

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the right to privacy**

REFERENCE:  
AL BRA 3/2020

4 June 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolutions 34/18 and 37/2.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **private surveillance system installed in the metro stations of São Paulo, Brazil.**

According to the information received:

In June 2019, Companhia do Metropolitano de São Paulo (Metrô), a company owned by the State Government of São Paulo and managed by the Metropolitan Transportation State Secretariat, launched a new contract to install 5,200 centrally controlled digital cameras on a 58.6 million Brazilian Reals project. This system would replace the 2,200 individually operated cameras currently in place. Not only would this project be an upgrade in numbers, quality, and centralization of these cameras, it would also include facial recognition capabilities for monitoring. In addition, the new system will be implemented with the autonomy to store images. The metro lines where this system would be implemented are estimated to have around 3.7 million passengers.

Based on concerns about discrimination, presumption of innocence, freedom of movement, and people's privacy rights, the Public Defender's Office of the State of Sao Paulo [*Defensoria Pública do Estado de São Paulo*], the Federal Public Defender's Office [*Defensoria Pública da União*] together with human rights organizations have taken judicial action requesting the production of evidence on pre-trial stage [*pedido de produção antecipada de provas*], under article 381 of the Code of Civil Procedure, before 1<sup>st</sup> Public Finance Court of São Paulo. This request allows for evidence to be generated prior to a formal lawsuit being presented, if the production of such evidence may justify or impede the subsequent lawsuit. On 12 February 2020, the 1<sup>st</sup> Public Finance Court of São Paulo granted the request, giving Metrô 30 days to disclose information to the public regarding this new public surveillance system, including details on how the data will be collected and processed, action protocols when identifying a suspect, security requirements, data leakage mitigation tactics, and effectiveness of the technology.

It is noted that the present case emerges in the context of the postponement of the introduction of Brazil's General Data Protection Law to the first half of 2021, and coincides with the reported imminent use of monitoring and surveillance technologies by authorities and private entities as indicated.

Without prejudging the accuracy of the received information, we wish to express our concerns regarding the use of private surveillance in such an essential public space and the data protection issues it raises.

We are particularly concerned that the use of facial recognition technologies may interfere with the rights to privacy, freedom of expression, freedom of association and peaceful assembly, and could have a chilling effect on the population, where individuals may no longer feel free to exercise these rights. These technologies also have the potential to be used for discriminatory purposes, such as ethnic and racial profiling. Indeed, facial recognition applications rely on datasets that, in their design or implementation, may allow for bias and thus produce discriminatory effects, and regularly produce false positives. The serious human rights risks of these technology combined with the lack of a clear legislative framework to regulate it in accordance with human rights framework, the lack of transparency regarding when and where these technologies can be used and to what end, all indicate that the use of facial recognition technologies, and the retention of related data, could be unlawful. We draw your attention to guidance published on this subject (A/HRC/37/62, appendix 7).

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on how the Government intends to respond to malfunctions and misidentifications of the facial recognition system without infringing on the rights of individuals under domestic and international human rights law.
3. Please provide information on the timetable for the coming into force of Brazil's General Data Protection Law, 2018, and the establishment of the Data Protection Authority.
4. Please provide information on the preliminary findings or conclusions of the process under the 1<sup>st</sup> Public Finance Court of São Paulo. This includes reports on any data protection impact analysis that has been carried out.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye  
Special Rapporteur on the promotion and protection of the right to freedom of opinion  
and expression

Joseph Cannataci  
Special Rapporteur on the right to privacy

## **Annex**

### **Reference to international human rights law**

In connection with the above alleged facts and concerns, we would like to draw the attention your Excellency's Government to the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), acceded by Brazil on 24 January 1992.

The general legal obligation under article 2 of the Covenant places a general duty to "respect" and "ensure" the rights enshrined in the Covenant, entailing a general duty to adopt all necessary measures to give the Covenant effect in domestic law. It entails a general prohibition against interference, and a due diligence obligation to prevent the commission of human rights abuse by private actors (Human Rights Committee General comment no 31 paras 6 and 8). The implementation of the rights under the Covenant must be made "without distinction of any kind", generally embodying principle of equality, further reaffirmed through the prohibition on discrimination in article 26 of the Covenant.

The right to privacy, which is enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of the ICCPR, entails that no one should be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence". As indicated by the Human Rights Committee in its General Comment 16, the use of surveillance technologies against persons constitutes an interference with their right to privacy. Consequently, the introduction of facial recognition technologies in a public space, must meet the requirements for permissible restrictions to article 17. As highlighted by the Committee, this must be provided by law, pursue a legitimate aim, and be necessary and proportionate (see further in the paragraphs below).

Article 19 of the ICCPR protects the right to freedom of opinion and expression. In its General Comment No. 34, the Human Rights Committee stated that these rights are "indispensable conditions for the full development of the person. They are essential for any society, and constitute the foundation stone for every free and democratic society" (CCPR/C/CG/34 para. 2). The Human Rights Committee has also highlighted the free communication of information and ideas about public and political issues between individuals is "essential" (Id. para. 20). Article 19(2) establishes the right to freedom of expression, defined as the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" and through any media of their choice. States have a positive obligation to ensure enabling environments for freedom of expression (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32, para. 18).

As UN and regional human rights bodies have consistently affirmed, the use of surveillance technologies, including technologies such as facial recognition, may constitute a concurrent restriction to the right to freedom of expression (For an overview, see for example A/HRC/23/40 paras. 19 - 27). Moreover, due to its chilling effect, the widespread use of surveillance technologies may be contrary to the general positive obligation to ensure an enabling environment for freedom of expression. As highlighted

by the UN Special Rapporteur on the freedom of opinion and expression, restrictions on the right to privacy may impede the free exchange of information and ideas (*id.* para. 24).

Any restriction on freedom of expression in article 19 (2) must meet the threshold established under article 19(3) of the ICCPR. That is, restrictions must “be provided by law” and be necessary and proportionate for the protection of the rights or reputation of others, for national security or public order (*ordre public*) or for the protection of public health or morals. The State is under a duty to demonstrate that any restrictions of the rights in article 19(2) are compatible with the requirements under article 19 (3).

The invocation of national security or public order (*ordre public*) considerations, although constituting a legitimate aim under article 19(3), does not provide a blanket competence to restrict rights. Furthermore, even if applied for a legitimate purpose, the requirement of necessity entails a duty to demonstrate, in fact, the needs for the limitation. The requirement of proportionality entails that the restriction “must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected [...] The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law” (CCPR/C/CG/34 para. 34).

The UN Special Rapporteur on the freedom of opinion and expression, as well as other global and regional human rights mechanisms, have provided general guidance on the use of surveillance technologies consistent with States’ human rights obligations under the Covenant (see, in particular, A/HRC/41/35, paras. 50 – ff.). In particular, the Special Rapporteur recommends Governments to ensure a prior review of the human rights compatibility of the introduction of any surveillance technology as well as the prior judicial authorization of any use of such technologies. In addition, there should be meaningful public consultations and oversight in decisions to acquire or use surveillance technologies (*id.* paras. 52 – 53). This applies equally in situations of acquisition and use by private actors whose conduct is attributable to the State.