



United States Department of State

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Office of the Legal Adviser

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**MEMORANDUM OPINION ON THE GEOGRAPHIC SCOPE OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

The geographic scope of States Parties' obligations under the International Covenant on Civil and Political Rights ("ICCPR") is governed by Article 2(1), which provides that

[e]ach 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, without distinction of any kind (emphasis added).

In 1995, in a brief oral response to a question regarding the geographic scope of the Covenant during the United States' Initial Report to the Human Rights Committee ("Committee" or "HRC"), then-Legal Adviser Conrad Harper stated that "[t]he Covenant was not regarded as having extraterritorial application."¹ Since that time, the U.S. Government has maintained, under the 1995 Interpretation, that Article 2(1) obligates States Parties to recognize Covenant rights only for "individuals who are both *within* the territory of a State Party *and* subject to that State

¹ U.N. Hum. Rts. Comm., 53rd Sess., 1405th mtg., March 31, 1995 (morning), ¶ 20, U.N. Doc. CCPR/C/SR 1405 (April 24, 1995) (Statement of State Department Legal Adviser, Conrad Harper) [hereinafter "1995 Interpretation"]. In response to an oral question from the Committee, Legal Adviser Harper stated as follows:

The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it *was presumed to apply only within a party's territory*. Article 2 of the Covenant expressly stated that each State party undertook to respect and ensure the rights recognized "to all individuals within its territory and subject to its jurisdiction." That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words "within its territory" had been debated and were added by vote, with *the clear understanding that such wording would limit the obligations to within a Party's territory*.

(Emphasis added). For further discussion, see Section III(E), *infra*.

Party's sovereign authority,"² so that "the terms of the Covenant apply exclusively within the territory" of the United States.³ Under this "strict territoriality" reading, the Covenant would not impose any obligations on a State Party either to respect or to ensure the rights in the Covenant for any individual who is located *outside* the territory of a State Party – even for persons who are subject to complete U.S. authority abroad, and even with respect to such fundamental Covenant rights as the right to be free of torture or cruel, inhuman or degrading treatment. One obvious implication of the 1995 Interpretation is that the States Parties would not have intended the Covenant to pose a legal barrier to a State Party torturing a person outside its territorial borders, even if that person were subject to that state's total and effective control.

As I noted during my confirmation hearing as Legal Adviser, I approach prior legal opinions of the Legal Adviser's Office as enjoying a presumption of *stare decisis*, while at the same time recognizing that, under certain circumstances, that presumption can and should be overcome.⁴ Since 1995, the 1995 Interpretation has been brought into question by the International Court of Justice ("ICJ") (writing in two important opinions), the Human Rights Committee (writing in its General Comment 31, in its responses to individual petitions and in its observations and recommendations regarding State reports), and a number of our closest allies in their written

² U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Third Periodic Reports of States Parties Due in 2003: United States of America*, Annex I, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) (emphasis in original) [hereinafter "2005 Report"].

³ U.S. Department of State, *List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America*, Question 4, U.N. Hum. Rts. Comm. (July 17, 2006), available at <http://www.state.gov/drl/rls/70385.htm> [hereinafter "2006 List of Issues"]. See also U.N. Hum. Rts. Comm., *Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Dec. 27, 2007) [hereinafter "2007 Observations"].

⁴ When asked for the record by Senator Lugar what my general approach would be to treaty interpretation, I answered:

In all cases, I would apply a presumption that an existing interpretation of the Executive Branch should stand, unless a considered examination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinced me that a change to the prior interpretation was warranted."

The Honorable Harold Hongju Koh, Nominee to be Legal Advisor to the Department of State Before the S. Comm. on Foreign Relations, 111th Cong. Question #2 (submitted April 23, 2009) (response to Senator Richard G. Lugar's pre-hearing QFRs of Legal Adviser-Designate Harold Hongju Koh).

With respect specifically to the ICCPR, I answered:

If confirmed, I would seek to review thoroughly all of the past legal memoranda by the Legal Adviser's office and other government law offices on this issue, to examine the various fact patterns to which this interpretation might apply, and to consult with policymakers, other government attorneys, and members of this Committee and other interested members of Congress on this question.

The Honorable Harold Hongju Koh, Nominee to be Legal Advisor to the Department of State Before the S. Comm. on Foreign Relations, 111th Cong. Question #42 (submitted May 1, 2009) (response to Senator Richard G. Lugar's supplemental QFRs of Legal Adviser-Designate Harold Hongju Koh).

comments to the Human Rights Committee. All have taken the considered position – contrary to the 1995 Interpretation – that the protections afforded by the Covenant do not in all cases stop at the water's edge.⁵ The 1995 Interpretation has been questioned repeatedly by numerous academics, human rights experts and NGO commentators.⁶ It also stands in tension with the recognition by regional human rights bodies of extraterritorial obligations under other human rights instruments.

Given these challenges, we conducted an initial investigation which established that, with respect to this issue, the 1995 Interpretation overstated the clarity of the text and negotiating history (*travaux préparatoires*) of the Covenant. Upon fuller analysis, we found that neither the text nor the *travaux* of the Covenant requires the extraordinarily strict territorial interpretation that the United States has asserted regarding the geographic scope of the Covenant – particularly when taking into account the treaty's broader context and object and purpose, as standard rules of treaty interpretation require. Nor, despite frequent citation to Eleanor Roosevelt's contemporaneous views as claimed support for the strict territorial view, do the *travaux* establish that this was in fact the U.S. understanding at the time when Eleanor Roosevelt presided over the Covenant's drafting. Nor, finally, was the 1995 Interpretation clearly embraced by the President at either the time of signature or of ratification, nor was it anywhere reflected in the understanding of the ratifying Senate.

All of this contradictory evidence raises the question whether the United States should continue to urge a rigidly territorial reading of the ICCPR. We cannot continue to adhere to the then-Legal Adviser's 1995 Interpretation to the Human Rights Committee without taking into account and explaining the competing evidence from the text, context, object and purpose, *travaux*, and ratification history of the Covenant, as well as the growing body of jurisprudential, governmental and scholarly interpretation articulating a broader interpretation of the treaty's territorial scope.

To resolve this disagreement, this Office has now conducted an exhaustive review of: (1) the language of the Covenant in its context; (2) the treaty's object and purpose; (3) the negotiating history; (4) all prior U.S. positions of which we are aware regarding the Covenant, including positions taken during the negotiation, signature and ratification of the treaty, as well as later interpretations; (5) the interpretations of other States Parties; (6) the interpretations of the U.N.

⁵ See Section IV, *infra*.

⁶ Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 73-75, 77 (F. Coomans & M. Kamminga, eds., 2004); Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* at 41, 47-49; Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Israeli L. Rev. 17, 34 (2003); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78, 79 (1995); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF HUMAN RIGHTS 72, 74 (Louis Henkin, ed., 1981). For recent debate over the extraterritorial reach of the ICCPR, compare Nigel Rodley, *The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena*, 2009 Eur. Hum. Rts. L. Rev. 628, with Michael J. Dennis & Andre M. Surena, *Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice*, 2008 Eur. Hum. Rts. L. Rev. 714.

Human Rights Committee, and (7) Advisory Opinions and judgments of the International Court of Justice (“ICJ”).

Based upon this comprehensive review, I have now reached the considered legal judgment, as Legal Adviser:

First, that the 1995 Interpretation is *not* compelled by either the language or the negotiating history of the Covenant;

Second, that the 1995 Interpretation is in fact in significant tension with the treaty’s language, context, and object and purpose, as well as with interpretations of important U.S. allies, the Human Rights Committee and the ICJ, and developments in related bodies of law;

Third, that an interpretation of Article 2(1) that is truer to the Covenant’s language, context, object and purpose, negotiating history, and subsequent understandings of other States Parties, as well as the interpretations of other international bodies, would provide that in fact, the Covenant *does* impose certain obligations on a State Party’s extraterritorial conduct under certain circumstances:

- In particular, as detailed below, it is my considered opinion that a better legal reading would distinguish between the territorial scope of the Covenant’s obligation to “respect” and to “ensure” Covenant rights.
- A state incurs obligations to *respect* Covenant rights – i.e., is itself obligated not to violate those rights through its own actions or the actions of its agents – in those circumstances where a state exercises authority or *effective control* over the person or context at issue.
- A state incurs obligations to *ensure* Covenant rights – either by legislating or otherwise affirmatively acting to protect individuals abroad from harm by other states or entities – only where such individuals are both within its territory and subject to its jurisdiction, since in such cases the exercise of such affirmative authority would not conflict with the jurisdiction of any other sovereign.

