

**International Covenant on Civil and Political Rights: Key elements in the context of the LIBE Committee inquiry.** Professor Martin Scheinin 14 October 2013

The Covenant was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976, in accordance with Article 49.

The 167 states parties include the United Kingdom and the United States of America. All states parties are subject to a periodic reporting procedure (Article 40). The two states mentioned above have also accepted the procedure for inter-state complaints (Article 41) but not the individual complaint procedure (established under the Optional Protocol).

All monitoring functions are exercised by the Human Rights Committee, a quasi-judicial body of 18 independent experts elected in their individual capacity (Article 28).

**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, ...<sup>1</sup>

***Lopez Burgos v. Uruguay (Communication 52/1979)***

In this early case the Human Rights Committee established its position on the extraterritorial effect of the ICCPR:

12. I The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ... ") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as *these acts were perpetrated by Uruguayan agents acting on foreign soil.*

12.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the *relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.*

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<sup>1</sup> General Comment No. 31, adopted by the Human Rights Committee in 2004, paraphrases this provision as follows: "10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction." (CCPR/C/21/Rev.1/Add. 13)

12.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be *held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.*"

### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

### **Human Rights Committee's General Comment on Article 17 (1988)**

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.
2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.
3. The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.
4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee 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.

5. Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term "home" in English, "manzel" in Arabic, "zhuzhai" in Chinese, "domicile" in French, "zhilische" in Russian and "domicilio" in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms "family" and "home".

6. The Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by the law. It is also indispensable to have information on the authorities which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the right provided for in article 17 of the Covenant. States should in their reports make clear the extent to which actual practice conforms to the law. State party reports should also contain information on complaints lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.

7. As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.

8. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by- case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire- tapping and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.

10. The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

11. Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

#### **List of issues in relation to the fourth periodic report of the United States of America (CCPR/C/USA/Q/4)**

##### *Right to privacy (art. 17)*

22. Please provide information on steps taken to ensure judicial oversight over National Security Agency surveillance of phone, email and fax communications both within and outside the State party. Please also specify what circumstances, as mentioned in section 206 of the USA Patriot Act, justify "roving" wiretaps.

#### **Replies of the United States of America to the list of issues (CCPR/C/USA/Q/4/Add.1)**

##### *Reply to the issues raised in paragraph 22 of the list of issues*

115. With regard to judicial oversight of NSA, as noted in ¶ 332 of the 2011 Report, the President acknowledged in 2005 that the U.S. National Security Agency (NSA) had been intercepting, without a court order, certain international communications where the government had a reasonable basis to conclude that one party was a member of or affiliated with al-Qaida or a member of an organization affiliated with al-Qaida and where one party was outside the United States. This activity thereafter was brought under the supervision of the Foreign Intelligence Surveillance Court (FISC) and, in 2008, Congress amended the Foreign Intelligence Surveillance Act (FISA) to modernize collection authorities

and solidify FISC's role. Please see 2011 Report at ¶¶ 585-586. These modifications enhance judicial and Congressional oversight and protect individuals' privacy and civil liberties.

116. The FISC plays an important role in overseeing certain NSA collection activities conducted pursuant to FISA. It not only authorizes these activities, but it also plays a continuing and active role in ensuring that they are carried out appropriately. Moreover, if at any time the government discovers that an authority or approval granted by the FISC has been implemented in a manner that did not comply with the Court's authorization or approval, or with applicable law, the government must immediately notify the FISC and corrective measures must be taken.

117. With regard to roving surveillance, as noted in ¶ 586 of the 2011 Report, section 206 of the USA PATRIOT Act, which permits "roving" wiretaps in certain circumstances, was recently reauthorized through June 1, 2015. The FISA's "roving" electronic surveillance provision allows the government to continue surveillance where the target of the surveillance switches from a facility (e.g., a telephone) associated with one service provider (e.g., a telephone company) to a different facility associated with a different provider. This provision was enacted to correspond to roving authority that has applied to law-enforcement surveillance since 1986, and which has repeatedly been upheld in the U.S. courts.

118. In an ordinary FISA surveillance case, the government must demonstrate to the FISC probable cause that the target of the surveillance is a foreign power or an agent of a foreign power, and that the target is using, or about to use, a facility, such as a telephone. If the target switches to a new provider the government must submit a new application and obtain a new set of FISA orders, because the new provider will – rightly – refuse to honor an order directed at another company. However, where the government can demonstrate in advance to the FISC that the target's actions may have the effect of thwarting surveillance, such as by changing providers, FISA's roving surveillance provision allows the FISC to issue an order that the government can serve on the new provider to commence surveillance without first going back to court. The government's probable cause showing that the target is an agent of a foreign power remains the same, and the government must also demonstrate to the FISC, normally within 10 days of initiating surveillance of the new facility, probable cause that that specific agent is using, or is about to use, that new facility.

119. The intelligence community is conducting court-authorized intelligence activities pursuant to a public statute with the knowledge and oversight of Congress. As described above, there is also extensive oversight by the executive branch, including DOJ and the Office of the Director of National Intelligence and relevant agency counsels and inspectors general. For example, activities authorized under Section 702 of FISA are subject to strict controls and procedures under oversight of the DOJ, the Office of the Director of National Intelligence, and the FISC, to ensure that they comply with the Constitution and the laws of the United States and appropriately protect privacy and civil liberties. See

<http://www.dni.gov/files/documents/Facts%20on%20the%20Collection%20of%20Intelligence%20Pursuant%20to%20Section%20702.pdf> and

<http://www.whitehouse.gov/the-press-office/2013/06/06/press-gaggle-deputy-principal-press-secretary-josh-earnest-and-secretary>.

120. The United States welcomes a discussion of the balance between security and civil liberties. As President Obama has recently stated on this issue, "...in the years to come, we will have to keep working hard to strike the appropriate balance between our need for security and preserving those freedoms that make us who we are," <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

### **About the consideration of USA's fourth periodic report**

The report will be considered by the Human Rights Committee in oral hearings to be conducted in Geneva on 17-18 October 2013. The Concluding Observations by the Committee can be expected on 1 November 2013. They may include the Committee's assessment of USA's compliance with ICCPR Article 17 in respect of telecommunications and internet surveillance. These assessments may use terminology such as "concern", "regret" or "incompatible", reflecting the Committee's position.