

I. Issue: Complaints of Violations of U.S. Obligations Pursuant to the ICCPR

II. Reporting Organization(s): The Identity Project (PapersPlease.org)¹

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization (NGO) based in Oakland, California, providing legal and educational resources dedicated to protecting and promoting rights protected by the First Amendment to the U.S. Constitution and corresponding provisions of international human rights treaties.

III. Issue Summary

The United States has not acceded to the First Optional Protocol to the ICCPR, so individuals cannot bring complaints to the UNHRC. The U.S. does not recognize the ICCPR as "self-effectuating", and has not enacted legislation to allow complaints of violations of the ICCPR to be a cause of action in U.S. courts.

The U.S. has not publicly designated a point of contact for the submission of complaints of violations of U.S. obligations pursuant to the ICCPR. The U.S. has not established any policies or procedures for recording, investigation, reporting, or responding to such complaints. As a result, the U.S. government does not know how many such complaints have been made, or what issues or allegations they have raised. Most such complaints, even complaints formally filed and docketed with U.S. government agencies and/or submitted to the heads of federal executive departments, are not recorded, investigated, reported, or responded to.

In its previous report to the UNHRC, the U.S. referred to Executive Order 13107, by which the President of the U.S. directed the head of each executive department to designate a single contact officer for implementation of human rights treaties, including the ICCPR, and ensuring that all complaints of violations of the ICCPR are investigated and responded to. EO 13107 also requires an annual review by an "Interagency Working Group on Human Rights Treaties" of "matters as to which there have been non-trivial complaints or allegations of inconsistency with or breach of international human rights obligations, in order to determine whether there should be consideration of any modification of relevant reservations, declarations, and understandings to human rights treaties, or United States practices or laws. The results and recommendations of this review shall be reviewed by the head of each participating agency."

However, the heads of key agencies with responsibilities related to human rights, including the Department of Justice² (responsible for investigation and prosecution of violations of the ICCPR

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2 Freedom of Information Act (FOIA) request to the Department of Justice by the Identity Project, August 29,

that also constitute crimes under U.S. law) and the Department of Transportation³ (responsible pursuant to 49 USC § 40101 for protection of "the public right of freedom of transit", i.e. freedom of movement under Article 12 of the ICCPR), have not designated any such contact officers for implementation of human rights treaties, created any policies or procedures for complaints, or maintained any records or reports of complaints.

The Department of State is still searching for any records of whether it has made such a designation or what action (if any) it has taken on such complaints⁴, and has not acknowledged or responded to formal complaints of violations of the ICCPR.⁵ And since these complaints are not recorded or reported, any review of the subject matter of these unrecorded and unreported complaints by any agency head or inter-agency body would be impossible.

Only one U.S. agency, the Department of Homeland Security (DHS), has publicly designated a point of contact for complaints of violations of the ICCPR. However, the DHS was created in 2001, but no DHS point of contact for human rights complaints was designated until 2006⁶, and the designation was only made public in 2010. Complaints of violations of the ICCPR filed in DHS regulatory dockets beginning in 2006 were not recorded as complaints of violations of human rights treaty obligations (no such category exists in DHS databases), were not reported to the Interagency Working Group on Human Rights Treaties or any other body, and were not responded to until 2011.⁷ The responses cited U.S. statutes as "authorizing" the actions complained of, suggesting that the U.S. believes that a State party to the ICCPR may enact legislation derogating from treaty obligations.

IV. Concluding Observations

In Paragraph 10 of its previous Concluding Observations, the UNHRC said, "The Committee notes with concern the restrictive interpretation made by the State party of its obligations under

2012, available at <<http://papersplease.org/wp/wp-content/uploads/2012/11/doj-foia-eo13107.pdf>>; Department of Justice response to FOIA request AG/12-01413 (F), November 28, 2012, available at <<http://papersplease.org/wp/wp-content/uploads/2012/11/doj-ag-12-01413-f-28nov2012.pdf>>.