In my view, the 1995 Interpretation is no longer tenable and the USG legal position should be reviewed and revised accordingly. A presumption in favor of *stare decisis* in executive interpretation does not compel rote repetition of incorrect legal positions in reports to international bodies, particularly when those positions can be reexamined in a way that enables this Administration to turn the page on the past by disengaging from an increasingly implausible legal interpretation.

Our prior position has been a source of ongoing international tension, with significant deleterious effects on our international human rights reputation and our ability to promote international human rights internationally. The prior administration was severely criticized in U.N. fora, by important U.S. allies, by members of Congress, by domestic and international human rights groups, and in the domestic and international media. The 1995 Interpretation is seen as allowing alleged incidents of abusive extraterritorial practices such as torture and “extraordinary rendition,” and as immunizing such practices from legal review by preserving the policy option for U.S. personnel to act in a “legal black hole” once they step outside the territorial United

States. By contrast, revising our legal position to recognize some application of the ICCPR to U.S. conduct abroad would have a salutary effect on our international reputation. It would significantly advance our international standing and reputation for respect for the international rule of law, which are primary commitments of this Administration.

In addition, reviewing and modifying the rigidly territorial reading of the ICCPR would offer a stronger legal foundation for current policy practices. To adhere to the 1995 Interpretation, in the face of extensive contrary evidence and authority, would place our attorneys in the position of providing legal advice to the U.S. government that does not reflect the best reading of the law. Nor is a “strict territorial” interpretation an accurate predictor of how authoritative interpreters, our allies, and other important interlocutors will likely evaluate the United States’ legal obligations.

Adopting the sounder legal interpretation need not require a dramatic change in our actual practices abroad. For example, President Obama has already ordered compliance with U.S. treaty obligations mandating humane treatment in armed conflict with respect to all persons “in the custody or under the effective control of” U.S. authorities “or detained within a facility owned, operated, or controlled by . . . the United States.”⁷ Many of the obligations recognized by the ICCPR that would apply to U.S. conduct overseas already apply in that context through the operation of other international legal obligations (such as the Geneva, Genocide and Torture Conventions, as well as customary international law). Indeed, some of those legal obligations already form part of the body of specialized international humanitarian law rules (*lex specialis*) that governs armed conflict. Part V of this Memorandum Opinion examines the policy implications of the legal reading being proposed.⁸

I. Treaty Language, Context, Object and Purpose

The Vienna Convention on the Law of Treaties (“VCLT”),⁹ sets forth the internationally accepted general and supplementary rules for treaty interpretation as follows:

⁷ Exec. Order No. 13491 on Ensuring Lawful Interrogations, 74 Fed. Reg. 16, Preamble and Sec. 3(a) (Jan. 22, 2009). President Obama’s Detention Policy Task Force was planning to take up the issue of the geographic scope of human rights treaties and detention operations, but that review was deferred in part due to time and resource constraints.

⁸ To the extent that other components of the United States Government have relied upon on the 1995 Interpretation, we are prepared to work with those components to square the legal interpretation set forth here with their lawful practices. For example, we believe that the interpretation set forth here is consistent with a theory of *lex specialis* that explains why U.S. military operations in the conduct of the armed conflict with Al Qaeda (and associated forces) in Afghanistan and elsewhere abroad are properly governed by relevant standards of international humanitarian law, not international human rights law.

⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. Although the United States has not ratified the VCLT, the United States has long recognized the VCLT as an authoritative guide to principles of treaty interpretation. See, e.g., *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001), cert. denied, 534 U.S. 891 (2001); see also Vienna Convention on the Law of Treaties, S. Exec. Doc. L, 92nd Cong., 1st Sess. 1, 19 (1971).

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble. . . . :

...

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

...

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 31 of the VCLT therefore indicates that treaty language is to be interpreted in accordance with its ordinary meaning “in the context” of the treaty and “in light of [the treaty’s] object and purpose.” *See also Abbott v. Abbott*, 130 S. Ct. 1983, 1990 (2010) (“This Court’s inquiry is shaped by the text . . . and the purposes of the Convention”). The “context” includes other treaty text, the preambular language, and other instruments that relate to the treaty. In addition, together with context, any subsequent state practice that establishes the agreement of the parties and relevant rules of international law applicable between the parties are to be taken into account when interpreting a treaty’s terms.

Under Article 32, the negotiating history may be examined as a supplementary means of interpretation to confirm an understanding based on application of the interpretive rules under Article 31. Alternatively, if after applying the Article 31 test, the language of the treaty is ambiguous or leads to a manifestly absurd or unreasonable result, the negotiating history of a treaty may be examined to “determine” that meaning.

Significantly, the 1995 Interpretation of the territorial scope of the ICCPR has turned primarily on treating the Article 2(1) text as clear, with some limited consideration of the negotiating history. To our knowledge, the 1995 Interpretation did not conduct a deeper analysis of the text to consider how that reading comported with the context, object and purpose of the treaty, subsequent state practice, and other primary interpretive sources set forth in VCLT Article 31.¹⁰ To the contrary, the 1995 Interpretation avoided extensive examination of these interpretive sources other than the text of Article 2(1) itself, by viewing that language as *unambiguous on its face*. In 2005, the U.S. ICCPR Report repeated that “the plain and ordinary meaning” of the Article “establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party’s sovereign authority.” The 2005 USG analysis – repeated virtually without change in 2007 – asserted that this conclusion was “inescapable.”¹¹

Yet in fact, far from being “unambiguous,” even on its face, the obligation of a state “*to respect and to ensure to all individuals within its territory and subject to its jurisdiction* the rights recognized in the . . . Covenant” has proven susceptible to not one, but several, possible interpretations: the first concerns whether the term “and” should be read as conjunctive or disjunctive; the second concerns whether the territorial limit equally modifies both the obligation to “respect” and the obligation to “ensure.”¹²

The first ambiguity involves the function of the word “and” in the treaty phrase at issue. On one hand, the word “and” in Article 2(1) could be read in the conjunctive, to apply to all persons who are “within [a state’s] territory and [*who are also*] subject to its jurisdiction,” as the United States has advocated. “Territory” and “jurisdiction” are not coterminous concepts, although they often overlap significantly in practice. Thus, individuals may be present within a state’s territory but not be subject to its jurisdiction for all purposes, such as foreign diplomats and consuls (and foreign embassies and missions), who generally remain within the jurisdiction of their home state. Conversely, persons outside of a state’s territory may nevertheless remain under its jurisdiction – either because they are present in territory under the state’s *de facto* or *de jure* jurisdiction (potentially including embassies, military bases, and state-flagged ships and aircraft),¹³ because they are agents acting on the state’s behalf or because they are nationals of the state, among other grounds. By reading “and” in the conjunctive, this reading would apply

¹⁰ 1995 Interpretation, at ¶ 7.

¹¹ 2005 Report, Annex I (emphasis in original); *see also* 2007 Observations.

¹² A phrase in a treaty that is open to more than one interpretation is by definition “ambiguous.” *See, e.g.,* the American Heritage Dictionary of the English Language (3rd ed., Houghton Mifflin 1994) (defining “ambiguous” as “[o]pen to more than one interpretation”). *See also* Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, 463 (July 20), (Schwebel, J., dissenting) (noting that resort to supplementary means of interpretation is justified where the text is not clear and the “text’s lack of clarity is sufficiently shown by the differences about its interpretation which are demonstrated as between the court’s Opinion and dissenting opinions” in the case at issue).

¹³ *Cf.* 18 U.S.C. 7 (2006) (defining the special territorial and maritime jurisdiction of the United States for purposes of criminal jurisdiction).

all of the Covenant's protections only to the limited set of individuals who fell within *both* its "territory" and its "jurisdiction." The 1995 Interpretation took the position that "and" must be read in this context as connective, which would mean that no person who is located outside a State Party's territory would ever be covered by the Covenant, *even if the state used its jurisdiction over a person located outside its territory to harm that individual's interests from within the state's own territory*. But as we elaborate below, such a stringent reading of the Covenant does not appear to be consistent with the United States' original interpretation or its modern application of the Covenant in practice.

