

SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE REGARDING FRANCE'S COMPLIANCE WITH ICCPR

May 2021

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France's compliance with the International Covenant on Civil and Political Rights
Suggested List of issues prior to reporting (LoIPR)
submitted to the UN Human Rights Committee
by Privacy International
May 2021

This submission is for the 132nd Session of the Human Rights Committee that will take place between 28 June 2021 and 23 July 2021 in relation to France's compliance with the International Covenant on Civil and Political Rights (ICCPR) before the adoption of the List of issues prior to reporting (LoIPR).

Privacy International (PI) is a global advocacy and campaigning group that works at the intersection of technology and human rights. PI campaigns against companies and governments who exploit our data and technologies. We expose harm and abuses, mobilise allies globally, campaign with the public for solutions, and pressure companies and governments to change.

PI calls the Human Rights Committee to include in the LoIPR the following issues:

- France to present all the **emergency surveillance measures** that have been introduced in response to the COVID-19 pandemic and provide an assessment on whether these measures were necessary and proportionate response to the public health emergency.
- When is France planning to withdraw these emergency measures and what steps will and have been taken to ensure that unlawful interferences with people's right to privacy and other human rights will be remedied?
- France to address the matter of **intelligence act reforms** and to ensure they comply with the requirements of the ICCPR.
- France to address the issues raised by the **newly proposed bills that expand the use of facial recognition technologies** and to provide information:
    - on how the proposed security law draft will be amended following with recent opinion by the "Conseil Constitutionnel" and to ensure compliance with the requirements of the ICCPR.
    - about the upcoming regulation that may further the use of facial recognition technologies, posing serious risks for the protection of the right to privacy under the ICCPR.
- When and how does France plan on updating the **management of ID procedure to ensure it respects the rights of transgender people**?
- Will France also consider removing gender markers from ID cards altogether?

Further information is provided below.

Response to the COVID-19 pandemic, emergency powers and surveillance

PI is concerned about the extensive emergency measures that France has introduced in response to the global pandemic.

On 23 May 2020, France introduced Emergency Law No. 2020-290 to address the Covid-19 epidemic.[1] A new state of health emergency, Decree no. 2020-1257, was declared on 14 October 2020.[2] The law establishes a "state of health emergency", under Article 38 of the Constitution. The state of health emergency allows the Prime Minister to issue decrees restricting individuals' freedom of movement and assembly, and to take "any other regulatory measure" necessary to address the health crisis. France has not notified the Committee about the state emergency and has not derogated from any of its treaty obligations.

Yet, unprecedented levels of surveillance measures have been introduced and justified under this emergency legislation.[3] PI is concerned that some of these measures imposed and continue to impose severe restrictions on people's right to privacy and other human rights.

Our concerns include:

- use of CCTV to monitor mask wearing in public places;
- introduction of a contact tracing app that according to the French Data Protection authority violated data protection law;[4]
- use of drones to monitor compliance with lockdown restrictions, found by the highest court to have been implemented without proper legal frameworks and safeguards.[5]

PI is concerned that these measures do not adequately protect from unlawful interference with the right to privacy, in violation of Article 17 of the ICCPR. Many of those measures are based on extraordinary powers, only to be used temporarily in a defined emergency. France introduced the emergency measures on 22 Mar 2020 and extended through 1 June 2021.

PI recommends the UN Human Rights Committee to include in the LoIPR the following questions in relation to the use of surveillance powers as part of the emergency response:

[1] LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (1), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746313/
[2] Décret n° 2020-1257 du 14 octobre 2020 déclarant l'état d'urgence sanitaire, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000042424377?init=true&page=1&query=2020-1257&searchField=ALL&tab_selection=all
[3] PI, Tracking the Global Response to COVID-19, https://pvcy.org/trackingglobalresponsefrance
[4] Commission Nationale de l'Informatique et des Libertés, Décision MED-2020-015 du 15 juillet 2020, https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000042125452
[5] Conseil d'État, ordonnance du 18 mai 2020, nos 440442 et 440445, paragraphe 18, https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-18-mai-2020-surveillance-par-drones

- France to present all the surveillance measures that have been introduced in response to the COVID-19 pandemic and provide an assessment on whether these measures were necessary and proportionate responses to the public health emergency.
- When is France planning to withdraw these emergency measures and what steps will and have been taken to ensure that unlawful interferences with people's privacy and other human rights will be remedied?

Surveillance powers in France and upcoming reforms

PI is concerned that electronic surveillance by French intelligence agencies and other bodies is overly broad, does not require prior judicial authorisation and is not subject to effective oversight.

As such, PI is concerned that the current law in France does not adequately protect from unlawful interference with the right to privacy, in violation of Article 17 of the ICCPR. Recently proposed reforms do not seem to rectify these regulatory gaps, and seek to expand the scope of such surveillance.

