



General Assembly

Distr.: General
21 June 2019

English only

Human Rights Council

Forty-first session

24 June–12 July 2019

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Joint written statement* submitted by American Civil Liberties Union, Centro de Estudios Legales y Sociales (CELS) Asociación Civil, Legal Resources Centre, non- governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[03 June 2019]

* Issued as received, in the language(s) of submission only.



Joint written statement on the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association's thematic report on "The rights to freedom of peaceful assembly and of association in the digital age"

We welcome the opportunity to share an overview of the submission made by INCLO members to inform the new thematic report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association focusing on "The rights to freedom of peaceful assembly and of association in the digital age."

Protest under threat

Protests¹ are a central tool of public expression and engagement, often serving as the only avenue for advocacy seeking political, social or economic reforms. Despite the importance of protest to a free society, many states have failed to adequately protect protest and public speech. In fact, policing institutions overwhelmingly treat protests as security threats that should be discouraged and suppressed.²

New threat to protest: online surveillance technologies

Although protest rights are historically understood in the context of physical gatherings, human rights protections should also apply to 'analogous interactions taking place online.'³ In this context, many challenges to the protection against unlawful interference with our rights to online and offline protest have materialised in this digital age. Recent years have seen a sharp expansion of online surveillance technologies by policing institutions⁴ against protests and protesters,⁵ and association.⁶ These technologies are designed or used to watch, intercept, record, retain, analyse and disseminate personal data about protesters – often without our knowledge, our consent, without real and effective oversight and control, and without available legal avenues of recourse. This can disrupt and preclude our freedom and ability to organise, gather, dissent and assemble.

¹ INCLO's use of the term 'protest' follows that of the Joint Report of the Special Rapporteur together with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies: A protest is 'an intentional and temporary gathering in a private or public space for a specific purpose, and can take the form of demonstrations, meetings, strikes, processions, rallies or sit-ins with the purpose of voicing grievances and aspirations or facilitating celebrations.' See UN Doc. A/HRC/31/66 (4 February 2016), para. 10.

² For more information about the rights attached to protest see INCLO's 2018 report *Defending Dissent*, available at: <https://www.inclo.net/pdf/Defending-Dissent-Report-Complete-WEB-FINAL.pdf>

³ 'Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies', UN Doc. A/HRC/31/66 (4 February 2016), para. 10.

⁴ The term 'policing institutions' comes from our *Defending Dissent* report and represents those state agencies and law enforcement agents (excluding non-state actors) tasked with the responsibility for safety, security and the protection and promotion of the rights to protest. Available at: <https://www.inclo.net/pdf/Defending-Dissent-Report-Complete-WEB-FINAL.pdf>. However, we also point out that the use of these technologies is not exclusive to police or other government institutions tasked with the responsibility for safety or security. For example, intelligence agencies and the judiciary conduct surveillance, often with no acknowledgment of or compliance with due process and guarantees. Further, as the Association for Civil Rights in Israel elaborates, private social media companies also have surveillance and authoritative policing powers that compare with states.

⁵ Those activists, organisers and individuals or groups who participate in protests.

⁶ However, in raising awareness about these specific sets of rights captured by the Special Rapporteur's mandate, we must clarify at the outset that our discussion here in relation to these rights **does not** imply lower standards for other individuals' rights and freedoms.

Lack of democratic engagement or human rights safeguards

INCLEO's case studies from 13 countries demonstrate that the way policing institutions select and deploy online surveillance technologies against protesters often occurs without necessary human rights and democratic safeguards. There is often no clearly defined legal framework specifying when and how these tools can be used, no limits or safeguards for fundamental freedoms and individual rights, and no due regard for whether deployment is compatible with human rights protections. There is no clarity about judicial requirements or instances for judicial review. The governing rules and practices are not transparent; there is no publicity or information about police and security institutions' use and no clear way of accessing this information. There are insufficient mechanisms for overseeing these institutions' operations, as well as limited avenues for pursuing accountability and redress when these surveillance tools are used in ways that are incompatible with fundamental rights.

INCLEO Report

INCLEO's 2019 report on the rights to freedom of peaceful assembly and of association in the digital age, *Spying on Dissent – Policing technologies and protest*,⁷ provides detailed case studies depicting the use of surveillance technologies and their effect on human rights, together with criteria for recommendations. These criteria come with a significant caveat: The cumulative effect of these technologies on human rights has yet to be evaluated, and as such the international community has not properly considered the question of whether it should ever be permissible to deploy some or all of these technologies, in protest contexts or at all.