On the other hand, depending upon the context, "and" could also be used *disjunctively*, for example, when used to connect *alternatives*. The Human Rights Committee, the ICJ, and others have read "and" in this manner, as applying the Covenant to all persons "within [a state's] territory and [*also to all persons*] subject to its jurisdiction."¹⁴

The 1995 Interpretation argues that, on the face of Article 2(1), "and" must be read as conjunctive. But even accepting that reading, this would not by itself establish that the entire phrase is unambiguous. To the contrary, at least two possible interpretations still remain available:

i. *Territorially Limiting Both the Obligation to Respect and the Obligation to Ensure*: Under this reading, the phrase "within its territory and subject to its jurisdiction" would modify *both* the obligation "to respect" and the obligation "to ensure," so that both of these obligations would apply only to persons who are both within a state's sovereign territory and also subject to its jurisdiction. Put another way, Article 2 would place an obligation on a State Party *"to respect Covenant rights only for all individuals within its territory and subject to its jurisdiction and to ensure Covenant rights only to all individuals within its territory and subject to its jurisdiction."* As noted above, this "strict territoriality" approach has been the U.S. reading since 1995.

ii. *Territorially Limiting Only the Obligation to Ensure ("Effective Control")*: Under this reading, the geographic limitation of "[w]ithin its territory and subject to its jurisdiction" modifies only the obligation to which it is textually appended: "to ensure" Covenant rights, not the obligation "to respect" those rights. A State Party would undertake "to respect" Covenant obligations by refraining from infringing protected rights, but undertake "to ensure" Covenant rights only to persons who are both "within its territory and subject to its jurisdiction." Put another way, this reading of Article 2 would place a general obligation on a State *to respect Covenant rights whenever it exercises authority or effective control, without regard to geographic location, but to ensure Covenant rights only to those individuals who are "within its territory and subject to its jurisdiction."* This has been the reading of certain commentators and Special Rapporteurs,¹⁵ and is

¹⁴ U.N. Hum. Rts. Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter "General Comment No. 31"]. For further discussion, see *infra* Section IV(A), (B).

¹⁵ See, e.g., Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 43 (2d ed., 2005) ("The obligation of a State party to *ensure* the rights of the Covenant relates to all individuals '*within its territory and subject to its jurisdiction*' ('*se trouvant sur leur territoire et relevant de leur compétence*').") (Second emphasis in original).

informed by the development of the concept of “effective control” in U.S. and other national courts and regional tribunals.¹⁶

In choosing between the “strictly territorial” 1995 Interpretation (reading (i), above), and the alternative “effective control” interpretation (reading (ii), above), which permits some extraterritorial application of the ICCPR, in light of the treaty text, context, object and purpose, we note at least five difficulties that arise with the 1995 Interpretation:

First, the 1995 Interpretation could be understood to render redundant or meaningless the Article 2(1) obligation “to respect” rights. It is canonical in treaty interpretation that all the words of a treaty are to be given meaning and that a treaty should not be construed so as to render some words redundant.¹⁷ If the words “to respect and to ensure” are *both* modified by the limiting clause “to all individuals within its territory and subject to its jurisdiction,” as under reading (i) above, the obligation to “respect” could be understood to be subsumed by the obligation “to ensure” and thus to have no independent effect.

Although the Covenant on its face does not elaborate on how these two terms differ, today the concepts “to respect” and “to ensure” are widely understood to bear separate and specific meanings under the ICCPR. The obligation “to respect” means that a state commits to *negative* obligations, i.e., to *refrain* itself from violating these rights through its own actions. By contrast, the obligation “to ensure” encompasses broader *positive* obligations to *guarantee* rights to individuals by protecting them from violation of their rights and facilitating the affirmative enjoyment of rights, including through the adoption of legislation.¹⁸ It would make little sense to say that a State Party was obligated to *ensure* rights of the kind recognized by the ICCPR (i.e., to promote them positively and protect against violations), but not also to respect them (i.e., refrain from violating those rights itself).

¹⁶ For further discussion see Section IV, *infra*.

¹⁷ Under the maxim *ut res magis valeat quam pereat*, sometimes referred to as the “rule of effectiveness,” Parties are assumed to intend all the words of a treaty to have a certain effect and not to be rendered meaningless. *Factor v. Laubenheimer*, 290 U.S. 276, 303–04 (1933) (The words of a treaty “[are] to be given a meaning, if reasonably possible, and rules of construction may not be resorted to render [them] meaningless or inoperative.”). The International Law Commission’s commentary on Article 31 of the VCLT noted that the maxim was a “true general rule of interpretation” that was embodied in the requirement that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose. *Summary Records of the 876th Meeting*, [1966] 2 Y.B. Int’l L. Comm’n 219, ¶ 6, U.N. Doc. A/CN.4/SER.A/1966. This interpretive rule is also regularly invoked by the ICJ. See, e.g., *The Corfu Channel Case (United Kingdom v. Albania)*, 1949 I.C.J. 4 at 24 (“It would indeed be incompatible with the generally accepted rules of interpretation to admit that a [provision of a treaty] should be devoid of purport or effect.”); *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, 1952 I.C.J. 93 at 105 (stating that the “principle” that “a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text” should in general be applied when interpreting the text of a treaty).

¹⁸ See Nowak, CCPR COMMENTARY, *supra* note 15, at 37–38. See also Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 9, 23–25 (Asbjørn Eide, et al. eds., 2d ed. 2001) (discussing obligations to respect and ensure in context of economic, social, and cultural rights).

Significantly, as the *travaux* reflect, the text of the treaty that was originally proposed by the United States only included the word “ensure;”¹⁹ the obligation to “respect” was later added.²⁰ In defending the original U.S. text, Eleanor Roosevelt “thought it was unnecessary to insert the words ‘respect and’ She felt that if a State *ensured* all the rights and obligations of the covenant, it must necessarily respect those rights and obligations.” The French delegate Mr. René Cassin, by contrast, considered it “essential that a State should not only guarantee the enjoyment of [i.e., ensure] human rights to individuals but also respect those rights itself.”²¹

On the other hand, reading (ii) above would read the territorial and jurisdictional limitation clause to modify only the obligation to “ensure,” giving both words clear distinct import. These two obligations would function independently, with differing geographic scopes. Under this interpretation, the treaty language creates not one, but two obligations: a geographically unconstrained obligation to *respect* – or avoid violating – the ICCPR rights of persons wherever the state may act with authority or effective control, coupled with a geographically constrained obligation to *ensure* – or affirmatively guarantee – rights for the more circumscribed category of persons who are both within the State’s territory and subject to its jurisdiction.

Second, the 1995 Interpretation is grammatically problematic in both English and other official Covenant languages. Under the English version of the treaty, the literal meaning of the phrase “to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant” does *not* apply the italicized territorial restriction to both the obligation “to respect” and the obligation “to ensure.” Rather, under normal English grammar, the territorially-limited prepositional phrase modifies only the verb “to ensure.” While it is appropriate to speak of ensuring rights “to” rights holders, it is not idiomatic English to speak of *respecting rights* “to” right holders. Yet, a reading that assumes that the territorial restriction modifies not just “to ensure,” but also “to respect,” would yield the ungrammatical reading that States Parties are obligated “to respect . . . *to* all individuals within its territory and subject to its jurisdiction the rights” in the Covenant. The more grammatically correct reading of the passage would obligate States Parties “to respect . . . the rights recognized in the present Covenant,” and also to *ensure* those rights *to* all persons within its territory and subject to its jurisdiction. Consistent with reading (ii), which also offers a solution to the redundancy concern above, this grammatically correct reading would place a territorial constraint on the positive obligation to ensure rights in the Covenant, but would apply the obligation to respect those rights wherever a state acts.

That this is not a scrivener’s error is suggested by the occurrence of the same grammatical problem in the French version of Article 2(1), which has the same grammatical structure: “à *respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur*

¹⁹ U.N. Hum. Rts. Comm., *Proposal for a Human Rights Convention Submitted by the Representative of the United States on the Commission on Human Rights*, art. 2, U.N. Doc. E/CN.4/37 (Nov. 26, 1947).

²⁰ U.N. Hum. Rts. Comm’n. 6th Sess., 138th Mtg., ¶ 21, U.N. Doc. E/CN.49/SR. 138 (April 6, 1950) (France) (requesting the addition of the words “respect and” between “undertakes to” and “ensure”).

²¹ U.N. Hum. Rts. Comm’n., 6th Sess., 193rd mtg., ¶¶ 60, 77, U.N. Doc. E/CN.4/SR.193 (May 26, 1950) (France & USA) (emphasis added).

compétence les droits reconnus dans le présent Pacte. . .” Normal French usage would be “*respecter les droits de tous les individus*,” not “*à tous les individus*.” The French example is particularly relevant, because the inclusion of the obligation to “respect” was proposed by France and Lebanon.²² The Spanish text also has the same grammatical structure: “*a respetar y a garantizar a todos los individuos que se encuentren en su territorio y estén sujetos a su jurisdicción los derechos reconocidos en el presente Pacto. . .*” The Russian text is similar but uses a dative phrase rather than a preposition after the equivalent of the verb “ensure.”²³ These other official language versions of the ICCPR thus confirm the ambiguity of the English version, and suggest that the most natural reading of Article 2(1) is a territorially restricted reading of “ensure” and a modestly extraterritorial (“effective control”) reading of “respect.”