PI had expressed its concerns during the previous reporting cycle before the UN Human Rights Committee regarding the 2015 Intelligence Bill, which had since entered into force and which granted government agencies a number of very intrusive surveillance powers.[6]

The Court of Justice of the European Union (CJEU) in its judgment of 6 October 2020, ruled that EU law applies every time a national government forces a telecommunications provider to process data, including when it is done for the purposes of national security. It concluded that EU law sets out privacy safeguards regarding the collection and retention of data by national governments, which France must follow.[7] Following the CJEU ruling, on 21 April 2021, the highest administrative court of France (Conseil d'État) gave the French government six months to re-write data retention rules in compliance with EU human rights standards.[8]

In 2021, the French government had already introduced a new draft law "on the prevention of acts of terrorism and intelligence" (le projet de loi « relatif à la prévention d'actes de terrorisme et au renseignement », thereafter the "2021 Draft Intelligence Bill") that will update the 2015 Act.[9] The current draft will have to be updated in light of the ruling of the Conseil d'État on 21 April 2021 mentioned above.

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[6] PI's submission in advance of the consideration of the periodic report of France, Human Rights Committee, 114th Session, 29 June – 24 July 2015, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FRA/INT_CCPR_CSS_FRA_20744_E.pdf

[7] Cases C-511/18 and C-512/18 *La Quadrature du Net and Others* [2020] ECLI:EU:C:2020:791. https://privacyinternational.org/sites/default/files/2020-10/PI%20CJEU%20judgment.pdf

[8] Conseil d'État, décision du 21 avril 2021, n° 393099, b/CE/decision/2021-04-21/393099 https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-21/393099

[9] Projet de loi n° 4104 relatif à la prévention d'actes de terrorisme et au renseignement (déposé le 28 avril 2021), https://www.assemblee-nationale.fr/dyn/15/textes/l15b4104_projet-loi

Regrettably, the 2021 Draft Intelligence Bill recently adopted by the National Assembly and currently under consideration by the Senate grants new, highly intrusive powers to the intelligence agencies while failing to strengthen oversight.

In its current form the 2021 Draft Intelligence Bill not only fails to address concerns the Human Rights Committee had expressed in the previous concluding observations,[10] but it introduces reforms that will further jeopardise the protection of the right to privacy. Among others, the draft bill:

- gives even broader powers to intelligence agencies and other bodies;
- allows information to be collected for a broad spectrum of reasons, including national security, counter-terrorism, but also measures to protect France's major economic, industrial and scientific interests as well as the prevention of crime;
- regulates the conditions under which the intelligence services can, on the one hand, exploit the information they have obtained for a purpose different from that which justified their collection in the first place and, on the other hand, transmit to each other the information they have collected by implementing authorized techniques;
- facilitates intelligence sharing among the different bodies without needing further authorization or effective oversight. These exchanges of information do not in principle have to be the subject of a specific authorization procedure;
- expands the surveillance tools and methods the intelligence agencies and other bodies can use to collect information. Among others, it gives the possibility for services to install IMSI catchers, namely false relay antennas capable of capturing the data exchanged via smartphone, on the base stations of operators or in the infrastructure of an online service provider based in France;
- enshrines the invasive and obscure "black box algorithm" surveillance technique (which requires electronic communications providers to implement on their networks algorithmic processes intended to detect connections suspected of revealing a terrorist threat), previously shown to be ineffective,11 while the previous bill only allowed its experimentation – and does so while the Commission Nationale de l'Informatique et des Libertés (CNIL) has not been given access to those algorithms in order to evaluate their impact and compliance,12 and without proper regard to the CJEU and Conseil d'État rulings;
- extends the reach of such algorithms to catch the full URLs accessed by Internet users, without additional safeguards;
- allows the systematic retention of data without judicial authorisation and oversight.

[10] Human Rights Committee, Concluding observations on the fifth periodic report of France, 17 August 2015, CCPR/C/FRA/CO/5, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/FRA/CO/5&Lang=En

[11] Délégation Parlementaire Au Renseignement, « Rapport d'activité 2019-2020 », Chapitre I, section II. B., http://www.senat.fr/rap/r19-506/r19-5067.html#toc148

[12] Commission Nationale de l'Informatique et des Libertés, « Délibération n° 2021-040 du 8 avril 2021 portant avis sur un projet de loi relatif à la prévention d'actes de terrorisme et au renseignement », para 31, https://www.cnil.fr/sites/default/files/atoms/files/deliberation_2021-040_du_8_avril_2021_portant_avis_sur_le_projet_de_loi_relatif_a_la_prevention_dactes_de_terrorisme_et_au_renseignement.pdf

PI recommends to the UN Human Rights Committee to ask the French government to provide information on how the existing surveillance legislation and the Draft Intelligence Bill comply with the requirements of the ICCPR and take into account the concerns expressed by the Committee in its previous concluding observations as well as those contained in the recent CJEU judgment.

New proposed security law and use of facial recognition technology

In 24 November 2020, the National Assembly passed a new proposed security law (known as « loi sur la sécurité globale », thereafter "proposed Security Bill").[13] On 15 May 2021, the French parliament adopted the new Security Bill.

