

TARGETED STAKEHOLDER CONSULTATION 2021 RULE OF LAW REPORT

UN HUMAN RIGHTS REGIONAL OFFICE FOR EUROPE (OHCHR)

This document presents the UN Human Rights Office's contribution to the targeted stakeholder consultation held by the European Commission in 2021 in the context of the second annual rule of law report.

It is a compilation of information related to France, included in reports and documents of United Nations Treaty Bodies, Special Procedures and the Universal Periodic Review of the UN Human Rights Council, presented in a summarized manner. It also refers to statements and reports of the UN High Commissioner for Human Rights and her Office. The cited material covers the period 2018-2020.

It mentions both positive developments and challenges to the rule of law in France, as well as recommendations issued by the UN Mechanisms on how these challenges can be addressed and how the rule of law can be further strengthened.

In light of the methodology proposed by the European Commission the submission is divided in four pillars: national justice systems, anti-corruption frameworks, media pluralism and freedom and other institutional issues related to the checks and balances essential to an effective system of democratic governance.

FRANCE REVIEW

Justice System

➤ *Independence*

In the report of his 2017 country visit to France – published in 2021 after having cross-checked preliminary results against follow-up research and developments to date –, the UN Special Rapporteur on the right to privacy noted with respect to surveillance, that special status has been granted to journalists, lawyers and members of parliament. When an intelligence request is made that applies to them, the National Commission for the Control of Intelligence Techniques must be informed just before data starts being collected so that it can assess whether the collection is necessary and proportionate, and it must also receive transcripts of the intercepted communications afterwards ([A/HRC/46/37/Add.2](#), para 40).

In the report of her 2019 country visit to France, the UN Special Rapporteur on the right to adequate housing noted that a survey by the Defender of Rights identified that of those who considered themselves victims of discrimination in accessing housing, only 11 per cent had filed complaints. Among the reasons cited for not filing a complaint were that it would not serve any purpose, that it was not worth the effort, that there was a lack of proof and that they lacked trust in the justice system ([A/HRC/43/43/Add.2](#), para 16).

➤ **Quality of justice**

In the report of her 2018 country visit to France, the UN Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern about a diminution of the meaningful exercise of attorney-client privilege resulting from the use of exceptional powers and the administration of justice in terrorism cases. She noted that the shift to administrative measures, the constrained scope for lawyers to meaningfully review the intelligence basis for administrative measures, the shift in the burden of proof and the intensity of resources required to successfully challenge criminal charges and administrative measures amounted in practice to a diminution of legal access and representation ([A/HRC/40/52/Add.4](#), para 31).

In her country visit report, the Special Rapporteur also raised concerns about the situation of French foreign terrorist fighters, their spouses and children being held in detention camps or pending trial in territories overseas, with concerns in particular about the fairness of trial, the access to meaningful legal representation and the risk of torture or inhuman and degrading treatment, including sexual violence, while in custody or detention overseas. She strongly encouraged France to activate positive legal and diplomatic protection for French citizens in conflict zones overseas, including interventions where they face serious human rights violations in detention ([A/HRC/40/52/Add.4](#), para 45-48, 61). Similar concerns were raised in several communication exchanges with France, initiated by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions and/or other Special Procedures in 2018 and 2019 ([FRA 7/2018](#), [FRA 10/2018](#), [FRA 5/2019](#), [FRA 8/2019](#), available at: <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>; see also <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24887&LangID=E>).

In February 2021, UN Human Rights experts urged 57 countries, including France, to repatriate women and children from camps in northeast Syrian camps. The experts recalled the urgent need for justice, truth and reparation for all of the victims of the very serious violations of human rights and humanitarian law that have occurred in the region. In that context, the continued detention, on unclear grounds, of women and children in the camps was a matter of grave concern and undermines the progression of accountability, truth and justice. They were gravely concerned that the exercise, reportedly to evaluate security threats, lacked regard for basic principles of due process and solely targeted families with alleged links to foreign ISIL fighters, including women and children, who already suffer from heightened discrimination, marginalisation and abuse on the basis of their alleged affiliation with the group, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730>

In the report of his 2017 country visit to France (published in 2021 taking account of latest developments), the UN Special Rapporteur on the right to privacy stated that the independent data protection authority of France (CNIL) raised the issue of training of judges and whether judges should have technical expertise. He also noted that the Council of State has consultative powers regarding the adoption of a law, its opinion being mandatory in what concerns the legality and conformity of the new law. The Council of State members, who enjoy

judicial status and who analyze new proposed laws, do not have technical knowledge. Those members indicated that it would not be appropriate to have independent experts as part of the team. Instead, they preferred that the administration take the decision with the help of experts, thereby assuring accountability. Should an external organ conduct controls and take decisions, there would be the risk of the Council of State being bypassed. The Special Rapporteur also strongly recommended that all persons with legal training involved in the oversight of surveillance should also be given adequate training in information and communications technologies and operational best practices. ([A/HRC/46/37/Add.2](#), para 51, 56, 83).

