

**International Covenant on Civil and Political Rights
(ICCPR)**

SHADOW REPORT



HUMAN RIGHTS COMMITTEE

109th session (14 October – 1 November 2013)

Geneva

Submitted to the U.N. Human Rights Committee by:



ARTICLE 19

Free Word Centre
60 Farringdon Rd
London EC1R 3GA

Executive Summary

ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) is an international, non-governmental human rights organisation established in 1986 that works around the world to protect and promote the right to freedom of expression and information, including by making submissions to the UN on countries' performance in implementing established freedom of expression standards. ARTICLE 19 has observer status with ECOSOC.

ARTICLE 19 is submitting information on issues 11, 16, and 22, regarding the treatment of Private Bradley Manning and the adequacy of oversight of the National Security Agency's surveillance activities under the Foreign Intelligence Surveillance Act. Both issues show the negative impact of the US Government's activities on the right of freedom of expression as protected under Article 19 of the International Covenant on Civil and Political Rights.

The Treatment of Bradley Manning

ARTICLE 19 makes the following submissions addressing issues 11 and 16, addressing the treatment of Bradley Manning and its broader impact on the right to freedom of expression and information.

Issue 16

ARTICLE 19 submits that the treatment of Bradley Manning while in US custody constitutes 'torture' under the definition in Article 1 of the UN's *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.¹ This categorisation is based upon Manning being held in a six-by-eight-foot cell, with no window or natural light for 23 hours a day at the Marine Corps base at Quantico in Virginia when he was initially detained with no security or safety justification, and before he had been convicted of any offence. UN Special Rapporteur on Torture, Juan Mendez has stated that Manning was "unjustly put in solitary confinement for eight months at the beginning of his detention," asserting that "the 11 months under conditions of solitary confinement ... constitutes at a minimum cruel, inhuman and degrading treatment in violation of Article 16 of the convention against torture."²

Regardless of whether the treatment of Manning by US authorities is categorised as 'torture' or 'cruel, inhuman and degrading treatment' it has broader ramifications from a human rights standpoint because his imprisonment resulted from his actions as a whistleblower.

Protecting whistleblowers who hold governments and institutions to account is central to protecting the right to freedom of expression under international law. Whistleblowing is protected as an aspect of freedom of expression under Article 19 of the International Covenant on Civil and Political Rights ('ICCPR'),³ and has been recognised by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms

¹United Nations, Treaty Series, vol. 1465, p. 85. Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

²As reported online at <<http://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un>>, last accessed 11.09.13

³International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.

While Countering Terrorism, the UN Special Rapporteur on the situation of human rights defenders, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, health and the Independent Expert on the promotion of a democratic and equitable international order as well as by the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights.⁴

The conditions under which Manning was detained establish a deplorable precedent for anyone who exposes serious human rights violations and war crimes, and will intimidate future whistleblowers from divulging material repressed by the state that is of high-level public interest. Consequently the treatment of Manning has a strong bearing on the right to freedom of expression, and the democratic interest in the free flow of information throughout society.

Issue 11(a)

In addition, by failing to adequately investigate allegations in a timely manner about Private Bradley Manning's mistreatment while in US custody, and in some cases impeding the attempts of external bodies to do so, US authorities have violated their international obligations to ensure that no one is subject to such conditions and to promptly rectify the situation and punish those who had ordered it.

There were multiple instances of US authorities actively inhibiting investigations into Manning's treatment, including when Amnesty International were blocked from visiting Manning and UN Special Rapporteur on Torture, Juan Mendez, being refused from speaking with Manning in an unrecorded environment. The refusal to allow Mendez unrestricted access to Manning contravenes the rules that the UN applies for prison visits and for interviews with inmates everywhere in the world.⁵

ARTICLE 19 emphasises that these events reflects the disregard of US authorities for the vital role whistleblowers such as Manning perform in a democratic society. By failing to uphold this obligation, Manning's personal rights, and the broader right of the public to receive information that it has a legitimate concern in, have been impermissibly restricted.

The Oversight of the National Security Agency

ARTICLE 19 makes the follow submissions addressing issue 22, which pertains to the oversight of the National Security Agency ('NSA').

- 1. The oversight of the NSA fails to ensure the rights to privacy and freedom of expression are adequately protected. This failure is chilling freedom of expression.*

⁴Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3, 4 February 2009, para 61. ; Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, A/HRC/22/47/Add.3, 26 February 2013; Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, A/HRC/24/38, 1 July 2013; JOINT DECLARATION by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, December 2004.

