

AMNESTY INTERNATIONAL'S COMMENTS ON THE DRAFT LAW ON INTERNAL AFFAIRS OF REPUBLIC OF SERBIA

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SURVEILLANCE AND RECORDING IN PUBLIC PLACES

Amnesty International is deeply concerned about the provisions in the Draft Law on Internal Affairs that seek to legalise the use of biometric mass surveillance in public places (Article 44). These provisions would allow for the capture, processing and automated analysis of peoples' biometric and other sensitive data in public spaces, including for purposes of remote identification. They would also enable access by state authorities to the video surveillance feeds of other (including private) actors.

The use of facial recognition and other biometric mass surveillance constitutes a very significant interference with individual rights and freedoms. Amnesty International therefore considers that this proposal is likely to be incompatible with Serbia's treaty obligations under both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) – in particular, its obligations regarding the right to privacy (Article 8 ECHR and Article 17 ICCPR). This right affords individuals a reasonable expectation of privacy in public spaces – including during public assemblies – given especially the multi-faceted nature of personal autonomy that it protects (which may also be contingent on the age, or other relevant characteristic, of the individual(s) concerned).

The right to privacy has been interpreted to require that state authorities have a specific and lawful interest, based on reasonable suspicion, in an individual to justify the use of surveillance measures. By contrast, the surveillance of public spaces (as proposed in the Draft Law) results in indiscriminate and generalized surveillance of the public at large, without any condition of reasonable suspicion. Even at the technical level, Amnesty considers facial recognition technology for identification a tool of mass surveillance by design and therefore incompatible with international human rights law, given its reliance on large databases consisting of images often obtained without knowledge or consent.¹ This applies to both live and retrospective forms of facial recognition for identification and mass surveillance.

Personal autonomy may be interfered with in multiple ways (including through the capturing of data, its processing and storage, and possible disclosure to third parties). On the basis of the envisaged law, members of the public would be unable to opt in or out of such generalized surveillance measures and many are unlikely to fully appreciate how their data is being captured, processed, shared or otherwise used.

Furthermore, the use of mass surveillance treats each person as a potential suspect and disregards the possibility of targeted use. This remains true even when authorities are searching for specific individuals as the personal data and privacy of passers-by is inevitably also infringed (since passers-by are an inherent feature of

¹ <https://www.amnesty.org/en/latest/press-release/2021/06/amnesty-international-and-more-than-170-organisations-call-for-a-ban-on-biometric-surveillance/>

public spaces). Furthermore, the measures proposed in the Draft Law on Internal Affairs would likely fail the tests of necessity and proportionality as required by the ECHR.

Recognizing the importance of public spaces for participation in public life, many European and international human rights groups have highlighted numerous other severe harms that biometric mass surveillance entails, including on the rights to free association, assembly, speech and thought and the rights to due process, proper procedure and good administration. This can happen as a result of the constant and highly invasive surveillance which may disincentivise people from protesting; risks suppressing anti-corruption efforts through the accumulation of data which may make it more difficult for sources to expose wrongdoing anonymously; and have a general chilling effect on peoples' rights and freedoms.

If introduced, biometric surveillance would allow for uses that go beyond what is necessary and proportionate, such as monitoring the movement of individuals who participate in peaceful demonstrations. It is important to emphasize that it is often precisely the ability to be part of an anonymous crowd that allows many people to participate in peaceful assemblies. As the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye noted, "[i]n environments subject to rampant illicit surveillance, the targeted communities know of or suspect such attempts at surveillance, which in turn shapes and restricts their capacity to exercise rights to freedom of expression [and] association."² The use of mass biometric surveillance and facial recognition technologies may thus significantly deter people from expressing legitimate concerns and grievances, for fear of being identified (automatically and from a distance) and subjected to arrest, detention or reprisals. Such chilling effects seriously undermine and erode the effective protection of the right of peaceful assembly.

