

The Identity Project

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December 8, 2011

Margo Schlanger
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Building 410, Mail Stop #0190
Washington, D.C. 20528
(by e-mail to <CRCL@dhs.gov>)

Dear Ms. Schlanger:

Thank you for your letter of September 30, 2011, in response to some of our pending complaints of violations by the DHS and DHS components of U.S. obligations pursuant to international human rights treaties. Thanks also to your staff for taking the time to meet with us on September 19, 2011, to discuss your complaint procedures.

As we discussed with your staff in that meeting, we are concerned that your office still has made no public announcement of your designation pursuant to Executive Order 13107 as the "single contact officer" responsible for DHS implementation of human rights treaties. As mentioned in your letter, your website identifies EO 13107 as being among the legal authorities for the actions of your office. But that is equally true of every executive department, agency, and office, each of which could and should properly include EO 13107 among the legal authorities for their actions. By its express terms, EO 13107 applies to, and imposes duties on, "all executive department and agencies".

Stating that you, like every other executive branch officer and employee, have a duty to comply with EO 13107, stops far short of public notice of your designation as the DHS "single contact officer" responsible for insuring that complaints of human rights violations by DHS are responded to. No such notice has been published in the Federal Register. We obtained a copy of the order so designating you only in response to a FOIA request, and it is currently available only on our website, not from any DHS website.

Your letter mentions the reports your office makes to Congress and to international treaty monitoring bodies, but does not mention your reporting to the Interagency Working Group on Human Rights Treaties. Pursuant to EO 13107, the Interagency Working Group is responsible for "coordinating and directing an annual review of ... matters as to which there have been non-trivial complaints or allegations of inconsistency with or breach of international human rights obligations."

Each of the matters raised in our complaints, which were received by DHS between 2006 and 2009 and by your office no later than 2009-2010, should already have been reported to the Interagency Working Group and included in one or more of these annual reviews. However, in response to our FOIA request we were told by your FOIA office that they were unable to locate any record of reporting of our complaints, or of any complaints received by your office or DHS, to the Interagency Working Group.

We specifically request that the matters raised by each of our complaints, and of each other complaint of human rights violations which has been received by your office or by any other DHS office or component since the creation of the department, be immediately reported by you to the Interagency Working Group – as they should have been years ago – and included in its next annual review of such matters.

Please provide us with a copy of your report to the Interagency Working Group and advise us how we can contact the Interagency Working Group to follow up with it and to find out the outcome of its review of the matters we have complained of.

As we pointed out to your staff during our meeting, the Interagency Working Group will remain unable to fulfill its duty to conduct an annual review of such matters unless and until you, and your counterpart single contact officers for other departments, implement comprehensive programs (1) requiring that *all* such complaints received by any office or component within your department be referred and/or reported to you, and (2) logging the specific matters complained of, i.e. the particular actions complained of and the particular human rights treaty obligations they are alleged to have violated.

You "decline to comment further" concerning one of our complaints because "there is ongoing litigation on this issue". We are pleased to learn that you, and the DHS Office of the General Counsel, believe that there is a cause of action for violations of the ICCPR. But we are unaware of any such litigation, and in any case EO 13107 makes no exception to your duty to insure that complaints receive a response in cases where an issue is also the subject of litigation.

We specifically request that you properly record this complaint in your docket as still pending and not yet responded to, and that you respond to this complaint as soon as the litigation to which you refer is concluded, if not sooner. Please advise us to what litigation you refer, so that we can monitor when it is concluded and know when to expect your response to our still-pending complaint.

Finally, we are disappointed that, like the DHS components which originally received some of our complaints, you cite statutory authority for DHS and component actions as though it were a justification for actions which violate Constitutional or treaty rights. Whether actions are authorized by statute is irrelevant to whether they violate Constitutional or treaty rights, and unresponsive to complaints of such violations. Such improper "responses" suggest a profound failure to recognize the supremacy of Constitutional and international treaty obligations over statutory and regulatory authority.