⁵As reported online at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11231&LangID=E>>, last accessed 11.09.13

The current system of oversight of the activities of the National Security Agency are seriously flawed and do not provide adequate protections for individuals rights under the US Constitution or international law.

External oversight of the NSA comes primarily through two channels: the intelligence committees of the House and the Senate, and the Foreign Intelligence Surveillance Court ('FISC'), established under the Foreign Intelligence Surveillance Act ('FISA').

Internal controls have also been inadequate. An internal audit found that the NSA had violated federal rules thousands of times each year but failed to inform the court or Congressional Committees. The audit itself was classified as top secret and only made public but Edward Snowden.⁶

Regrettably, this total lack of oversight fails to protect the rights to privacy and freedom of expression due to the secrecy in which they conduct themselves and the constrained nature of the oversight that they provide. A consequence of this lack of transparency is a diminished level of state and judicial accountability, as well as public confidence in the rule of law is undermined.

More significantly, the largely unregulated surveillance has a chilling effect on journalists and the speech of citizens of the United States and worldwide. The link between surveillance of communications and the right to free expression has been well established., especially relating to the media. As noted by UN Special Rapporteur Frank La Rue in his recent report:

In order to receive and pursue information from confidential sources, including whistleblowers, journalists must be able to rely on the privacy, security and anonymity of their communications. An environment where surveillance is widespread, and unlimited by due process or judicial oversight, cannot sustain the presumption of protection of sources. Even a narrow, non-transparent, undocumented, executive use of surveillance may have a chilling effect without careful and public documentation of its use, and known checks and balances to prevent its misuse.⁷

However, this chilling effect has been ignored by the US courts. In 2013, the US Supreme Court ruled that a group of attorneys and human rights, labor, legal, and media organizations who made sensitive international telephone calls could not challenge the FISA because they could not show proof of the surveillance. This surveillance has now been established by the leaks from Edward Snowden.⁸

The Foreign Intelligence Surveillance Court

National security-related surveillance in the United States is regulated by the Foreign Intelligence Surveillance Act.⁹ The Act was adopted following concern about illegal national security-related surveillance, with the FISC set up to provide judicial oversight of

⁶ NSA broke privacy rules thousands of times per year, audit finds, The Washington Post, 16 August 2013. http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html

⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40, 17 April 2013.

⁸ *Clapper v Amnesty International*, 2013. http://www.supremecourt.gov/opinions/12pdf/11-1025_ihdj.pdf

⁹ Foreign Intelligence Surveillance Act of 1978 ("FISA" Pub.L. 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36).

Intelligence Community activities in a classified setting.¹⁰ The FISC is composed of nine specially-selected judges who meet in secret to hear requests for surveillance from intelligence agencies. It has heard 33,942 cases since its creation in 1979 and has only declined 11 requests.¹¹

According to public records, the FISC has made numerous decisions ruling on the scope of the FISA but has failed to make these decisions public.¹² ARTICLE 19 reiterates that international law states that courts are held openly and not in secret is an essential aspect of their character, and that exceptions to the principle of open justice must be constrained by a test of strict necessity.¹³ The need to keep secret all information about the activities of the court save a one page annual statement of how many requests it decided fails the obligations of open justice.

The quality of the FISC's role is also limited because it does not have the control or authority necessary to protect the rights to privacy and freedom of expression. FISC Judge Reggie Walton has emphasised that the FISC is limited in its reviewing of NSA's conduct, stating, "The FISC does not have the capacity to investigate issues of noncompliance".¹⁴ Recently released documents confirm that noncompliance has been an area of concern for the FISC since at least 2009. In a recently declassified redacted FISC order from March 2009, Judge Walton wrote that "the court no longer has such confidence" that the government is complying with its orders.¹⁵ Such statements capture the FISC's own acknowledgment of the inadequacy of the oversight it is providing. The constraints placed on the FISC preclude it from providing the checks and balances required to ensure the NSA does not violate the rights to privacy and freedom of expression. As Walton stated, "more is needed to protect the privacy of U.S. person information acquired and retained pursuant to the FISC orders".¹⁶ However, even with these concerns, the court did not initiate any new procedures to ensure compliance and protect fundamental human rights.