Third, an interpretation that limits all Covenant obligations to a State Party’s territory renders the territorial restriction in Article 12(1) superfluous. Article 12(1) provides that “Everyone lawfully within the territory of a state shall, *within that territory*, have the right to liberty of movement and freedom to choose his residence.” (Emphasis added). But if through the operation of Article 2(1), the entire Covenant already applied only within a state’s territory, it would be entirely redundant to add the second, italicized reference in this particular clause, which limits the right of persons lawfully within a state’s territory to freedom of movement “*within that territory*.” On the other hand, if the Covenant has the potential to apply extraterritorially in certain contexts, then the second territorial restriction in Article 12(1) would become meaningful to limit the operation of that particular Article to the territory of a State Party.

Fourth, a strict territorial reading places the Covenant in tension with its own Optional Protocol. The First Optional Protocol to the ICCPR, a related instrument which was adopted simultaneously with the Covenant in 1966 (and which the United States has not signed or ratified), provides for review by the HRC of individual petitions brought by “individuals subject to [the State Party’s] *jurisdiction* who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”²⁴ Note that the Optional Protocol does not limit the Committee’s authority over individual claims that also arise within the *territory* of the State Party. Reading Article 2(1) as strictly territorial, therefore, appears to create an anomalous authority for the HRC to review individual petitions under the Optional Protocol that would extend more broadly than the scope of a State Party’s substantive obligations under the ICCPR.

Fifth and finally, contrary to VCLT articles 31 and 32, a reading that the Covenant applies solely and exclusively within a State Party’s territory (a) does not comport with the treaty’s object and purpose, and (b) produces unreasonable or absurd results.

²² See Marc J. Bossuyt, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 54 (1987); Nowak, CCPR COMMENTARY, *supra* note 15, at 37.

²³ “. . . уважать и обеспечивать [to respect and to ensure] всем [to all] находящимся в пределах его территории и под его юрисдикцией лицам права . . .”

²⁴ International Covenant on Civil and Political Rights, First Optional Protocol, art. 1, Dec. 19, 1966, 999 U.N.T.S. 302, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (emphasis added).

a. *Object and purpose*: The purpose of the Covenant, as set forth in the Preamble and acknowledged by the U.S. transmittal documents for ratification, is to advance the U.N. Charter and Universal Declaration of Human Rights goals of promoting “the inherent dignity and . . . the equal and inalienable rights of all members of the human family,” and “universal respect for, and observance of, human rights and freedoms.”²⁵ Logically, the treaty drafters may have assumed that the goal of universal protection for human rights could be achieved primarily by securing universal state adherence to the Covenant, together with uniform compliance within each state’s territory. It also seems logical that the drafters would not have sought to impose obligations on States Parties to ensure rights extraterritorially in regions subject to another State’s legal authority, since such obligations could impose excessive extraterritorial burdens on States Parties and provoke conflicts of jurisdiction. The drafters also appear to have understood that in certain situations, the ICCPR would complement other bodies of international law (such as international humanitarian law) which would primarily regulate state behavior in armed conflict.²⁶ But none of these purposes or potential understandings of the Covenant would be served by a rigidly territorial construction that reads the treaty as mandating comprehensive protection of human rights within a State Party’s borders, while imposing absolutely no obligation on the State not to violate rights when it acts affirmatively beyond those borders – whether on the high seas or in the territory of another sovereign. Such a construction would underserve the Covenant’s broad and protective object and purpose. Indeed, such an interpretation would have flouted the animating purpose of post-World War II human rights regime, which was to develop legal tools to respond effectively to Nazi and other atrocities.²⁷ Moreover, as the Human Rights Committee and other commentators have noted, a strictly territorial reading of Article 2(1) would create tension with other aspects of the treaty, such as Article 5(1) of the Covenant, which provides that

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

In 1981, the HRC construed this article as establishing a strong negative inference *against* a rigid territorial restriction. The Committee concluded that in light of this article, “it would be unconscionable” to interpret Article 2(1) “to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”²⁸

²⁵ ICCPR, Pmbi.; Charter of the United Nations, art. 56 (June 26, 1945), 59 Stat. 1031, T.S. 993; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). *See also* U.N. Hum. Rts. Comm’n., 6th Sess., 193rd mtg., ¶ 36, U.N. Doc. E/CN.4/SR.193 (May 26, 1950) (Chile) (noting the goal of the Covenant to commit states to the U.N. Charter obligation “to promote universal respect for, and observance of, human rights.”).

²⁶ *See infra* notes 172, 174.

²⁷ *See, e.g.*, Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights*, Paris, France (Dec. 9, 1948) (“The realization that the flagrant violation of human rights by Nazi and Fascist countries sowed the seeds of the last world war has supplied the impetus for the work which brings us to the moment of achievement here today.”), *available at* <http://www.americanrhetoric.com/speeches/eleanorrooseveltdclarationhumanrights.htm>.

²⁸ Hum. Rts. Comm., *López Burgos v. Uruguay*, Communication [Comm.] No. 52/1979, ¶ 12.3, UN Doc. CCPR/C/13/D/52/1979 (1981) [hereinafter “*López Burgos*”].

b. *Unreasonable or absurd results*: The interpretation that “the terms of the Covenant apply exclusively within the territory”²⁹ of a State Party also yields unreasonable or absurd results. A rigidly territorial restriction on State obligations under the Covenant, for example, would yield the bizarre result that a state that was obligated to protect citizens within its borders could act against those same citizens with impunity under the Covenant, the moment they stepped outside the state’s borders. Absent other complementary treaty regimes regulating such conduct, such a construction would permit a state to torture, commit extrajudicial killing, or violate other human rights just outside its borders. As HRC Member Professor Christian Tomuschat noted: “To construe the words ‘within its territory’ . . . as excluding any responsibility for conduct occurring beyond the national boundaries would . . . lead to utterly absurd results . . . [by] grant[ing] States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.”³⁰

Moreover, it is unclear precisely what it means for a state’s obligations under the ICCPR to apply only to persons within its borders. Governments may act in a variety of ways to affect the rights of persons inside or outside of their territory. For example, a government may (a) act externally and affect a person externally; (b) act internally but affect a person externally; or (c) act externally but affect a person internally. Under a rigidly territorial restriction, a State Party could act internally but affect a person externally (situation (b) above), for example, by conducting a flagrantly unfair trial within its territory to adjudicate rights of a citizen who lived abroad, including applying a presumption of guilt rather than innocence or subjecting the person to double jeopardy, contrary to Article 14 of the Covenant. A State could likewise act within its territory to interfere with the privacy or family of a national residing abroad, contrary to Article 17, or deny a passport to a citizen living abroad, thereby denying the individual the right to enter his own country guaranteed under Article 12(4). *Indeed, it is unclear what the Covenant’s explicit right to enter a country could mean if it does not bestow protection on persons who are outside the territory.*³¹ The 1995 Interpretation of the territorial scope of the Covenant fails to take account of these various means by which reading strict territorial limits into Covenant provisions may lead states to affect the rights of individuals in a way that yields unreasonable or absurd results.

In short, for all of these reasons – the multiple plausible readings of the text of Article 2(1) itself, the textual redundancies and grammatical difficulties created by the 1995 Interpretation, the tensions with other treaty provisions such as Article 12(1) and the Optional Protocol, the conflict with the Covenant’s object and purpose, and the potential for unreasonable or absurd results – the text of Article 2(1), standing alone, does not plainly and unambiguously dictate a rigidly territorial delimitation of all Covenant obligations. To the contrary, an interpretation more

²⁹ 2006 List of Issues, *supra* note 3.

³⁰ López Burgos, *supra* note 28, Appendix.

³¹ While the U.S. has appeared to assume under the 1995 Interpretation that Covenant rights would protect an individual in situation (b) (where the state’s internal action affects an individual abroad), it is not clear why this would be true, given the U.S. interpretation that the *person* must be both within the territory and subject to the jurisdiction.

consistent with the treaty's language, context, and object and purpose would acknowledge some extraterritorial application of the Covenant in some limited circumstances, for example, when a state itself acts abroad with authority or effective control to directly violate Covenant rights (such as reading (ii), *supra*).