12 members of INCLO call on the Human Rights Council to develop clear guidelines to direct states as to how online surveillance technologies might be used by policing institutions in the context of protests.

Our recommendations include mandating:

- **Objective evidence** connecting the need for online surveillance technologies to the protesting subject being surveilled; and
- **Notification** of those protesters whose personal data is collected via online surveillance technologies deployed by policing institutions as soon as notification is not likely liable to jeopardise the legitimate investigations undertaken;

Our recommendations also include prohibiting:

- **Indiscriminate** use of online surveillance technologies by policing institutions and collection of any personal data; and
- **Data distribution** by collected policing to other government agencies - unless the person surveilled is in some way implicated in a serious crime

Read our full criteria for recommendations⁸ and sample INCLO member case studies on policing surveillance technologies⁹ in our 2019 INCLO report, *Spying on Dissent: Surveillance Technologies and Protest*.

I Watching online protest activity via social media networks

In Israel, the ACRI writes that the Immigration Authority and the Ministry for Strategic Affairs use a variety of sources to identify alleged Boycott, Divestment and Sanctions (BDS)¹⁰ activists, including social media. For example, the Ministry watched the social

⁷ Available at: <https://www.inclo.net/pdf/spying-on-dissent-report.pdf>

⁸ Available at: <https://www.inclo.net/pdf/spying-on-dissent-report.pdf> - 16

⁹ Available at: <https://www.inclo.net/pdf/spying-on-dissent-report.pdf> - 21

¹⁰ The Boycott, Divestment and Sanctions movement (also known as BDS) is a global campaign promoting various forms of boycott against Israel.

media posts of Lara Alqasem, an American student and former president of a local chapter of the pro-boycott group Students for Justice in Palestine. Despite not participating in the boycott movement for years and holding a valid entry visa, the state alleged that Alqasem continued to support the movement and denied her entry. They cited as evidence the fact that Alqasem had recently deleted all of her social media accounts.

In Argentina, CELS describes how two people arriving in Buenos Aires as intended civil society representatives at the World Trade Organization (WTO) Ministerial Conference were deported. They were among 65 people from civil society organisations throughout the world whose WTO accreditation had been rejected by Argentine security authorities ‘for unspecified reasons’.¹¹ A Foreign Affairs Ministry press release justified the decision on the grounds that the organisations or their members ‘had made explicit calls via social media for violent demonstrations, expressing their intent to generate intimidation and chaos.’¹² Clearly, the government had been gathering intelligence, very possibly based on people’s organisational affiliation or political opinion – which is expressly prohibited under Argentine law.¹³

In Egypt, the EIPR confirms that anti-protest laws implemented in offline space affect the ability of citizens to protest online, citing the experience of Alaa AAbdel Fattah. Alaa was arrested violently in 2013 after the government passed Law No. 107 banning street protests.¹⁴ He was charged for organising a gathering of more than five individuals that was likely to endanger public order. A report from the Directorate of Information and Documentation showed that Alaa AAbdel Fattah used Twitter to ask people to demonstrate at the entrance to the Shura Council building.¹⁵ The prosecution files and the court ruling in the case brought against Alaa and others also referred to Alaa’s use of his personal page on Facebook.

II Recording, face surveillance and protester databases

In Hungary, the HCLU observes how police have recently begun to use temporarily installed CCTV cameras. A recommendation was enacted by the parliamentary commissioner for data protection¹⁶ that police delete recorded footage if they determine that the protesters were not violating laws. However, the HCLU has no information about whether the police are meeting this requirement to delete footage¹⁷ and on the contrary, they suspect the police are instead retaining the footage and comparing it with other footage that the police capture of protesters who demonstrate outside the confines of the restrictive assembly law.

In the United Kingdom, Liberty describes how police forces are using face surveillance in live public settings.¹⁸ Face surveillance technology is capable of identifying or verifying a person from a digital or video image or source. It can scan the faces of all passers-by in real

¹¹ On 9 December 2017, at a court hearing on a habeas corpus that was filed, the Argentine government presented the list of 65 people whose accreditations were rejected.

