

Special Focus: Communication surveillance law and human rights in Africa

Editorial

Given the nature of African governments' use of communication surveillance and the importance of human rights protection in such practices, there is a need for adequate human rights safeguards in communication surveillance. While the use of communication surveillance is not new in African countries, its increased indiscriminate use in the region has raised privacy concerns, including governments' illegitimate surveillance of political opposition, the harassment of journalists and human rights defenders, and unrestricted state access to communications held or transmitted by the private sector in Africa.¹

Communication surveillance² refers to the 'monitoring, interception, collection, preservation and retention of information that

¹ African countries including Zimbabwe, Ethiopia, Nigeria, Tanzania, Uganda, Zambia, Mozambique and Cameroon require unrestricted access to communications held or transmitted by telecommunications companies through various laws. See CIPESA 'State of internet freedom in Africa 2021' (2021), <https://cipesa.org/wp-content/files/State-of-Internet-Freedom-in-Africa-2021-Report.pdf> (accessed 25 February 2023); N Allen & CL Kelly 'Deluge of digital repression threatens African security' *defenceWeb* 27 January 2022, <https://www.defenceweb.co.za/cyber-defence/deluge-of-digital-repression-threatens-african-security/> (accessed 25 February 2023).

² Principle 41 of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (revised Declaration).

has been communicated, relayed or generated over communications networks'.³ Communication surveillance is more closely linked to the right to privacy than to any other right.⁴ This close association is because the use of communication surveillance poses more direct risks to the substance of the right to privacy.⁵ One of these direct risks is seen in how privacy – the ability to keep one's information from arbitrary and unlawful interference – usually is the first casualty of unlawful surveillance.⁶ This direct and close relationship between communication surveillance and the right to privacy also takes into account the non-hierarchical and interconnectedness of other human rights. Therefore, it is essential to acknowledge that while the right to privacy may be most vulnerable to risks when communication surveillance is conducted, other human rights, such as the rights to dignity, freedom of opinion and expression, assembly and association, are also affected in varying degrees and contexts.⁷ The articles included in this thematic section address these issues from various perspectives, illustrating state surveillance practices, inadequate legislation and oversight, and pathways for civil society, the judiciary and other relevant actors to address the identified shortcomings.

In the first article, 'Protecting human rights amid the rise of artificial intelligence (AI) surveillance in Africa', Mutuma considers the use and impact of AI in surveillance across the African continent. He demonstrates how AI-supported 'smart policing' and 'safe city initiatives' may be beneficial in combating crime and preventing terrorism. However, there is a lack of transparency and a need for clearer regulation and institutional frameworks to prevent abuse.

Mudau explores the impact of surveillance laws in Zimbabwe in his article 'The ramifications of communication surveillance laws on human rights pertinent to elections in Zimbabwe'. He shows how the deployment of mass surveillance tools, often lacking judicial oversight,

3 UN General Assembly 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue' 17 April 2013 UN Doc A/HRC/23/40 para 6a, https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf (accessed 25 February 2023).

4 M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) 402.

5 S Vincent 'Preventing the police state: International human rights law concerning systematic government access to communications held or transmitted by the private sector' in FH Cate & J Dempsey (eds) *Bulk collection: Systematic government access to private-sector data* (2017) 360.

6 E Watt *State sponsored cyber surveillance: The right to privacy of communications and international law* (2021) 211-230.

7 CN Voule & O Flores 'Protecting the right to peaceful assembly for today and the future' in F Viljoen and others (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 319, 326.

has disproportionately targeted human rights defenders, journalists and opposition figures, undermining democratic accountability and electoral integrity. He proposes legal reforms, institutional safeguards and advocacy strategies aimed at aligning surveillance laws and practices with democratic principles and human rights obligations.

In the article “‘We will visit your bedrooms’: Testing the adequacy of safeguards in interception of communications in Zimbabwe through the lens of the *AmaBhungane* case’, Saki explores the constitutionality of the Zimbabwe’s Interception of Communications Act of 2007 (IC Act) in light of international human rights law on communications surveillance and the judgment of the South African Constitutional Court in the *AmaBhungane* case in which similarly worded legislation was held to be unconstitutional.

In ‘The peril of digital privacy and free speech in Uganda’, Basimanyane explores how the Ugandan government has become a ‘digital space tyrant’ through its use of excessive powers to constrain digital freedom for political reasons. She illustrates how the surveillance measures adopted by the Ugandan government do not meet the requirements for limitations to freedom of expression as set out in the Ugandan Constitution.

In ‘Leveraging constitutional review to combat retrogressive communication surveillance laws in Francophone Africa’, Makunya and Sindani illustrate how Francophone African states have devised new laws and mechanisms to stifle online and offline expression, arguing that most of these laws are unlawful under constitutional and international human rights law. They demonstrate how the constitutional review could be used to address such laws and the role that judges and civil society groups could play in facilitating this.

In the final article of this thematic section, ‘Surveillance, privacy and civil society: The struggle for digital rights in Malawi’, Kainja explores the relationship between communication surveillance, data protection and human rights in Malawi, with a focus on the role of civil society organisations (CSOs) in translating statutory guarantees into practical protections. He finds that CSO engagement in digital rights remains limited due to technical knowledge gaps, funding constraints, political sensitivities, and the perception of digital rights as secondary or elitist.

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