At a minimum, these concerns should call into question the repeated assertions that the 1995 Interpretation is "unambiguous" or "inescapable."³² Yet after carefully reviewing all extant prior U.S. government interpretations of Article 2(1) that have set forth the strict territorial view, we have found no statements or documents that either acknowledge or explore the various reasonably available meanings on the face of Article 2(1) or attempt to reconcile that language with the other interpretive sources required by VCLT Art. 31. The 1995, 2005, 2006 and the 2007 analyses simply asserted, with little elaboration, that the U.S. position was "fully in accord with the ordinary meaning and negotiating history of the Covenant."³³

The strict territorial view – that, on the face of Article 2(1), all obligations under the Covenant are limited to individuals who are both within the territory of the State Party and also subject to its jurisdiction – was first asserted in a conclusory fashion in Legal Adviser Conrad Harper's initial statement of the U.S. position to the HRC in 1995. In its Second and Third Periodic Reports on the ICCPR, submitted in 2005, the United States reiterated that "the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party,"³⁴ and elaborated on the position in a two-page annex. The United States again reasserted this view, without further pertinent elaboration of the VCLT Article 31 criteria, in the 2006 responses to the List of Issues and in the U.S. government's 2007 Observations to the Human Rights Committee's General Comment 31.

Each of these assertions essentially reiterated the 1995 Interpretation, without any detailed examination of the language of Article 2(1); the Article's relationship to other treaty text, and the treaty's context, object and purpose. The most detailed articulation of the U.S. position we can find – that set forth in 2005 and repeated in 2007 – only repeats the conclusion, based on "the plain and ordinary meaning of the text," that, "Article [2(1)] establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party's sovereign authority."³⁵ In 2005, the USG analysis asserted that this conclusion was "inescapable"³⁶ and reiterated in 2007 that the Committee's alternative reading "would have the effect of transforming the 'and' in Article 2(1) into an 'or.'"³⁷ But as noted above, adopting a conjunctive reading of Article 2(1) does not answer a second interpretive question, about the territorial limits on the obligations to respect and ensure.

³² 2005 Report, Annex I.

³³ 2007 Observations, at ¶ 8.

³⁴ 2005 Report, Annex I.

³⁵ *Id.* (emphasis in original).

³⁶ 2005 Report, Annex I.

³⁷ 2007 Observations, at ¶ 4.

In sum, a thorough legal analysis of the treaty text, considered in its context and in light of the treaty's object and purpose, finds the treaty's language neither clear nor unambiguous, but rather, susceptible to multiple reasonable interpretations.³⁸ The additional interpretive sources considered below, including the U.S. understanding at the time of signature and ratification, subsequent state practice, and relevant developments in international law, make clear that the ambiguity in the text cannot be resolved without fuller examination of supplementary interpretive tools, including the negotiating history of the ICCPR. *See* VCLT art. 32.

II. Negotiating History

Negotiating history is only a supplementary interpretive source for either confirming the meaning of treaty terms derived from the application of Article 31, or determining that meaning if the application of Article 31 leaves the treaty's meaning ambiguous or absurd. *Id.* Because the 1995 Interpretation relied in part on the Covenant's negotiating history, however, we consider this history next.

The 2005 U.S. Report to the HRC stated that the Covenant's negotiating history "underscore[s] the intent of the negotiators to *limit* the territorial reach of obligations of States Parties," and establishes that the language "within its territory" was added "to make clear that states would not be obligated to *ensure* the rights recognized therein outside their territories."³⁹ In its 2006 oral response to the Committee, the United States reasserted even more sweepingly that "the terms of the [entire] Covenant apply exclusively within the territory" of a State Party.⁴⁰

But on inspection, the negotiating history of the Covenant proves far less conclusive regarding the intended geographic scope of the Covenant than the 1995 Interpretation suggested. The *travaux* nowhere suggest that states sought rigidly to preclude extraterritorial operation of all provisions of the Covenant in all circumstances. Instead, they indicate that the negotiators intended to narrow, but not to foreclose, application abroad of the obligation to *ensure* Covenant rights. While a fair reading of the negotiating history plainly reflects a desire of states to limit the territorial reach of certain obligations of States Parties, that desire did not extend to the kind of categorical or "exclusive[]" territorial restriction with respect to all Covenant obligations that the 1995 Interpretation has advanced. Instead, the negotiating history indicates a far narrower intent: to protect States Parties from an affirmative obligation to *adopt legislation to guarantee or otherwise to ensure* Covenant protections to persons who were only temporarily or partially under their jurisdiction (such as residents of post-war occupied Germany and Japan, or citizens of a State Party who were residing abroad), in situations where legislating would create conflicts with the legal authority of another sovereign. In these specific contexts, the delegates recognized that States Parties would not have the capacity – and hence should not bear the legal obligation – to *ensure* rights under the Covenant to persons who were only nominally subject to their jurisdiction for some purposes, but who were physically located in foreign territory and primarily

³⁸ *See supra* note 12.

³⁹ 2005 Report, Annex I (emphasis added).

⁴⁰ 2006 List of Issues.

subject to the authority of another sovereign. This conclusion derives in particular from a review of the history of the Roosevelt Amendment.

A. The Roosevelt Amendment

In January of 1950, the draft of Article 2(1) provided only that “Each State party hereto undertakes to *ensure* to all individuals *within its jurisdiction* the rights defined in this Covenant.” Eleanor Roosevelt, as Chair of the Human Rights Commission, famously proposed an amendment to shift toward the current wording of that article by adding the words “territory and subject to” between the words “within its” and “jurisdiction.”⁴¹

It is important to understand Mrs. Roosevelt’s proposal in context. As noted, at the time, Article 2 only addressed State obligations “to ensure” Covenant rights. The obligation “to respect” such rights was added later at the suggestion of France and Lebanon.⁴² Furthermore, the Article itself focused on the obligation “to adopt . . . legislative or other measures to give effect to the rights” in the Covenant. Thus, with Mrs. Roosevelt’s proposed amendment, the resulting text would have provided as follows:

Each State party hereto undertakes to *ensure* to all individuals *within its territory and subject to its jurisdiction* the rights defined in this Covenant. Where not already provided by legislative or other measures, each State undertakes, in accordance with its constitutional processes and in accordance with the provisions of this Covenant, *to adopt* within a reasonable time *such legislative or other measures to give effect to the rights defined in this Covenant*.⁴³

In March, Mrs. Roosevelt explained her proposed amendment as follows:

The purpose of the proposed addition was to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of contracting States. The United States was afraid that without such an addition the draft Covenant might be construed as obliging the contracting States to enact legislation concerning persons who, *although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan*: persons within those countries were subject to the jurisdiction of the occupying States in certain respects, *but were outside the scope of legislation of those States. Another illustration would be the case of leased territories*; some countries leased certain territories from others for limited purposes, and there might be questions of

⁴¹ U.N. Hum. Rts. Comm’n., *Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation*, U.N. Doc. E/CN.4/353/Add.1 (Jan. 4, 1950) (emphasis added); U.N. Hum. Rts. Comm’n., *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles*, 14, U.N. Doc. E/CN.4/365 (Mar. 22, 1950) (compilation of comments by States Parties, including USA proposed amendment).

⁴² U.N. Hum. Rts. Comm’n., 6th Sess., 194th mtg., ¶¶ 45, 46, U.N. Doc. E/CN.4/SR.194 (May 25, 1950) (noting the addition of the phrase “to respect and” and the phrase “territory and subject to its” to Article 2).

⁴³ See *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation*, *supra* note 41 (emphasis added).

conflicting authority between the lessor nation and the lessee nation. . . . In the circumstances, it seemed advisable to resolve *those ambiguities* by including the [territorial] words . . . in article 2, paragraph 1.⁴⁴

On its face, Mrs. Roosevelt's animating concern thus was not strict territoriality: i.e., limiting all rights under the Covenant exclusively to the territory of a State Party. To the contrary, elsewhere, she repeatedly and famously argued that the Covenant rights were universal in application.⁴⁵ Instead, she offered the amendment with the narrower goal of addressing particular "ambiguities": so that states would not be obliged "to enact legislation" regarding persons – such as those under short-term military "occupation" – who were subject to some limited forms of jurisdiction but "outside [the] scope of legislation" of the State Party, or those in leased territories, who were subject to concurrent jurisdiction and with respect to which legislation by the State Party could thus result in "conflicting authority" with the local sovereignty.

Under the international humanitarian law rules governing occupation, the occupying state has a duty to respect, unless absolutely prevented, the existing laws in force in the occupied territory.⁴⁶ By 1950, the post-war Allied occupations of West Germany, Japan, and Austria also all involved governance by locally-elected governments under varying degrees of oversight by the occupying powers. Given that context, as Mrs. Roosevelt indicates, although persons within those territories were subject to the jurisdiction of the occupying states in certain limited respects, the duty to *ensure* fell primarily on the local governments, and not on the United States or its Allies. The scope of U.S. authority and responsibility was therefore far more limited than it would have been had the United States been engaged in a comprehensive occupation with direct governance responsibilities.