The intelligence committees:

Following the concerns in the 1970s about illegal activities of the intelligence agencies, the US House of Representatives and the US Senate both set up specialized committees to provide oversight of intelligence agencies.¹⁷ The Committees are limited to only a few members who are prohibited from revealing any information, including serious abuses. Other members of Congress and the Senate are limited to accessing the sensitive files without permission of the Committees, which in practice is not given.

¹⁰ *United States v. U.S. District Court*, 407 U.S. 297 (1972).; see <http://nsarchive.wordpress.com/2013/07/16/the-documents-behind-the-birth-of-fisa-the-invisible-hand-granting-nsas-surveillance-the-legal-ok/>

¹¹ Summary of annual FISA reports. http://epic.org/privacy/wiretap/stats/fisa_stats.html

¹² <<https://www.fas.org/irp/agency/doj/fisa/fisc0912.pdf>>.

¹³ See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3, 4 February 2009; Ottawa Principles on Anti-terrorism and Human Rights, <http://www.refworld.org/pdfid/470e0e642.pdf>

¹⁴ Online at <<http://normantranscript.com/nation/x312409754/New-NSA-revelations-stir-congressional-concern/print>>.

¹⁵ Page 12, Order Docket Number BR 08-13, available online at <<http://www.documentcloud.org/documents/785205-pub-march-2-2009-order-from-fisc.html>>.

¹⁶ Page 17, Order Docket Number BR 08-13, available online at <<http://www.documentcloud.org/documents/785205-pub-march-2-2009-order-from-fisc.html>>.

¹⁷ See e.g The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, ("Church Committee"), Book II: Intelligence Activities and the Rights of Americans. http://www.aarclibrary.org/publib/church/reports/book2/pdf/ChurchB2_0_Title.pdf

This secrecy seriously undermines their ability to ensure accountability. Earlier this year, Director of National Intelligence James Clapper was forced to admit to that he misled Congress in a public hearing about NSA surveillance following more accurate testimony in closed sessions to the Senate Intelligence Committee. Senators were unable to publicly question his inaccurate testimony and it was only revealed by the whistleblower Edward Snowden's unauthorized releases. After the revelations, Senators Ron Wyden and Mark Udall confirmed, "the rules, regulations and court-imposed standards for protecting the privacy of Americans' have been violated thousands of times each year."¹⁸ They were not able to before.

More seriously, the Committees themselves have done little in the wake of the revelations about the abuses. They have not held hearings or issued reports on the surveillance and many of their members have called for the prosecution of Snowden instead.

Thus the intelligence committees should not be viewed as adequate to provide satisfactory oversight of the NSA and limit abuses.

2. *The FISC does not follow requirements of due process in making determinations that restrict on human rights.*

Under FISA, the court only hears from the government party. There is no mechanism for additional information to be introduced from parties (including telecommunications providers) who will be affected by the order before it has been granted or specially appointed advocates who can introduce opposing views and information. Amicus are not invited to introduce external views. The fact that no lawyer represents the opposing interests of anyone outside the US government is inconsistent with the right to a fair hearing, enshrined in Article 14 of the ICCPR. Robertson J, who served on the FISC, has raised his concern on this issue, stressing that "a judge needs to hear both sides of a case before deciding".¹⁹ The absence of legal representation for the party affected by the FISC court's order accords with the findings of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, who reported that counter-terrorism surveillance practices had adversely impacted on due process rights.²⁰

The imbalanced representation of rights and interests is compounded by the FISC's lack of investigative powers, which renders it entirely dependent on the representations that the government lawyers make, which have been shown to be unreliable. This is explicated by recently declassified orders from the FISC that the NSA had searched through thousands of phone records "in a manner that appears to be directly contrary to the [above-quoted] order and directly contrary to the sworn attestations of several executive branch officials."²¹ The judgment of Bates J in the "Foreign Intelligence Surveillance Court Memorandum Opinion and Order" of 3 October 2011, which found that "the volume and nature of the information it [the NSA] has been collecting is fundamentally different from what the court had been led to

¹⁸ Online at < <http://www.theguardian.com/world/2013/aug/16/nsa-revelations-privacy-breaches-udall-wyden>>, accessed 11/09/13.

¹⁹ <http://www.cbsnews.com/8301-250_162-57592836/former-judge-admits-flaws-with-secret-fisa-court/>, accessed 11/09/13.

²⁰ A/HRC/13/37.