Biometric mass surveillance technologies have also been shown to operate in ways that have discriminatory effects. Research has consistently found that facial recognition technologies process some faces more accurately than others, depending on key characteristics including skin colour, ethnicity and gender. In addition, classification and categorisation by facial recognition technologies is limited and does not allow for nuance – for example, it may assign a face with a probability score for being male or female (with varying degrees of accuracy) but will struggle to accurately identify non-binary or genderfluid identities.³

Facial recognition threatens the rights of minority communities, and people with darker skin, who are at greater risk of false identification⁴ and false arrests.⁵ But even when it correctly identifies someone, facial recognition threatens to increase discrimination.⁶

On this basis, there is growing momentum from the European Union to take the necessary steps to prevent biometric mass surveillance practices. This includes the proposed ban on real-time remote biometric identification (RBI) by law enforcement in the EU's Artificial Intelligence Act and a call from the EU's top privacy and data protection watchdogs – the European Data Protection Supervisor (EDPS) and European Data Protection Board (EDPB) – to implement a “general ban any use of AI for an automated recognition of human features in publicly accessible space.”⁷ In September, the United Nations High Commissioner for Human

² Kaye, Surveillance and human rights: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression 28 May 2019 para 21

³ Pew Research Center, 'The challenges of using machine learning to identify gender in images' (September 5, 2019): <https://www.pewresearch.org/internet/2019/09/05/the-challenges-of-using-machine-learning-to-identify-gender-in-images/>

⁴ 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification', Boulamwini and Gebru, 2018. <https://proceedings.mlr.press/v81/buolamwini18a.html>

⁵ 'Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match', New York Times, January 2021. <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html>

⁶ 'Derrick "Dwreck" Ingram, Warriors in the Garden Founder, New York City', Ban The Scan, January 2021. <http://banthescan.amnesty.org>

⁷ https://edpb.europa.eu/news/news/2021/edpb-edps-call-ban-use-ai-automated-recognition-human-features-publicly-accessible_en

Rights warned against biometric surveillance and called governments around the world to limit or ban these practices due to the serious risk of human rights violations.⁸

DATA PROTECTION

Amnesty International is concerned about the provisions for the processing of data, in particular the processing of biometric data, contained within the Draft Law on Internal Affairs (Arts 12 and 13 and Article 68). Data protection principles flow from international human rights law regarding privacy; information and public participation; due process; and effective remedies.

Data protection is commonly defined as the set of safeguards designed to protect personal information, some of which may be sensitive, and which is collected, processed and stored by “automated” means or intended to be part of a filing system.⁹ Sensitive data relates to “characteristics such as race or ethnic identity, sexual orientation, political opinions, physical and mental health, disability, criminal convictions or offenses, and biometric and genetic data.”¹⁰ The processing of personal data implicates everyone’s rights broadly, but for “Indigenous peoples, undocumented migrants, sex workers, or for human rights defenders, the collection and disclosure of sensitive data carries heightened security risks.”¹¹ These risks must be mitigated.¹² Data protection frameworks attempt to mitigate these risks by “balancing the rights of individuals with the legitimate processing of personal data. They permit the processing of personal or sensitive data but impose stricter conditions and additional safeguards for the processing of that data.”¹³

According to General Data Protection Regulation (GDPR)¹⁴, any data-collecting entity must clearly define and explain the purpose of the data collection and this purpose must be “specific and legitimate”¹⁵ and it “should be necessary and proportionate” to the stated purpose.¹⁶ We note that the provisions of this and related laws require the processing of especially sensitive forms of data, including biometric data. People’s biometric data, such as their faces, are central to their personal identity and sometimes also their protected characteristics. Biometric data processing can therefore infringe on people’s rights to dignity, their right to equality and non-discrimination, autonomy and self-determination.

⁸ ‘Spyware and surveillance: Threats to privacy and human rights growing, UN report warns’ (OHCHR, September 16, 2022): <https://www.ohchr.org/en/press-releases/2022/09/spyware-and-surveillance-threats-privacy-and-human-rights-growing-un-report>

⁹ “101: Data Protection”, Privacy International (12 Oct. 2017), available at <https://privacyinternational.org/explainer/41/101-data-protection>.