Moreover, Mrs. Roosevelt's concern with avoiding affirmative obligations to ensure rights abroad – was fully consistent with the text of the article at the time, which focused on "ensur[ing]" rights by "adopt[ing] . . . legislation."⁴⁷ In May 1950, Mrs. Roosevelt reiterated this position, stating that absent the U.S. amendment

⁴⁴ U.N. Hum. Rts. Comm'n., 6th Sess., 138th mtg., ¶¶ 34-35, U.N. Doc. E/CN.4/SR.138 (April 6, 1950) (USA) (emphasis added).

⁴⁵ See, e.g., Eleanor Roosevelt, *The Struggle for Human Rights*, delivered in Paris, France (Sept. 28, 1948) (noting that "the peace and security of mankind are dependent on mutual respect for the rights and freedoms of all" and that "[t]he field of human rights is not one in which compromise on fundamental principles are possible Is there a faithful compliance with the objectives of the Charter if some countries continue to curtail human rights and freedoms instead of to promote the universal respect for an observance of human rights and freedoms for all as called for by the Charter?"); see also MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

⁴⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, U.S.T.S. 539, 2 A.J.I.L. Supp. 90; accord Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 64, 6 U.S.T.S. 3516, 75 U.N.T.S. 287.

⁴⁷ See *supra* note 43 and accompanying text.

[the Covenant] could be interpreted as obliging a contracting party to *adopt legislation applying to persons outside its territory although technically within its jurisdiction for certain questions*. That would be the case, for example, in the occupied territories of Germany, Austria and Japan, as persons living in those territories were *in certain respects* subject to the jurisdiction of the occupying Powers *but were in fact outside the legislative sphere of those Powers*.⁴⁸

The next day, Mrs. Roosevelt reiterated again: “By this amendment the United States Government would not, by ratifying the covenant, be assuming an obligation *to ensure* the rights recognized in it to citizens of countries under United States occupation.”⁴⁹

Significantly, nothing in the Roosevelt Amendment indicates a purpose to establish that States Parties should have no obligations where the State acted to affirmatively violate the rights of an individual outside its territory, or where the State exercised *complete* and long-term legislative authority over a territory, as in the context of an indefinite lease (such as Guantánamo) or certain protectorates (such as territories subject to U.S. law). In short, while Mrs. Roosevelt’s amendment was focused on the positive obligations embodied by the concept of the term “ensure,” she never denied the possible extraterritorial application of the obligation “to respect” Covenant rights, in the sense of that term that was being asserted by France. France, in turn, agreed that whatever the territorial scope of the duty to respect rights, “the rights recognized in the covenant . . . could not, in practice, *be ensured* outside the territory of the contracting State”⁵⁰

As the *travaux* make clear, for other delegates, the obligation to “ensure” raised issues regarding whether States Parties would have positive obligations to guarantee Covenant rights of their own nationals abroad. In response to an assertion by the Philippines that “a United States citizen abroad would surely be entitled to claim United States jurisdiction if denied the rights recognized in the covenant,”⁵¹ for example, Mrs. Roosevelt indicated that the United States could not be legally expected to protect a citizen abroad *from harms committed by a third country*. She explained that:

if such a case occurred within the territory of a State party to the covenant, the United States Government would insist that that State should honour its obligations under the covenant; if, however, the State in question had not acceded to the covenant, the United States Government would be unable to do more than make representations on behalf of its citizens through the normal diplomatic channels. It would certainly not exercise jurisdiction over a person outside its territory.⁵²

⁴⁸ U.N. Hum. Rts. Comm’n., 6th Sess., 193rd mtg., ¶ 52, U.N. Doc. E/CN.4/SR.193 (May 26, 1950) (USA) (emphasis added).

⁴⁹ U.N. Hum. Rts. Comm’n., 6th Sess., 194rd mtg., ¶ 14, U.N. Doc. E/CN.4/SR.194 (May 25, 1950) (USA) (emphasis added).

⁵⁰ *Id.* at ¶ 19 (France) (emphasis added). See also *supra* notes 20-22, and accompanying text.

⁵¹ *Id.* at ¶ 15 (Philippines).

⁵² *Id.* at ¶ 16 (USA).

Likewise, when Lebanon suggested that “a nation should *guarantee* fundamental rights to citizens abroad as well as at home,”⁵³ Mrs. Roosevelt “reiterated that it was not possible for any nation to *guarantee* such rights . . . to its nationals resident abroad.”⁵⁴ Again, she was clearly referring to a State Party’s inability to protect its citizens abroad from harm inflicted by the third country. She later underscored:

that a nation could not *guarantee* a fair trial, under the terms of the covenant, to its nationals in another country. *If that country had not ratified the covenant, it would not consider itself bound by it*; and the only recourse open to the Government of the citizen in question would be appeal through diplomatic channels.⁵⁵

Uruguay agreed with United States: “Since no State could provide for judges, police, court machinery, etc. *in territories outside its jurisdiction*, it was evident that States could *effectively guarantee* human rights only to those persons residing within their territorial jurisdiction.”⁵⁶ Other delegates spoke to support, question or modify, the U.S. proposal, with their comments focusing on the authority to ensure.⁵⁷ On the basis of these exchanges, the Roosevelt Amendment ultimately was adopted at the 1950 session by a vote of 8-2, with 5 abstentions.⁵⁸

B. Subsequent Debates

⁵³ *Id.* at ¶ 24 (Lebanon) (emphasis added).

⁵⁴ *Id.* at ¶ 25 (USA) (emphasis added).

⁵⁵ *Id.* at ¶ 29 (USA) (emphasis added).

⁵⁶ *Id.* at ¶ 30 (Uruguay) (emphasis added).

⁵⁷ Chile supported the U.S. position, stating that “Citizens living in a given territory were entitled to protection by the State which exercised jurisdiction over that territory; consequently nationals living abroad must be subject to *the laws of the country in which they resided*. . .” *Id.* at ¶ 20 (Chile) (emphasis added). As noted previously, France expressed the view that the Roosevelt Amendment was relatively uncontroversial since Covenant rights “could not, in practice, be *ensured* outside the territory of the contracting State.” *Id.* at ¶ 19 (France). Yugoslavia expressed concern that “inclusion of both the word ‘territory’ and the word ‘jurisdiction’” would reduce states’ human rights obligations and urged that the problem of military occupation be handled instead by derogation from Covenant obligations under Article 4. *Id.* at ¶ 22 (Yugoslavia). During a discussion of various national approaches to jurisdiction, Belgium proposed the alternative language of “to all individuals who are subject to its jurisdiction, whether within its territory or abroad.” *Id.* at ¶ 26 (Belgium). Greece proposed the alternative language of “all individuals either within its territory or subject to its jurisdiction.” *Id.* at ¶ 17 (Greece). The United States did not address the Belgian proposal, but opposed the Greek proposal on the ambiguous grounds that “it seemed to draw a distinction between the two concepts of being within the territory of a State and being subject to its jurisdiction.” *Id.* at ¶ 18 (USA). At most, however, this position suggests that Mrs. Roosevelt believed that “and” should be read in the conjunctive. It does not establish that the territorial restriction was understood to qualify anything but the word “ensure.” Significantly, only the day before, France proposed “that in the French text the word ‘et’ should be replaced by the word ‘ou’,” on the grounds that “[i]f that was not done many States would lose their jurisdiction over their foreign citizens.” U.N. Hum. Rts. Comm’n., 6th Sess., 193rd mtg., ¶ 97, U.N. Doc. E/CN.4/SR.193 (May 26, 1950) (France). This proposal suggests a conjunctive understanding of the English word “and,” applied consistently with a territorial focus on the obligation to ensure.

⁵⁸ *Id.* at ¶ 46.

Subsequently, after similar debates, the United States and others defeated proposals to delete the phrase “within its territory” at both the 1952 session of the Commission⁵⁹ and the 1963 session of the General Assembly.⁶⁰ Although at this point the obligation to respect had been added to the text of Article 2, the U.S. position on the territorial phrase continued to focus not on the strict territoriality of all Covenant provisions, but on whether the Covenant should be understood to impose obligations on states to *ensure* rights to their own citizens residing abroad and to residents of other territories where the state did not exercise legislative authority.

