignity and it reinforces other rights, such as freedom of expression and information, and freedom of association, and is recognised under international human rights law.



Preamble

- Communications Surveillance interferes with the right to privacy among a number of other human rights. As a result, it may only be justified when it is prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.



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- In recent decades, logistical barriers to surveillance have decreased and the application of legal principles in new technological contexts has become unclear.



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- The frequency with which States are seeking access to both communications content and metadata is rising dramatically, without adequate scrutiny.



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Preamble

- The determination of whether the State may conduct Communications Surveillance with regard to Protected Information must be consistent with the following principles.
- These principles are the outcome of a global consultation with civil society groups, industry, and international experts in Communications Surveillance law, policy, and technology.



The Principles

- Legality
- Legitimate Aim
- Necessity
- Adequacy
- Proportionality
- Competent judicial authority
- Due Process
- User notification
- Transparency
- Public oversight
- Integrity of communications and systems
- Safeguards for international cooperation



Legality

- Any limitation to human rights must be prescribed by law.
- Given the rate of technological changes, laws that limit human rights should be subject to periodic review by means of a participatory legislative or regulatory process.



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Legitimate Aim

- Laws should only permit Communications Surveillance by specified State authorities to achieve a legitimate aim that corresponds to a predominantly important legal interest that is necessary in a democratic society.



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Necessity

- Communications Surveillance must only be conducted when it is the only means of achieving a legitimate aim, or, when there are multiple means, it is the means least likely to infringe upon human rights.
- The onus of establishing this justification is always on the State.



Adequacy

- Any instance of Communications Surveillance authorised by law must be appropriate to fulfil the specific Legitimate Aim identified.



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Proportionality

- Communications surveillance should be regarded as a highly intrusive act that interferes with human rights threatening the foundations of a democratic society.
- Decisions about Communications Surveillance must consider the sensitivity of the information accessed and the severity of the infringement on human rights and other competing interests.



Proportionality

- there is a high degree of probability that a serious crime or specific threat to a Legitimate Aim has been or will be carried out; and
- there is a high degree of probability that evidence of relevant and material to such a serious crime or specific threat to a Legitimate Aim would be obtained by accessing the Protected Information sought; and
- other less invasive techniques have been exhausted or would be futile, such that the techniques used is the least invasive option; and



Proportionality

- information accessed will be confined to that which is relevant and material to the serious crime or specific threat to a Legitimate Aim alleged; and
- any excess information collected will not be retained, but instead will be promptly destroyed or returned; and
- information will be accessed only by the specified authority and used only for the purpose and duration for which authorisation was given; and
- that the surveillance activities requested and techniques proposed do not undermine the essence of the right to privacy or of fundamental freedoms.



Competent Judicial Authority

- Determinations related to Communications Surveillance must be made by a competent judicial authority that is impartial and independent.
- separate and independent from the authorities conducting Communications Surveillance; conversant in issues related to and competent to make judicial decisions about the legality of Communications Surveillance, the technologies used and human rights; and have adequate resources in exercising the functions assigned to them.



Due Process

- Due process requires that States respect and guarantee individuals' human rights by ensuring that lawful procedures that govern any interference with human rights are properly enumerated in law, consistently practiced, and available to the general public.



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User Notification

- Those whose communications are being surveilled should be notified of a decision authorising Communications Surveillance with enough time and information to enable them to challenge the decision or seek other remedies and should have access to the materials presented in support of the application for authorisation.



Transparency

- States should be transparent about the use and scope of Communications Surveillance laws, regulations, activities, powers, or authorities.
- States should provide individuals with sufficient information to enable them to fully comprehend the scope, nature, and application of the laws permitting Communications Surveillance.



Public Oversight

- States should establish independent oversight mechanisms to ensure transparency and accountability of Communications Surveillance.
- Independent oversight mechanisms should be established in addition to any oversight already provided through another branch of government.



Integrity of Communications and Systems

- In order to ensure the integrity, security and privacy of communications systems, and in recognition of the fact that compromising security for State purposes almost always compromises security more generally, States should not compel service providers or hardware or software vendors to build surveillance or monitoring capability into their systems, or to collect or retain particular information purely for State Communications Surveillance purposes.
- Individuals have the right to express themselves anonymously; States should therefore refrain from compelling the identification of users.



Safeguards for international cooperation

- Accordingly, the mutual legal assistance treaties (MLATs) and other agreements entered into by States should ensure that, where the laws of more than one state could apply to Communications Surveillance, the available standard with the higher level of protection for individuals is applied.
- Mutual legal assistance processes and other agreements should be clearly documented, publicly available, and subject to guarantees of procedural fairness.



Safeguards against illegitimate access and right to effective remedy

- States should enact legislation criminalising illegal Communications Surveillance by public or private actors.
- States should also enact laws providing that, after material obtained through Communications Surveillance has been used for the purpose for which information was given, the material must not be retained, but instead be destroyed or returned to those affected.