PI is concerned that the new Security Bill provides broad surveillance powers to the French authorities in violation among others of Article 17 of the ICCPR. Civil society actors have already expressed their concerns around the Security Bill whose adoption was followed by protests.[14] Among others, the law provides for:

- surveillance by drones equipped with cameras in almost all public spaces above borders, in any public space to observe violations, but also during demonstrations (Article 22). Filming the population using mobile cameras is very intrusive: to allow such an invasion of privacy, the authorities must prove that the use of drones is necessary and that it is proportionate.
- generalized use of pedestrian cameras and on-board cameras (in law enforcement cars) and opens up access to CCTV images to many officers (Article 21).
- does not prohibit the use of facial recognition. PI is concerned that in its latest version the Bill specifically bans the use of facial recognition technologies on drones by the police but does not mention anything as to the use of the same technologies on bodycams or CCTVs. In France, the use of facial recognition devices only for images filmed by drones have been prohibited. However, such a prohibition does not appear in the provisions governing the use of pedestrian cameras or on-board cameras. A specific bill on FRT should be examined by Parliament soon and calls for a large experimentation. [15]

PI is concerned that such broad surveillance powers coupled with facial recognition would amount to mass surveillance.[16] It would amount to an unlawful interference with the right to privacy.

On 21 May 2021, the Constitutional court (Conseil Constitutionnel) has already found numerous of the proposed provisions of the Security Bill to be against the right to privacy,[17]

[13] Proposition de loi n° 3452 relative à la sécurité globale, https://www.assemblee-nationale.fr/dyn/15/textes/l15b3452_proposition-loi# .
[14] France24, https://www.france24.com/fr/france/20210415-la-loi-s%C3%A9curit%C3%A9-globale-d%C3%A9finitivement-adopt%C3%A9e-par-le-parlement
[15] Proposition de loi n° 4127 relative aux technologies de reconnaissance faciale, https://www.assemblee-nationale.fr/dyn/15/textes/l15b4127_proposition-loi.pdf
[16] PI, "Mass surveillance", https://privacyinternational.org/learn/mass-surveillance
[17] Décision n° 2021-817 DC du 20 mai 2021, Loi pour une sécurité globale préservant les libertés, paras 136-141 https://www.conseil-constitutionnel.fr/decision/2021/2021817DC.htm

but PI is still concerned that certain invasive powers are retained in some form and also it remains to be seen how the French government will implement the recent judgment.

PI recommends to the UN Human Rights Committee to ask the French government to address the issues raised by the newly proposed bills and to provide information:

- on how the proposed security law draft will be amended following with recent opinion by the "Conseil Constitutionnel" and to ensure compliance with the requirements of the ICCPR.
- about the upcoming regulation that may further the use of facial recognition technologies, posing serious risks for the protection of the right to privacy under the ICCPR.

Correction of identification documents for transgender people

PI is concerned that the current procedure for transgender people who wish to have their identification documents corrected to ensure they accurately reflect their gender expression and the name they use is lengthy and complex, often dependent on the discretion of different administrative employees and leaves transgender people open to further risks and abuse.

The procedure involves two separate processes, one for correction of the person's name and one for the correction of their gender.[18] And as a person undertakes each, there are barriers. In the case of the name change there is a need to justify the legitimate interest of their request as well as the need to demonstrate a "prolonged and constant use of the name". Changing the gender then requires an authorisation of a judge and to make a request separately for every type of document (ID card, social security, taxes, diplomas, etc.), except the birth certificate which is automatically updated. Both processes can also result in a time-consuming and costly process of appeal if the request is denied, and there is also a general lack of harmonisation of the process across France.[19]

PI is concerned that:

- This procedure places transgender people at the mercy of the decision of civil registry employees given reports from trans activists suggesting that there are different applications of the procedures from one town to another.[20]
- The length of the procedure implies that transgender people are exposed to the risks of not carrying an ID that reflects their identity for extended periods of time, with implications for their access to health, education and their day-to-day life.

[18] PI, My ID, my identity? The impact of ID systems on transgender people in Argentina, France and the Philippines, https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and

[19] "Defenseur des Droits, Décision cadre du Défenseur des droits 2020-136, https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/decision_cadre_ndeg2020-136_1.pdf

[20] PI, Case Study 2: France - When your ID does not match your identity, you end up at the mercy of everyone you interact you with: your employer, your professors, your landlord…" in My ID, my identity? The impact of ID systems on transgender people in Argentina, France and the Philippines, 15 January 2021, https://privacyinternational.org/long-read/4372/my-id-my-identity-impact-id-systems-transgender-people-argentina-france-and

- The procedure also carries an impact on the well-being and mental health of transgender people, whose gender dysphoria may be triggered by the absence of an ID that reflects their identity.

PI recommends the UN Human Rights Committee to include in the LoIPR the following:

- When and how does France plan on updating the management of ID procedure to ensure it respects the rights of transgender people, in particular in order to facilitate and quicken the correction of identification documents, for example by making it a purely declarative procedure?
- As gender markers are no longer featured on driving licenses in France, would France also consider following the decision of other countries in removing gender markers from ID cards altogether?

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