In 1952, Eleanor Roosevelt again emphasized that “[t]he Commission had considered that expression necessary so as to make it clear that a State was not bound *to enact legislation in respect of its nationals outside its territory*.”⁶¹ Significantly, the United Kingdom agreed: “A State could hardly undertake to *ensure* to nationals outside its territory the rights set out in the covenant since, for example, there were cases in which such nationals were for certain purposes under its jurisdiction, *but the authorities of the foreign country concerned would intervene in the event of one of them committing an offence*.”⁶² France nevertheless continued to press for a text that would “*commit States in regard to their nationals abroad*.”⁶³ Put another way, the delegates were affirming that states cannot meaningfully *ensure* Covenant rights for individuals unless they are both within the state’s territory and subject to its jurisdiction. On this basis, the French amendment was rejected in favor of Mrs. Roosevelt’s language.⁶⁴

A decade later, in November 1963, Greece sought to remove “within its territory” on the grounds that this language was “unduly restrictive and should be deleted, and the words ‘subject to its jurisdiction’ would then refer to both the national and the territorial jurisdiction of the State Party.”⁶⁵ The UK responded that Article 2 stated the obligation of States Parties “*to ensure* to all

⁵⁹ In June 1952, France unsuccessfully reopened its proposal to delete the territorial phrase in Article 2(1). U.N. Hum. Rts. Comm’n., *Draft International Convention on Human Rights and Measures of Implementation*, 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.161 (1952) (French amendment).

⁶⁰ U.N. GAOR 3rd Comm., 18th Sess., 1259th mtg., ¶ 30, U.N. Doc. A/C.3/SR.1259 (Nov. 11, 1963) (rejection of French and Chinese proposal to delete “within its territory”).

⁶¹ U.N. Hum. Rts. Comm’n., 8th Sess., 329th mtg., at 10, U.N. Doc. E/CN.4/SR. 329 (June 27, 1952) (USA) (emphasis added).

⁶² *Id.* at 12 (UK) (emphasis added).

⁶³ *Id.* at 13 (France) (emphasis added); Yugoslavia took the position that “the words ‘within its territory and’ and ‘subject to its jurisdiction’ were not reconcilable.” *Id.* at 13 (Yugoslavia). The summary of these debates explained that in response to the argument that States should not be relieved of their “obligations under the covenant to certain persons . . . merely because they were not within the territory,” other representatives contended – again consistent with the analysis here – “that *it was not possible for a State to protect [i.e. to ensure] the rights of persons subject to its jurisdiction when they were outside its territory.*” U.N. Hum. Rts. Comm’n., *Report of the 8th Session, 14 April to 14 June 1952*, ¶ 270, U.N. Doc. E/CN.4/669 (1952) (emphasis added).

⁶⁴ U.N. Hum. Rts. Comm’n., 8th Sess., 329th mtg., at 14, U.N. Doc. E/CN.4/SR.329 (June 27, 1952) (vote rejecting amendment).⁶⁵ U.N. GAOR 3rd Comm., 18th Sess., 1257th mtg., ¶ 1, U.N. Doc. A/C.3/SR. 1257 (Nov. 8, 1963) (morning) (Greece).

⁶⁵ U.N. GAOR 3rd Comm., 18th Sess., 1257th mtg., ¶ 1, U.N. Doc. A/C.3/SR. 1257 (Nov. 8, 1963) (morning) (Greece).

individuals without distinction the rights recognized in the Covenant.”⁶⁶ The UK found the phrasing of Article 2(1) “entirely acceptable . . . for a State could hardly be expected to assume responsibilities towards individuals who were outside its territory and jurisdiction and *over whom it therefore had no authority*.”⁶⁷ Italy maintained that the Covenant should “ensure[]” rights to citizens abroad.⁶⁸ France noted that “it would be regrettable if the words ‘within its territory’ in paragraph 1 were to be construed as permitting a State to evade its obligations to those of its citizens who resided abroad.”⁶⁹ Peru expressed the view that “[n]o State could . . . act outside the limits of its territory.”⁷⁰

In contrast to this extensive focus in the *travaux* on obligations to *ensure* rights to inhabitants of the post-war occupied territories and to a state’s nationals abroad, minimal attention was given to placing a territorial limit on the obligation to *respect* Covenant rights so that a State Party might *itself* act to violate the rights of an individual located abroad. None of the United States’ responses indicated that Article 2(1) would preclude application of Covenant obligations in such circumstances. In 1950, for example, in addition to addressing whether a State Party could ensure that a third country would afford a citizen a fair trial, as noted above, Lebanon voiced the following objections to the proposed Roosevelt Amendment:

First, . . . that amendment conflicted with article [12], which affirmed the right of a citizen abroad to return to his own country; it might not be possible for him to return if, while abroad, he were not under the jurisdiction of his own Government. Secondly, if a national of any State, *while abroad*, were informed of a suit being brought against him in his own country, he might be denied his rightful fair hearing because of his residence abroad.⁷¹

Mrs. Roosevelt suggested that these were not a concern, assuring Lebanon that “[s]he could . . . see *no conflict* between the United States amendment and article [12]; *the terms of article [12] would naturally apply in all cases*, and any citizen desiring to return to his home country would receive a fair and public hearing in any case brought against him.”⁷² Mrs. Roosevelt’s response that she could see “no conflict” between the territorial amendment and Article 12 is difficult to

⁶⁶ *Id.* at ¶ 5 (UK) (emphasis added).

⁶⁷ *Id.* (UK) (emphasis added).

⁶⁸ U.N. GAOR 3rd Comm., 18th Sess., 1257th mtg., ¶ 10, U.N. Doc. A/C.3/SR. 1257 (Nov. 8, 1963) (morning) (Italy) (emphasis added).

⁶⁹ *Id.* at ¶ 21 (France). China argued that “the words ‘within its territory’ . . . seemed superfluous, since a State must protect its nationals whether or not they were within its territory.” U.N. GAOR 3rd Comm., 18th Sess., 1258th mtg., ¶ 29, U.N. Doc. A/C.3/SR.1258 (Nov. 8, 1963) (afternoon) (China). Greece proposed replacing the territorial language with “national and territorial” jurisdiction. *Id.* at ¶ 33 (Greece).

⁷⁰ *Id.* at ¶ 39 (Peru).

⁷¹ U.N. Hum. Rts. Comm’n., 6th Sess., 194rd mtg., ¶ 23, U.N. Doc. E/CN.4/SR.194 (May 25, 1950) (Lebanon) (emphasis added).

⁷² *Id.* at ¶ 25 (USA) (emphasis added).

reconcile with a reading of the Roosevelt Amendment as restricting all Covenant rights in all circumstances to persons “within the territory.” For a citizen abroad who was seeking permission to return might be considered within U.S. “jurisdiction” for purposes of reentry, but he or she certainly would not be considered “*within the territory*.” Had a strict territorial reading been the prevailing reading at the time, the U.S. citizen abroad would have fallen outside the scope of Covenant rights. Mrs. Roosevelt did not take this position, however. It is therefore notable that although a citizen residing abroad would obviously be outside the territory of the State Party, both Lebanon and the U.S. apparently assumed that the Covenant obligation to respect rights to reentry under Article 12 would apply extraterritorially to that person.⁷³

Moreover, Mrs. Roosevelt elsewhere seemed to suggest that the U.S. could be responsible for ensuring human rights to U.S. military personnel posted abroad. In response to Uruguay’s observation that states could “effectively guarantee” human rights only to residents within their territorial jurisdiction, Belgium “raised the question of troops maintained by a State in foreign areas” and observed that “such troops were obviously under the jurisdiction of that State.”⁷⁴ Mrs. Roosevelt assured the delegates “that such troops, although maintained abroad, remained under the jurisdiction of the State,”⁷⁵ a response which could be understood to suggest that a state would incur responsibility under the Covenant with respect to such troops.

Throughout the subsequent debates, the delegates do not appear to have considered the context in which *a state’s own agents* – e.g., persons whose conduct was under the direct authority of the State Party, even when those agents acted abroad – might violate Covenant obligations overseas. Had the delegates done so, it seems unlikely that they would have entirely precluded the possibility that the Covenant would apply extraterritorially, given the focus of their other discussions on persons *not* under a state’s authority, and on a primary purpose of the Universal Declaration of Human Rights and the Covenants, namely, to address Nazi atrocities that led to World War II, some of which ranged across borders.

While the 1995 Interpretation would read Mrs. Roosevelt’s proposed addition of “territory” to the jurisdictional clause as strictly limiting any and all operation of the Covenant to persons

⁷³ On the other hand, it is unclear precisely what Mrs. Roosevelt meant when she said that any citizen desiring to return to his home country would receive a fair and public hearing in any case brought against him. In theory, she could have intended to suggest that a citizen abroad *could* be subjected to an unfair trial at home without violating the Covenant. But she does not say this, and in context, that interpretation seems dubious, given Mrs. Roosevelt’s clear focus elsewhere on ensuring that the U.S. would not be responsible for actions taken by other states against U.S. nationals abroad. This also would contradict even the U.S. approach under the 1995 Interpretation, which in practice has assumed that the Covenant applied to governmental actions that occur within the territory, regardless where the citizen affected was located. More likely, she either (1) was addressing only the possibility of a citizen returning to a fair trial, not whether the Covenant would obligate the state to provide such a trial even if the citizen did not return; or (2) took the question to refer to criminal trials, which under U.S. law can only be conducted for a defendant who is present and not *in absentia*, as allowed in some jurisdictions. Indeed the exchange in which she made her comment also considered different states’ approaches to criminal jurisdiction over crimes committed abroad. See *id.* at 9-10.

