

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on freedom of religion or belief

REFERENCE:
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9 May 2017

Dear Mr. Allegra,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 25/2 and 31/16.

In this connection, we would like to bring to the attention of your Government information we have received concerning **intensified screening of travelers at the United States border, leading to undue and discriminatory interference with the rights to freedom of expression and privacy of travelers based on their religious affiliation.**

Concerns about Executive Order No. 13,769 of 27 January 2017 were raised in a joint communication by Special Procedures mandate holders on 31 January 2017 (USA 2/2017). Concerns about requests for information of travelers' social media handles by amendments to the Electronic System for Travel Authorization (ESTA) were raised in a communication by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on 30 September 2016 (USA 9/2016). We regret that to date no response has been received to any of these communications.

According to the new information received:

On 27 January 2017, the U.S. President issued Executive Order No. 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States". This order has since been replaced with Executive Order No. 13780, issued on 6 March 2017.

Since 27 January 2017, the United States' Customs and Border Protection (CBP) has subjected certain travelers to extensive questioning about their political views and religious beliefs at U.S. airports and other border crossings.

The majority of those selected for such questioning are reportedly travelers of Middle Eastern and South Asian (MASA) origin and travelers who observe the Muslim faith. Some journalists have also been selected for such questioning.

Questions posed to these travelers include:

1. *Questions related to the traveler's Muslim faith and relationships*, including: "Where does your name come from? Are you a Muslim?"; "Are you a devout Muslim?"; "Are you Sunni or Shia?"; "What school of thought do you follow?"; "Do you pray five times a day?"; "Which current Muslim scholars do you follow or listen to?"; "Why do you have a prayer mat in your luggage?"; "Why do you have a Qu'ran in your luggage?"; "What mosque do you attend?"; "Have you ever delivered the Friday Prayer? What did you discuss with your community?"; "Why did you shave your beard?"; "Do any individuals in your mosque have any extreme or radical views?"; and "What are the views of other imams or community members that give the Friday sermon at your mosque? Do they have extremist views?";
2. *Questions concerning the traveler's views of Muslim nations and Islam*, including: "What do you think of America's foreign policy toward the Muslim world?"; and "Do you think we should allow someone like you to enter our country?"
3. *Questions concerning the traveler's knowledge and views of specific groups, actors and activities*, including: "What do you know about the Tebleeghi-Jamat?"; "What do you know about the political situation in Sudan?"; "What are your views about Jihad?"; "Do any individuals in your mosque have any extreme or radical views?"; "What are the views of other imams or community members that give the Friday sermon at your mosque? Do they have extremist views?"; "What are your views regarding [various terrorist organizations]?"; "Have you been trained by the military in [your home country]?"; and "What do you think of killing non-Muslims?"; and
4. *Questions concerning the traveler's past and future travel plans to Muslim-majority or Middle East countries*, such as: "When was the last time you visited your home country?"; "Have you ever visited Saudi Arabia?"; "Will you ever visit Saudi Arabia or Israel?"

It has been reported that travelers who decline to answer or who provide answers that CBP officers deem unsatisfactory have been, among other things, handcuffed, detained between two and eight hours, or denied entry.

Before explaining our concerns with CBP's practices, we wish to stress the U.S. Government's obligations to respect and protect the right to freedom of thought, conscience and religion or belief and freedom of opinion and expression under articles 18 and 19, respectively, of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992. Under the non-discrimination provision in article 2(1), this right is guaranteed to all persons "without distinction of any kind, such

as race, color ... language, religion, political or other opinion, national or social origin ... birth or other status.”

Article 19(1) protects everyone’s right to hold an opinion without interference. In other words, opinions may not be “restricted by law or other power” (A/HRC/29/32). Article 19(2) protects the right to seek, receive, and impart information of all kinds, regardless of frontiers and through any media. This right applies to “everyone”, and is not limited to citizens. Under article 19(3), restrictions on the right to freedom of expression must be “provided by law”, and necessary for “respect of the rights and reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”.

Restrictions on freedom of expression must be “necessary” to protect such objectives, and not simply useful, reasonable or desirable. The requirement of necessity “also implies an assessment of the proportionality” of those restrictions. A proportionality assessment ensures that restrictions “target a specific objective and [do] not unduly intrude upon other rights of targeted persons.” The ensuing “interference with third parties’ rights must [also] be limited and justified in the light of the interest supported by the intrusion” (A/HRC/29/32). Finally, the restriction must be “the least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/34).

With regards to the questioning of journalists, we would like to highlight that it is normally considered incompatible with article 19(3) to “restrict the entry into the State party of foreign journalists or those from specified countries” (CCPR/C/GC/34).

Article 26 of ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (A/RES/36/55) also provides that no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief. The Declaration also stresses that discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms [...].

Paragraph 4 (g) in Resolution 2005/40 of the Commission on Human Rights urges States to ensure that all public officials and civil servants, including members of law enforcement bodies, the military and educators, in the course of their official duties,

respect different religions and beliefs and do not discriminate on the grounds of religion or belief, and that all necessary and appropriate education or training is provided.

With respect to the allegations about handcuffing and detention of persons unwilling to answer above-mentioned questions, we would like to refer to article 9 of the ICCPR, guaranteeing the right to liberty and security of person, and establishing that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

We are concerned that CBP’s screening practices since 27 January 2017 violate U.S. obligations under the ICCPR on multiple grounds. CBP’s questioning indicates that the authorities may be assessing entry into the country based on the religious and political opinions and beliefs espoused by travelers, in violation of their absolute right to hold opinions of any kind under article 19(1) of the ICCPR. The nature of the questions posed also raises grave concern that CBP’s additional screening is rooted in stereotypical assumptions about Islam, Muslims and persons of MASA descent. Such religious and national profiling potentially deters Muslim and MASA travelers from participating in religious and political discourse, both within and outside of the U.S., for fear of detention and denial of entry at the U.S. border. The resulting disproportionate impact on the right to freedom of expression in this regard would also violate the article 2(1) guarantee of non-discrimination.

We are also concerned by reports that CBP’s screening practices have also disproportionately targeted journalists. We raise concern that such practices will hamper or chill reporting about current affairs and other issues of public interest, and therefore interfere with the public’s right to seek, receive, and impart information.

Under the mandate provided to us by the Human Rights Council, it is our responsibility to seek to clarify all cases brought to our attention. We would be grateful for your cooperation and observations on the following matters:

1. Please provide any additional information and any comment you may have on the above mentioned allegations.
2. Please provide the legal basis for CBP’s questioning of travelers about their religious and political beliefs and views, and explain how this is compatible with U.S. obligations under international human rights law.
3. Please clarify the total number of travelers subject to CBP’s questioning described above.

4. Please provide the criteria that CBP relies on to identify travelers for the questioning described above, and how such criteria is consistent with U.S. obligations under articles 2(1), 18 and 19 of the ICCPR.
5. Please provide information about the legal basis for handcuffing and detention of persons who are unwilling to answer or provide unsatisfactory answers to the questions described above, and explain how these actions are compatible with U.S. obligations under international human rights law.
6. Please explain what safeguards and procedures, if any, have been established to ensure that all persons at the U.S. border are protected from discriminatory restrictions on their rights to freedom of expression and freedom of religion.

We would appreciate receiving a response as soon as possible. In view of the above comments, we urge the U.S. Government to take all steps necessary to conduct a comprehensive review of CBP's screening practices and ensure its compliance with international human rights standards.

Finally, I would like to inform that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression:
(<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>).

Your Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Allegra, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Ahmed Shaheed
Special Rapporteur on freedom of religion or belief