In the report of his 2017 country visit to France, the UN Special Rapporteur on the right to privacy drew the Government's attention to his recommendations on the protection of health data contained in his August 2019 report to the General Assembly (A/74/277). He urged France to reflect on the successes – and the failures – in attempts to use applied technologies and especially smartphone applications in its attempts to fight the COVID-19 pandemic ([A/HRC/46/37/Add.2](#), para 85).

➤ **Other**

While seeking to initiate a dialogue with France on the lasting consequences of France nuclear program in French Polynesia in 2019, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes raised concerns with regard to access to court and remedies, noting in particular language barriers facing the complainants in court, as well as considerable administrative challenges to compile some evidence required in court or to access remedies. ([FRA 1/2019](#), available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>).

In the 2020 report of country visit to France, the UN Special Rapporteur on the right to adequate housing referred to several barriers to accessing justice, with respect to the ability to claim the right to housing through an accessible mechanism. She noted that applicants who are not granted a social housing unit within six months are entitled go to court, where local governments are frequently ordered to provide social housing and pay a fine. In many cases, local authorities pay the fine but do not assign a housing unit to the applicant, whose only recourse is to return to court for a one-time compensation, thereby resulting in a denial of justice whereby local governments pay to opt out of respecting the right to housing. She also expressed concern that some decisions of the administrative tribunals and the Council of State have limited the unconditional right to emergency accommodation and the right to housing. She cited examples where courts have required claimants to show proof of additional medical, psychological or social distress, or where it was argued that the State was incapable of ensuring emergency housing or adequate housing because of a lack of financial means. She reminded the authorities that human rights are generally not subject to derogation based on the availability of funds or means, and that homelessness threatens the right to life, health and physical integrity and must be accorded the utmost priority, even in times of fiscal pressures ([A/HRC/46/37/Add.2](#), para 28, 82-85).

Anti-corruption framework

➤ *Prevention*

In the report of his 2017 country visit to France (published in 2021), the UN Special Rapporteur on the right to privacy noted that the French legal system includes politicians in the process required for prior authorization of surveillance. He recommended that it would be preferable if the next round of reforms would alter the mechanism in such a way as to ensure that the *ex-ante* authorization of surveillance is carried out by a completely independent entity, with no politician involved in the process ([A/HRC/46/37/Add.2](#), para 75).

In addition, the Special Rapporteur recommended that the National Commission for the Control of Intelligence should, at a minimum, have the power to overrule and revoke any authorization for surveillance signed off by the Prime Minister, who, very preferably, should never be involved in such decisions. He recommended that France seriously consider furthering the doctrine of separation of powers through the creation or consolidation of a separate, independent hybrid identity, which would combine adequate resources mastering several areas of domain expertise (legal, operational and technical), possibly with the continued contribution of senior judges, and that it should be empowered to authorize and/or monitor surveillance through decisions made completely independently and often even without the knowledge of the politicians forming part of the Executive. He furthermore strongly recommended that the system of safeguards and remedies applicable to foreign intelligence should be brought in line with those required for domestic intelligence ([A/HRC/46/37/Add.2](#), para 75, 77, 78).

Media pluralism

➤ *Framework for journalists' protection*

As noted in the reply on question #9, in the report of his 2017 country visit to France (published in 2021), the UN Special Rapporteur on the right to privacy noted that with respect to surveillance, special status has been granted to journalists, lawyers and members of parliament. When an intelligence request is made that applies to them, the National Commission for the Control of Intelligence Techniques must be informed just before data starts being collected, so that it can assess whether the collection is necessary and proportionate, and it must also receive transcripts of the intercepted communications afterwards ([A/HRC/46/37/Add.2](#), para 40).

In 2019, several UN Special Procedures initiated a dialogue with France regarding grave concerns related to the safety of demonstrators and journalists during protests in France late 2018. The communication brought up reported cases of journalist's victims of police violence and of attacks from demonstrators. The communication referred to around 15 photographs and reporters injured by flashballs, grenades or stray bullets despite being visually identified as media; to the confiscation by law enforcement of some journalists' protective equipment;

and to journalists taken to police custody while carrying out their work ([FRA 2/2019](#), available at <https://spcommreports.ohchr.org/TmSearch/Results>).