¹⁰ European Union General Data Protection Regulation, Art. 9. See also Monitoring Working Group, Collective Position: Data for Economic, Social and Cultural Rights, International Network for Economic, Social and Cultural Rights (2022), pp. 71 (citing generally Privacy International, *The Keys to Data Protection: A Guide for Policy Engagement on Data Protection* (2018); Human Rights Council (2018) *The right to privacy in the digital age: Report of the United Nations High Commissioner for Human Rights, Section B. (A/HRC/39/29)*).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Although Serbia is currently not a member of the European Union, as an EU candidate country, it has an obligation to harmonize domestic legislation with GDPR.

¹⁵ General Data Protection Regulation, Recital 39, *Principles of Data Processing and A Guide for Policy Engagement on Data Protection*, Privacy International (2018) at 39.

¹⁶ United Nations High Commissioner for Human Rights, *The right to privacy in the digital age, A/HRC/39/29*, (3 August 2018), ¶129.

Another relevant principle of data protection is data minimization, that is, states should gather and process only data needed to meet the specific purposes identified.¹⁷ The GDPR explains that the collection and processing of data must be “proportionate in relation to the legitimate purpose pursued.”¹⁸ This requires public authorities to use the “least intrusive method is used to achieve a legitimate aim.”¹⁹

As noted above, the use of facial recognition and other biometric identification in public spaces constitutes mass surveillance and obscures the possibility of targeted use.

In the view of the above, we urge you to remove the provisions on biometric surveillance and biometric data processing from the Draft Law on Internal Affairs as the use of this technology would present an indiscriminate intrusion on the right to privacy and could have unforeseeable consequences for other rights and freedoms.

USE OF MEANS OF COERCION AGAINST ASSEMBLIES

Article 116 of the Draft Law provides that authorized police officials could order a group of people who gathered “illegally” or whose “behavior could provoke violence or disturb peace and public order” to disperse. It further authorizes the use of 11 different means of coercion against groups of people in instances when they do not comply with the order to disperse or otherwise act “contrary to law”. The expansive list of means of coercion includes special vehicles, police dogs, official horses, water cannons, chemical agents, electroshock equipment and sound-emitting devices, among others.

In its current form, the provision could have a seriously adverse impact on the right of peaceful assembly. References to police decisions to disperse do not reflect the imperative of considering whether the assembly was peaceful and appear to justify dispersal solely on the basis of an assembly being unlawful or because there is a *risk of violence* or disturbance of peace and public order.

The decision to disperse an assembly should always be the last resort.²⁰ Indeed, the fact that an assembly may be considered unlawful under domestic legislation should not automatically lead to its dispersal. Under international human rights law, the authorities generally have an obligation to facilitate *peaceful* assemblies even in circumstances when they might be deemed unlawful under provisions of domestic law. The authorities may only exceptionally resort to dispersal if the assembly is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence that cannot be reasonably addressed by more proportionate measures, such as targeted arrests.²¹

This provision in the Draft Law is especially problematic when read together with Article 2, para. 6 which defines an act of “resistance” as “any opposition to the legal application of police powers, measures and actions that can be performed by disobeying an order or occupying a kneeling, sitting, prone or a similar position (herein: passive resistance) ...” Such a broad definition of what constitutes “resistance” could result in police officials dispersing or using force against an entirely peaceful assembly. In this regard, General Comment No. 37 emphasizes that “[m]ere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to ‘violence’”. The UN Human Rights Committee has established a

¹⁷ Monitoring Working Group, Collective Position: Data for Economic, Social and Cultural Rights, International Network for Economic, Social and Cultural Rights (2022), pp. 74 (citing generally Privacy International, *The Keys to Data Protection: A Guide for Policy Engagement on Data Protection* (2018); Human Rights Council (2018) *The right to privacy in the digital age: Report of the United Nations High Commissioner for Human Rights, Section B. (A/HRC/39/29)*).

¹⁸ Council of Europe, Protocol Convention, Art. 5(1).

¹⁹ Privacy International, *A Guide for Policy Engagement on Data Protection* (2018), pp. 41, available at: <https://privacyinternational.org/report/2255/data-protection-guide-complete>.