¹² Press release available at: <https://cancilleria.gob.ar/es/actualidad/comunicados/sobre-la-acreditacion-de-ongs-la-conferencia-ministerial-de-la-omc-en-buenos>

¹³ Article 4 of National Intelligence Law 25.520, as modified by Law 27.126

¹⁴ Alaa was finally released in 2019! For more information on the details attached to his arrest, see Wafa Ben Hassine, ‘The Crime of Speech: How Arab Governments Use the Law to Silence Expression Online’: <https://www.eff.org/files/2016/04/28/crime-of-speech.pdf>

¹⁵ See Opinion No. 6/2016 adopted by the UN Working Group on Arbitrary Detention (6 June 2016): https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session75/Opinion_2016_6_Egypt.pdf

¹⁶ Recommendation 118/A/1995.

¹⁷ The Hungarian National Authority for Data Protection and Freedom of Information puts out annual reports which reveal that it hasn’t yet examined the police practice in this regard. This body’s annual reports are available at: <https://www.naih.hu/annual-reports.html>

¹⁸ For example, at Remembrance Sunday commemorations in London in November 2017, the Metropolitan Police (the Met) compiled a watchlist of images of people with known mental health issues. The South Wales Police (SWP) and the Met have also admitted that images could come from social media.

time. The technology measures biometric facial characteristics, creating unique facial maps in the form of numerical codes. These codes are then compared with those of other images on databases, which are not limited to people wanted for crimes. Liberty describes how UK police are compiling their face surveillance data from live public settings in bespoke watchlists that include those not accused of crimes.

III Hacking

In Russia, Agora describes repeated indirect indications of data use for covert surveillance of protesters' online activities.¹⁹ Police often intercept activists at the places they frequent, even when the activists have not revealed their location. The 'System for Operative Investigative Activities' (SORM) is the technical foundation for targeted mass communication surveillance. Communications service providers are obliged to install at their own expense a special device ('Punkt Upravlenia') on their networks that allows the Federal Security Service (FSB) to directly collect traffic without the knowledge or co-operation of the service provider.

In the United States, the ACLU investigation into Florida police use of IMSI catchers did not produce any policies or guidelines governing the use of stingrays or restricting how and when they could be deployed, suggesting a lack of internal oversight.²⁰ Often described as 'stingrays' or 'grabbers', IMSI catchers are a class of surveillance devices that provide active online interception capabilities.²¹ The ACLU did discover that the state has a troubling history when it comes to stingrays: according to a document available online but not among the records provided to the ACLU, the Miami-Dade Police Department first purchased a cell site simulator in 2003 to surveil protesters at a Free Trade Area of the Americas conference.²²

In South Africa, the LRC describes media reports with on and off-record comments by police sources strongly suggesting that government agencies have bought and used IMSI technology themselves, potentially against student protesters in the #feesmustfall movement.²³

The Agora International Human Rights Group (Agora, Russia); the Association for Civil Rights in Israel (ACRI); the Canadian Civil Liberties Association (CCLA); Dejusticia (Colombia); the Egyptian Initiative for Personal Rights (EIPR); the Hungarian Civil Liberties Union (HCLU); the Irish Council for Civil Liberties (ICCL); the Kenya Human Rights Commission (KHRC); the Legal Resources Centre (LRC, South Africa); and Liberty (United Kingdom), NGOs without consultative status, also share the views expressed in this statement.

¹⁹ For example, on 20 January 2019 a public prosecutor came to the informal meeting of 'Open Russia' activists at the city café in Cheboksary and handed the subpoena to Yuriy Sidorov. See his personal Facebook account (20 January 2019) available in Russian at: https://m.facebook.com/story.php?story_fbid=2263701970584620&id=100008345174557

²⁰ ACLU, 'ACLU-Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida' (22 February 2015) available at: <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>

²¹ Citizenlab definition (and discussion of the problem in Canada): a class of surveillance devices called 'cell site simulators', and which are commonly referred to as 'IMSI Catchers', 'Digital Analyzers', 'cell grabbers', and 'mobile device identifiers' or by brand names such as 'Stingray', DRTBOX and 'Hailstorm'. See: https://citizenlab.ca/wp-content/uploads/2016/09/20160818-Report-Gone_Opaque.pdf

²² Available at: <http://cdn.arstechnica.net/wp-content/uploads/2013/09/miami-dade.pdf>

²³ Further evidence of police use of 'grabbers' was detailed in an investigative report in the *Mail & Guardian* newspaper.