In November 2020, several UN Special Procedures initiated a dialogue with France on some provisions of Bill No 3452 on Global Security dated 20 October 2020. The mandate-holders expressed concerns that one of the envisaged provisions, governing the use of images of law enforcement officials, would unduly restrict the right to freedom of expression, notably the right of journalists and of the general public to seek and impart information, and further may risk undermining law enforcement accountability ([FRA 4/2020](#), available at <https://spcommreports.ohchr.org/TmSearch/Results>).

Other institutional issues related to checks and balances

➤ *The process for preparing and enacting laws*

In the 2019 report of her country visit to France, the UN Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern that the review of the Law on Strengthening Internal Security and the Fight against Terrorism (SILT) has eschewed transparent engagement with civil society and with affected communities and individuals. The statutorily mandated assessment of the effectiveness and operation of the law had not been made publicly available by December 2018. The Special Rapporteur noted serious concerns about the adequacy of existing review and the marginality of human rights to its process to date, and encouraged substantive civil society engagement and human rights mainstreaming in the reviews to be completed. She emphasized that the total effect of France's counter-terrorism legislation from 1955 onwards on the overall protection of rights (complex and cumulative emergency powers) must be continually reviewed, as a piecemeal review of certain aspects of counter-terrorism laws is insufficient to address the overall effects that they may have on rights protection ([A/HRC/40/52/Add.4](#), para 23, 32).

In the 2019 report of her country visit to France, the UN Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism extensively dealt with questions relating to emergency measures and procedures. She noted that France has a reservoir of experience in managing terrorism through a rule of law-based approach. She commended in particular robust judicial control as an example of good national practice, and practice in respect of victims of terrorism as an outstanding positive model ([A/HRC/40/52/Add.4](#), 13-17, 20).

The UN Special Rapporteur nonetheless expressed a number of concerns. France had been in a formal state of emergency from November 2015 to October 2017 and there were outstanding consequences from the use of these powers, including unresolved legal consequences and necessary remedies for persons whose rights were disproportionately impinged upon during the period of exigency. Situated within the broad array of counter-terrorism powers already available to the State, the 2017 Law on Strengthening Internal Security and the Fight against Terrorism (SILT), adopted to avoid the spectre of an unending

emergency, also constituted a de facto state of qualified emergency in ordinary French law. The Special Rapporteur expressed concern at the transposition of exceptional emergency-form powers into the ordinary law, and detailed throughout her report the risks presented to the protection of rights in a wide array of situations and procedures. She urged a root and branch review of the necessity, proportionality and discriminatory effects of such laws and encouraged France to rebalance its use of exceptional legal norms, deepen its use of ordinary law, whose strength and fortitude have been proven, and harness remedies for human rights breaches occasioned by the use of counter-terrorism powers ([A/HRC/40/52/Add.4](#), see especially para 23-28.).

In 2020, a number of UN Special Procedures followed up on some of the concerns summarized above, in particular the fact that the SILT Law engaged a perceptible shift towards the anticipatory prevention of terrorism. In their dialogue with France, they expressed concerns that a draft law amending the Code of Criminal Procedures with regard to Security Measures that can be imposed on authors of terrorist offenses, would enshrine in ordinary law exceptional measures of administrative control and surveillance measures of individuals. They expressed concern that the import into criminal law of exceptional measures previously included in an emergency law led to the normalization and perpetuation of emergency that could result in a ‘permanent state of emergency’ ([FRA 2/2020](#), available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>).

➤ ***Accessibility and judicial review of administrative decisions***

In the 2019 report of her visit to France, the Special Rapporteur on counterterrorism concluded that the composite effect of administrative counter-terrorism measures in France is to significantly shift the regulation of persons’ liberties to the pre-criminal or precautionary space – a potentially serious challenge to the overall balance of security and rights. She urged that the judicial branch play a full a priori role, and that oversight to determine the necessity, proportionality and legality of measures be constantly reviewed and entrenched. While administrative review of measures taken during the 2015-2017 state of emergency (some of which were extended by the SILT law) is available, in practice appeal processes are slow and affected persons generally not well placed to seek review. The small number of remedies sought in the context of the high number of measures taken during the state of emergency underscored the remedial lacunae (e.g. number of house searches vs subsequent number of proceedings, judicial decisions and incarcerations). She urged France to address the gap ([A/HRC/40/52/Add.4](#), para 21, 24, 37, 61).