²⁰ Joint Report to the Human Rights Council, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and UN Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66, para. 61.

²¹ See UN Human Rights Committee (HRC), General comment No. 37 (2020) on the right of peaceful assembly (Article 21) (General Comment No.37), CCPR/C/GC/37, 17 September 2020, Para. 85

high threshold for what constitutes “violence”, which “typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property.”²²

In addition, the proposed provisions on the use of coercive means do not differentiate between people assembled peacefully and those engaged in violence. As such, the provisions fail to provide for focused measures that target violent actors while allowing participants who remain peaceful to continue to assemble. This may allow for a general intervention against an assembly as a whole – whereas international human rights law emphasizes that “isolated acts of violence by some participants should not be attributed to others, to the organizers or to the assembly as such.”²³ Moreover, the decision to disperse an *entire* assembly may be justified only in instances when violence is ‘manifestly widespread’²⁴ (such that it precludes the isolation of violent individuals) or where the disruption caused is *both* “serious and sustained”.²⁵

This provision of the Draft Law also extends the circumstances in which coercive means may be used far beyond the limited situations in which force may be legitimately used under international human rights law. The vague formulations such as a group “acting contrary to law” could allow for the widespread use of force for minor infringements of the law, or when acts of violence are isolated and could be addressed with targeted means. The Draft Law is entirely silent on the use of milder methods, including communication, mediation and negotiation, to de-escalate potentially volatile situations (the principle of necessity), or an assessment of whether the use of force, or indeed the decision to disperse the assembly, would not cause more harm than the harm police officials seek to prevent (the principle of proportionality).

Amnesty International is particularly concerned about the expansive list of coercive means, which are listed without a clear operational purpose and a clearly specified threshold for use, including the potential risks involved and the need to first exhaust other less restrictive methods of de-escalation. The threshold of risk established by the Draft Law is too sweeping and permissive in terms of the different means of coercion which may be used and does not establish concrete criteria or conditions (beyond that of a police officer determining that people are acting contrary to law or a belief that coercion is necessary to preserve peace and order). The “disturbance of public peace and order” is also overly broad and vague as a threshold for the use of some of the coercive means listed. Moreover, the provisions on the use of chemical agents (Article 132), for example, neither differentiate between different types of equipment and weapons, nor specify the circumstances in which they would be used and how.

The provisions pertaining to the use of coercive means seem to unduly and dangerously downplay the risks of using different weapons and devices, including chemical substances, stating that they cause “no harm” or that they are essentially “harmless.” However, people can suffer unexpected and strong reactions, including breathing difficulties, panic, fainting, skin rash, etc. from exposure to such substances. The law should specify a high threshold for the use of these measures and ensure that police officials using these coercive means assess the wellbeing of persons affected and provide medical and other assistance in case of any signs of health problems.

Finally, Amnesty International opposes the use of electromagnetic devices, including stun guns, electromagnetic shields and electric batons, tear gas fired from drones, and water cannon mixed with chemical irritants and color (Article 125), as they are inherently harmful and do not serve any legitimate objective that cannot be achieved with other, less harmful and less abusive means. These weapons should never be used to disperse assemblies.

In conclusion, the policing of assemblies should always seek to facilitate peaceful assemblies and prevent the need to resort to force. As a rule, there is no room for the use of force in policing assemblies, except when

²² HRC, General Comment No. 37, para. 15 (emphasis added). The General Comment also emphasizes that “there is a presumption in favour of considering assemblies to be peaceful” (para. 17).

²³ HRC, General Comment No. 37, para. 17.

²⁴ HRC, General Comment No. 37, para. 19.