As cited in our complaints, and as entirely ignored by your letter and by all of the DHS components to which our complaints were originally submitted, the proper criteria for the evaluation of measures that implicate the right to freedom of movement guaranteed by Article 12 of the International Covenant on Civil and Political Rights (ICCPR) are those enunciated by the U.N. Human Rights Committee, pursuant to its authority under the ICCPR, in its "General Comment No. 27 on Freedom of Movement".

In fulfillment of your duty under EO 13107 to maintain an awareness of U.S. obligations pursuant to human rights treaties including the ICCPR, and to insure that all DHS components do likewise, we urge you to familiarize yourself with "General Comment No. 27 on Freedom of Movement" as the legal basis for evaluating that right.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project

Enclosure: U.N. Human Rights Committee, General Comment No. 27

UNITED
NATIONS

CCPR



**International Covenant
on Civil and
Political Rights**

Distr.

GENERAL

CCPR/C/21/Rev.1/
Add.9, General
Comment No. 27
2 November 1999

Original: ENGLISH

***General Comment No. 27: Freedom of movement (Art.12) : . 11/02/1999.
CCPR/C/21/Rev.1/Add.9, General Comment No. 27. (General Comments)***

Convention Abbreviation: CCPR
HUMAN RIGHTS COMMITTEE

GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE
UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS

Addendum

GENERAL COMMENT No. 27 (67)*

Freedom of movement

(Article 12)

1. Liberty of movement is an indispensable condition for the free development of a

1. Liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant, as is often shown in the Committee's practice in considering reports from States parties and communications from individuals. Moreover, the Committee in its general comment No. 15 ("The position of aliens under the Covenant", 1986) referred to the special link between articles 12 and 13. ¹
2. The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.
3. States parties should provide the Committee in their reports with the relevant domestic legal rules and administrative and judicial practices relating to the rights protected by article 12, taking into account the issues discussed in the present general comment. They must also include information on remedies available if these rights are restricted.

Liberty of movement and freedom to choose residence (para. 1)

4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12. ² Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3. ³ It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.
5. The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.
6. The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of

women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.

7. Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles 12 and 9 may come into play together. ⁴

Freedom to leave any country, including one's own (para. 2)

8. Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State. ⁵

9. In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. ⁶ Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. ⁷ It is no justification for the State to claim that its national would be able to return to its territory without a passport.

10. The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.

Restrictions (para. 3)

11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant (see para. 18 below).

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. 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. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of "State secrets", or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities. 8

17. A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, *inter alia*, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3.

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.

The right to enter one's own country (para. 4)

19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (“no one”). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”.⁹ The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

Notes

1/ HRI/GEN/1/Rev.3, 15 August 1997, p. 20 (para. 8).

2/ Communication No. 456/1991, Celepli v. Sweden, para. 9.2.

3/ General comment No. 15, para. 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20.

4/ See, for example, communication No. 138/1983, Mpandajila v. Zaire, para. 10; communication No. 157/1983, Mpaka-Nsusu v. Zaire, para. 10; communication Nos. 241/1987 and 242/1987, Birhashwirwa/Tshisekedi v. Zaire, para. 13.

5/ See general comment No. 15, para. 9, in HRI/GEN/1/Rev.3, 15 August 1997, p. 21.

6/ See communication No. 106/1981, Montero v. Uruguay, para. 9.4; communication No. 57/1979, Vidal Martins v. Uruguay, para. 7; communication No. 77/1980, Lichtensztejn v. Uruguay, para. 6.1.

7/ See communication No. 57/1979, Vidal Martins v. Uruguay, para. 9.

8/ See general comment No. 23, para. 7, in HRI/GEN/1/Rev.3, 15 August 1997, p. 41.

9/ See communication No. 538/1993, Stewart v. Canada.

* Adopted at the 1783rd meeting (sixty-seventh session), held on 18 October 1999.



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