- 3 FOIA request to the Department of Transportation by the Identity Project, August 29, 2012, available at <<http://papersplease.org/wp/wp-content/uploads/2012/10/dot-foia-eo13107.pdf>>; Department of Transportation response to FOIA request FY2012-316, September 28, 2012, available at <<http://papersplease.org/wp/wp-content/uploads/2012/10/dot-foia-fy2012-316-norec.pdf>>.
- 4 FOIA request to the Department of State by the Identity Project, July 14, 2011, available at <<http://papersplease.org/wp/wp-content/uploads/2011/09/dos-foia-eo13107.pdf>>. In its first interim response (December 13, 2012), the Department of State said that it had identified four responsive documents, all of which were withheld as "pre-decisional" and thus could not have included a decision to designate a point of contact.
- 5 Complaints filed by the Identity Project, et al., in Department of State regulatory dockets on March 11, 2010, and April 24, 2011, and submitted to the Secretary of State on April 24, 2011, available at <<http://papersplease.org/wp/wp-content/uploads/2011/09/dos-eo13107-24apr2011-attach.pdf>>.
- 6 Memorandum signed by Secretary of Homeland Security Chertoff, September 22, 2006, available at <<http://papersplease.org/wp/wp-content/uploads/2011/09/chertoff-eo13107-11sep2006.pdf>>.
- 7 See references at "DHS responds to our complaints of human rights treaty violations", The Identity Project, <<http://papersplease.org/wp/2011/12/01/dhs-responds-to-our-complaints-of-human-rights-treaty-violations/>>.

the Covenant, as a result in particular of ... (b) its failure to take fully into consideration its obligation under the Covenant not only to respect, but also to ensure the rights prescribed by the Covenant.... The State party should in particular ... (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant".

V. U.S. Government Report

In response to the UNHRC's previous recommendation that "the Committee recommends that appropriate inter-federal and state institutional mechanisms be established for the review of existing as well as proposed legislation and other measures with a view to achieving full implementation of the covenant, including its reporting obligations", the U.S. Second and Third Periodic Report, paragraphs 452-453, said that, "The United States has considered this issue, and on December 18, 1998, the President issued Executive Order 13107." However, the U.S. must have known, when it referred to EO 13107 in its report to the UNHRC in 2005, that this Executive Order had never been implemented. The U.S. Fourth Periodic Report does not mention EO 13107 or any alternative action by the U.S. to record, investigate, report, or otherwise act on complaints of violations of the ICCPR.

VI. Legal Framework

ICCPR Article 2: "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant....

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted...."

ICCPR Article 40: "The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights".

VII. Recommended Questions

(1) What, if any, means are available to an individual or organization to obtain judicial review of a law, regulation, policy, or practice alleged to violate U.S. obligations pursuant to the ICCPR, but not otherwise alleged to violate U.S. law?

(2) What, if any, records are kept of complaints of violations of the ICCPR by the U.S. or by

state or local governments? To whom, if anyone, are these complaints required to be reported? What, if any, policies or procedures have been adopted for recording, reporting, investigating, or responding to such complaints?

(3) Please clarify whether the U.S. believes that a State party may enact national legislation which derogates from its obligations pursuant to the ICCPR.

(4) Please clarify whether the U.S. has implemented Executive Order 13107, which was mentioned in Paragraphs 452-453 of the Second and Third Periodic Reports to the UNHRC but which is not mentioned in the Fourth Periodic Report. Does the failure to carry out an Executive Order of the President indicate a lack of ability or lack of good-faith commitment by the U.S. to implement the ICCPR?

VIII. Suggested Recommendations

(1) The U.S. should enact legislation implementing and effectuating the ICCPR by giving U.S. federal and state courts jurisdiction to hear cases arising under the ICCPR, and creating a federal cause of action for violations of the ICCPR.

(2) The U.S. should implement Executive Order 13017, or take other comparable actions to publicly designate a point or points of contact for complaints of violations of the ICCPR; to require recording, reporting, investigation, and response to such complaints; and to provide for periodic reviews by an inter-agency body of the subject matter and issues raised in those complaints.

(3) The lack of publicly-designated points of contact for complaints of violations of the ICCPR or any requirement for recording or reporting of such complaints greatly impairs the ability of the UNHRC to evaluate the implementation of the ICCPR by the U.S. and the degree to which the rights it recognizes are enjoyed. The U.S. should include information on the complaints it receives of violations of the ICCPR – including the numbers of such complaints, the agencies or entities to which they pertain, the issues they raise, the actions (if any) taken in response to them, and the outcome of any reviews of them – in its future periodic reports to the UNHRC.