²⁵ HRC, General Comment No. 37, para. 85 (emphasis added).

dealing with individuals committing sufficiently serious offences.²⁶ Less lethal weapons that have an impact on a wide area must only be used in exceptional circumstances in response to widespread violence that cannot be contained through an individualised approach. Law enforcement officials should not resort to the use of force merely on account of a failure by either organisers or participants to fully comply with domestic law.²⁷ Less lethal weapons can only be used when responding to violent incidents. When using force in response to violence, law enforcement officials must distinguish between the individuals who are engaged in violence and those who are not (e.g. peaceful demonstrators or bystanders) and carefully aim such force only at those engaged in violence. In particular, less lethal weapons should not be directed at peaceful demonstrators or bystanders, but only at persons engaged in violence, and must at all times comply with the principles of legality, necessity and proportionality.²⁸ It is important to underscore that participants of an assembly who engage in violence are no longer protected by the right to freedom of peaceful assembly but retain all other human rights including the right to life, to security of the person and to freedom from torture and other cruel, inhuman or degrading treatment.

THE USE OF TERM AND DESIGNATION OF POLICE

Article 25 of the Draft Law provides that the police director could authorise “other entities” to use the designation “police” without specifying who those entities may be. Without further clarification, this provision risks undermining the fulfilment of Serbia’s international human rights obligations. Such obligations relate, in particular, to the appropriate training and equipping of law enforcement officials, their clear identification during policing operations and the imperative to ensure accountability for any human rights abuses that may occur.

This provision is particularly concerning in view of the situations where unidentified men in civilian clothing have been captured on camera violently handling and restraining protesters and using excessive force to subdue environmental activists demonstrating in Novi Sad, Novi Pazar, Šabac, and other towns in Serbia in 2021 and 2022. In some cases, the men did not wear visible identification or police insignia but appeared to act on behalf of the Ministry of Interior and exercise police powers.²⁹

The proposed provision seems to be an attempt to legalise such practices. However, attempting merely to establish a legal footing for such practices does nothing to address or remedy the multiple ways in which such practices contravene international norms. In particular, law-enforcement officials in the exercise of police powers should always be identifiable as such. In public order situations, they should wear uniforms or otherwise clearly visible insignia. The handling of public order situations must be done by law-enforcement officials who are mandated, instructed and trained to do so in a human rights-compliant manner.³⁰ Untrained persons should not be deployed at all for any law enforcement tasks.

The jurisprudence of the European Court of Human Rights (ECtHR) is also clear and instructive in this regard. In *Shmorgunov v Ukraine* (2021) and *Lutsenko and Verbytskyi v Ukraine* (2021) for example, the Court attributed liability to the state for the actions of ‘Titushky’, unidentified private individuals specifically recruited to assist law enforcement officials and equipped by law enforcement to oppose protestors. In *Lutsenko and*

²⁶ Guideline No. 7, Use of Force: Guidelines for Implementation of the UN Basic Principles on The Use of Force and Firearms by Law Enforcement Officials (AI Netherlands - August 2015), available at: <https://bit.ly/2QTM6DU>. See also OSCE ODIHR, Human Rights Handbook on Policing of Assemblies, pp. 30-32, available at: <https://bit.ly/2QTM6DU>.

²⁷ See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 27 August to 7 September 1990, No. 13, available at: <https://bit.ly/3tVq6ac>

²⁸ See also Office of the United Nations High Commissioner for Human Rights (OHCHR): Guidance on Less-Lethal Weapons in Law Enforcement, available at: <https://bit.ly/3tVq6ac>.

²⁹ <https://www.politika.rs/sr/clanak/512800/Traze-se-odgovorni-za-nasilje-na-protestu>

³⁰ HRC, General comment No. 37, para. 80

Verbytskyy, liability was attributed to the state where abuses were ‘committed either upon the instructions and/or under the control of law-enforcement authorities or at least with their acquiescence or connivance’.³¹

In conclusion, the UN Human Rights Committee has emphasized that “States must ... promote an enabling environment for the exercise of the right of peaceful assembly without discrimination, and put in place a legal and institutional framework within which the right can be exercised effectively.”³² The above discussed provisions of the Draft Law fall short of the obligation of the Republic of Serbia to put in place such a legal framework for enabling the effective exercise of the right of peaceful assembly and they stand to significantly undermine the protection of individual rights and freedoms in Serbia more broadly.

³¹ *Lutsenko and Verbytskyy v Ukraine*, para 90, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-207417%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207417%22]})

³² HRC, General comment No. 37, para. 24