²¹ Order Regarding Preliminary Notice Of Compliance Incident Dated January 15, 2009. Online At <https://www.eff.org/sites/default/files/filenode/br_08-13_alert_list_order_1-28-09_final_redacted1.ex_-_ocr_0.pdf>. Accessed 11/09/13.

believe,”²² also affirms that the FISC is not able to provide oversight of the quality necessary to safeguard the rights to privacy and freedom of expression.

3. *The FISA violates US citizens’ rights to freedom of expression and assembly.*

§ 702 of the FISA empowers the NSA to intercept the communications of individuals in contact with one of the NSA's foreign targets without obtaining a warrant. By allowing these correspondences to be intercepted without an individualized court order supported by probable cause, the law violates the constitutional rights of anyone who has been in contact with one of NSA’s targets. This reflects a regime of guilt by association, which has repeatedly been held to be incompatible with the rights to freedom of expression and assembly guaranteed by Articles 19 and 21 of the ICCPR, the principal legal framework for the United States’ international obligations in relation to these rights.²³

The vast ambit of NSA’s surveillance was confirmed by Deputy Director John C Inglis’ testimony before the House Judiciary Committee, when he stated that the surveillance extends ‘three hops’ from a suspect. This means that the NSA can intercept data from a suspected terrorist, and from everyone that suspect communicated with, and then from everyone those people communicated with, and then from everyone all of those people communicated with. Such a sprawling scope is incompatible with a free society and the nature of online association. In the Internet context, network analysis may expose ‘associations’ that are unknown to anyone, including the individuals involved. Given that the receipt of information three-times removed from a suspect is sufficient for the NSA to infringe on individual privacy rights, the risk of innocent citizens’ privacy rights being violated is manifest.

Accordingly, clear limitations on the NSA surveillance authority need to be introduced to alleviate the overly broad scope of the current laws.

4. *The FISA allows the right to privacy to be disproportionately restricted in a manner that deviates from established international standards.*

Activities that restrict the right to privacy, including surveillance, can only be justified when they are prescribed by law, pursue a legitimate aim and are necessary and proportionate to achieving that aim.

The vast surveillance conducted by the NSA does not satisfy the test of proportionality. The overbroad scope of the NSA’s surveillance was evinced by the FISC’s order that telephone service provider Verizon hand over copies of "all call detail records or 'telephony metadata' created by Verizon for communications between the United States and abroad" or "wholly within the United States, including local telephone calls".²⁴ This exemplifies the disproportionate scale of the NSA’s violation of the right to privacy.

The FISA allows for privacy rights to be restricted for the purpose of gathering information for the “collection of information necessary for the conduct of the foreign affairs of the

²² FISC Memorandum Opinion by Judge Bates (redacted), October 3, 2011 online at < <https://www.fas.org/irp/agency/doj/fisa/fisc100311.pdf>> accessed 11/09/13.

²³ *Keyishian v Board of Regents* 385 US 589, 606 (1967); *Elfbrandt v Russell* 384 US 19 (1966).

²⁴ <http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order>.

United States.”²⁵ This is not a legitimate basis for restricting privacy rights under international law. While national security is a legitimate purpose that can validate restricting privacy rights, FISA’s further extension of the grounds for qualifying privacy rights is inconsistent with the *Siracusa Principles* for permissible limitations on the rights conferred by the ICCPR,²⁶ and reflects an overbroad restriction of human rights.

Documents released by Edward Snowden reveal details of the N.S.A. spying on the presidents of Brazil and Mexico and their top aides,²⁷ as well as Brazil’s state-controlled oil company, Petroleo Brasileiro SA.²⁸ These revelations confirm the need for the broad scope of the FISA to be limited to ensure privacy rights are not unnecessarily restricted and the sovereignty of members of the international community is not undermined by illegitimate surveillance. Further, ARTICLE 19 reminds the NSA that national security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.²⁹ Effective safeguards and remedies appear to be negligible under the current regime.

²⁵See definition of “foreign intelligence information” in §1801(e)(2)(B) 50 U.S.C. (2008)

²⁶UN Doc E/CN 4/1985/4.

²⁷<<http://www.nytimes.com/2013/09/03/world/americas/brazil-angered-over-report-nsa-spied-on-president.html>>

²⁸< <http://g1.globo.com/fantastico/noticia/2013/09/petrobras-foi-espionada-pelos-eua-apontam-documentos-da-nsa.html>>.

²⁹ Siracusa Principles CI 31, online at <<http://www1.umn.edu/humanrts/instree/siracusaprinciples.html>>.