In the report of his 2017 visit to France (published in 2021) the UN Special Rapporteur on privacy noted that Laws No. 2015-912 and No. 2015-1556 led to the creation of administrative and jurisdictional controls on the use of intelligence techniques and files of interest for State security. The judicial control that is now exercised is the first time a judge is given access to classified documents without details being communicated to the applicant. These laws constitute both a great step forward because of the unprecedented scope of administrative control they grant, and a tangible evolution because of the creation of a mechanism for providing judicial remedies. He noted with satisfaction the developments regarding remedies for citizens in administrative litigation, noting that the creation of a special team of five judges

of the State Council, each powered to have full access to intelligence files, is an important remedy established since 2015 for citizens seeking redress for the illegal collection of information about them ([A/HRC/46/37/Add.2](#) para 10, 82).

The expert also noted that Decree No 2015-1639 granted authority to over 20 police/gendarmerie services, some of which are not officially intelligence services, to intercept communications and request data, mostly for counter-terrorism purpose. He observed the law on intelligence presented to the Council of Ministers in March 2015 further weakened judicial control, formally allowing intelligence services to carry out several previously illegal practices and technologies – eg geolocalization of cars, wiretapping of private places, placement of black boxes on ISP networks... None require judicial authorization: given the scope of the intrusion, the Special Rapporteur found the existing possibility of a posteriori control too weak a guarantee ([A/HRC/46/37/Add.2](#) para 20, 23).

➤ ***The enabling framework for civil society***

Freedom of expression and freedom of peaceful assembly are essential elements of an enabling framework for civil society. In October 2020, several UN Special Procedures initiated a dialogue with the French government on some provisions of Bill No 3452 on Global Security dated 20 October 2020. They pointed to overall concerns that the bill, developed within the broader context of counter-terrorism initiatives, appeared to reflect a lack of precision which would be likely to undermine the rule of law. They also expressed concerns that the bill as drafted was likely to disproportionately infringe many rights, fundamental freedoms and general principles of law, including freedom of peaceful assembly and freedom of expression ([FRA 4/2020](#) available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>). This followed a previous dialogue initiated in 2019 on the protection of the right to peaceful assembly, following violence that occurred during protests in France late 2018 ([FRA 2/2019](#), available at <https://spcommreports.ohchr.org/TmSearch/Results>)

In the context of migration management, several Special Procedures initiated in 2018 a dialogue with France, expressing deep concern about reports of practices and measures by law enforcement and local authorities, as well as judicial sanctions, effectively hindering, and in some cases criminalising, the work and assistance of civil society organisations and volunteers seeking to assist migrants and asylum-seekers ([FRA 9/2018](#), available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>).

➤ ***Other***

In the report of his 2017 country visit to France (published in 2021), the UN Special Rapporteur on the right to privacy observed that during the 23-month-long state of emergency prior to October 2017, the practice of judicial courts was to accept “white notes”, which were frequently used by the Ministry of the Interior to justify police actions (house arrest, prohibition to demonstrate) against people suspected of challenging the State apparatus. Such “white notes” were attributed to the intelligence services, but lacked any heading, date, reference or signature. The aim was to protect the secrecy of source, but their anonymity also prevented anyone from having to take responsibility for the statements made in them. The Special Rapporteur noted the notes sometimes contained errors, such as references to

convictions that had not been pronounced or to acts that did not actually exist. As long as they were regarded as “evidence”, it was very difficult to distinguish the value of these anonymous documents drawn up without any guarantee, from that of the records that the law strongly oversees. He stated that since the new 2017 terrorism law did not mention them, it would be interesting to follow how the judicial courts will see these white notes going forward ([A/HRC/46/37/Add.2](#), para 10).

The Special Rapporteur furthermore noted that Law No. 2017-1510 (which ended the state of emergency) strengthened the powers of the Executive (e.g., prefects) to assign someone to carry out house searches, close places of worship, or carry out identity checks near borders and at railway stations, seaports and airports, all without first getting the judicial green light (with the exception of searches). Prefects’ decisions to have houses searched and people confined were still based on very shaky legal grounds, e.g., on informal, anonymous and often vague notes by the secret services. Civil rights campaigners claimed that the law places citizens under a general blanket of suspicion, as security parameters invert an important principle of French law, and the police no longer need a reason to search ([A/HRC/46/37/Add.2](#), para 15).

For purposes of oversight, the Special Rapporteur noted that the National Commission for the Control of Intelligence Techniques is kept informed of all requests and supervises the implementation of intelligence techniques. The Commission plays an advisory role and cannot overrule any decision by the Prime Minister, but it can notify the State Council if the Prime Minister does not respect its advice or about any irregularities found. The Special Rapporteur recommended that the Commission’s power to revoke a decision about surveillance should be entrenched in law, and at a minimum the Commission should have the power to overrule and revoke any authorization for surveillance signed off by the Prime Minister, who should never be involved in such decisions ([A/HRC/46/37/Add.2](#), para 34-38, 76).