⁷⁴ U.N. Hum. Rts. Comm’n., 6th Sess., 194th mtg., ¶ 30, U.N. Document E/CN.4/SR.194 (May 25, 1950) (Uruguay); *id.* at ¶ 31 (Belgium).

⁷⁵ *Id.* at ¶ 32 (USA).

within a State Party's formal territory, a thorough examination of the *travaux*, particularly Mrs. Roosevelt's comments, as well as those of other states, suggests that the delegates sought to solve a narrower problem. The United States, the United Kingdom, and other states explicitly defended the phrasing of Article 2(1) to avoid incurring affirmative obligations to legislate to *ensure* Covenant rights for persons who were outside the state's territory and not fully subject to the state's jurisdiction, under circumstances where such obligations would risk "conflicting authority." These included: (1) inhabitants of the post-war occupation, who were only subject to limited Allied authority; (2) nationals of the State Party who were residing abroad and thus primarily subject to a foreign state's jurisdiction (though potentially also subject to some forms of the State Party's jurisdiction based on nationality); and (3) inhabitants of leased territories, which, depending on the terms, could be subject only to the limited jurisdiction of the leasing State. *The common thread with respect to each of these groups is that the drafting states that supported the Roosevelt Amendment sought to avoid treaty obligations to legislate affirmatively to ensure rights to persons over whom they lacked sufficient authority to do so.* States that opposed the Roosevelt Amendment did so primarily based on their belief that states had a positive obligation to protect their citizens residing abroad from harm by a third state. Mrs. Roosevelt in turn rejected this view on the grounds that if a third country should violate the Covenant rights of a U.S. national, the appropriate avenue for redress was diplomatic. But significantly, *none of these scenarios placed a strict territorial limit on a State Party's obligation to "respect" Covenant rights abroad.* Certainly, nothing in the *travaux* suggests that the United States sought to remain free to attack the Covenant rights of its own citizens or foreign nationals abroad.

In sum, the *travaux* establish that: (1) the delegates sought to differentiate the territorial scope of the terms "respect" and "ensure;" (2) the delegates generally understood the term "and" in Article 2(1) in the conjunctive; (3) the focus of the negotiators in adding the territorial clause was on extraterritorial contexts in which states lacked sufficient authority to *ensure* Covenant rights; (4) the ensuing discussion therefore focused on modifying the obligation to "ensure" to make a contracting state's obligation coextensive with its jurisdictional and territorial authority; (5) the obligation to "respect" was added after the bulk of the discussions over the territorial section had already occurred, and without the same concerns expressed regarding the need to set territorial limits upon that term; (6) even after the word "respect" was added to Article 2(1), the negotiators continued to focus on the need to avoid incurring obligations to ensure abroad that could not be effectively implemented due to lack of formal legislative authority and the potential for conflicting sovereignty; (7) Mrs. Roosevelt took the position that the Article 12(4) obligation to respect right to return one's country would apply "in all cases" to a citizen residing abroad; and (8) the delegates indicated no intent that a contracting state should be able to frustrate the Covenant's purposes by reaching outside its borders to violate the rights of persons under its control.

C. Commentary Construing the *Travaux*

The above reading of the *travaux* is shared by prominent commentators, who have read the negotiating history as reflecting an intent to restrict the territorial scope of the Covenant only in situations where enforcing the Covenant would likely encounter exceptional obstacles. As former ICJ Judge Thomas Buergenthal has explained:

the travaux préparatoires indicate that efforts to delete “within its territory” or to substitute “or” for “and” failed for other reasons. It was feared that such changes might be construed to require the states parties to protect individuals who are subject to their jurisdiction but living abroad, against the wrongful acts of the foreign territorial sovereign.⁷⁶

In the *López Burgos* decision, HRC Member Professor Christian Tomuschat offered the following explanation of the negotiating history and the Covenant’s purpose:

*To construe the words “within its territory” . . . as excluding any responsibility for conduct occurring beyond the national boundaries would . . . lead to utterly absurd results The formula [instead] was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.*⁷⁷

Both of these analyses recognize the practical barriers to a state’s ability to afford *all* the protections of the Covenant to its citizens who are residing in another country, even though those citizens remain subject to the jurisdiction of their state of nationality. Likewise, states occupying a foreign territory may not be able to ensure persons in that territory all the protections of the Covenant, *inter alia*, because jurisdiction may be shared with local authorities, and under international humanitarian law, the occupying state has a potentially competing duty to respect existing local law.

At a minimum, the Covenant’s negotiating history suggests that the 1995 Interpretation overclaimed regarding the clarity of the *travaux*. The travaux do not in fact convey a clear intent to *preclude* extraterritorial operation of the Covenant in all circumstances, but rather, only the states’ desire *to avoid affirmative obligations to ensure rights in situations over which they lacked significant legislative authority*. The negotiators intended to narrow, but not necessarily to foreclose application of the Covenant abroad, particularly with regard to the obligation to *ensure* Covenant rights. *As a whole, the negotiating history, supported by respected commentators, comports best not with the 1995 Interpretation, but rather, with an “effective*

⁷⁶ Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS 72, 74 (Louis Henkin ed., 1981) (internal citation omitted).

⁷⁷ *López Burgos*, *supra* note 28, at Appendix (opinion by Christian Tomuschat) (emphasis added).

control” interpretation (reading (ii) offered above). Under that reading, even if the duty to “ensure” does not apply absent a meaningful exercise of territorial jurisdiction, the duty to “respect” would still apply extraterritorially, where a state affirmatively exercises authority or effective control over particular persons or places abroad. At a minimum, this understanding of the *travaux* does not foreclose the possibility that some Covenant rights would apply to state conduct abroad in some circumstances.

Significantly, when closely examined, the official U.S. interpretation of the *travaux* can easily be squared with this reading. The official U.S. formulation, set forth both in its 2005 Report and its 2007 observations, has long been that the Covenant’s negotiating history “underscore[s] the intent of the negotiators to limit the territorial reach of obligations of States Parties,” and establishes that the language “within its territory” was added “to make clear that states would not be obligated to ensure the rights recognized therein outside their territories.”⁷⁸ Nothing in this carefully crafted statement establishes the broader, more categorical claim – asserted in the 1995 Interpretation and afterward – that all Covenant rights apply “exclusively” or “only” within the territory of the United States.

This point is confirmed by an historical review of the evolving U.S. position. That review reveals that far from originating with the ICCPR itself, the 1995 strict territoriality Interpretation is relatively newly minted.

III. The Evolving United States Position

In recent years, the United States has represented to the Human Rights Committee that the 1995 Interpretation of strict territoriality is “the position that the United States has stated publicly *since becoming Party to the Covenant*.”⁷⁹ But on examination, we can find no support for this claim. An historical review demonstrates that the United States did not articulate this view: (1) at the time of signature and transmittal of the Covenant in 1978; (2) upon Senate advice and consent to the Covenant in 1991, or (3) at the time ratification in 1992. The Carter Administration’s treaty transmittal package of February 1978 did not articulate this position.⁸⁰ The first Bush Administration did not take the position that the Covenant was exclusively limited to U.S. territory – either when President Bush first sought and obtained Senate consent to ratification in 1991, or when the United States ultimately ratified the Covenant in 1992. Nor does this position appear to have been the understanding of the Senate that gave its advice and consent to ratification. (4) Nor, finally, was the interpretation advanced in the United States’ Initial Report to the HRC.

⁷⁸ 2005 Report, Annex I (emphasis added); accord 2007 Observations, at ¶ 6.

⁷⁹ 2007 Observations, at ¶ 8 (emphasis added).

⁸⁰ Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Docs. C, D, E and F, 9th Cong., 2nd Sess. (1978).

A. The Carter Administration Position at Signing and Transmittal

When President Carter signed the Covenant and transmitted it to the Senate, together with a proposed package of reservations, understandings and declarations in 1978, the United States Government does not appear to have taken a public position that ICCPR obligations were restricted to a state's territory. The President's transmittal does not mention territoriality and does not touch on this question in discussing Article 2; if anything, it suggests an understanding limited only to jurisdiction.

The Department of State's Letter of Submittal to the President regarding transmission of the treaty to the Senate indicated that the package of treaties was "designed to implement" the human rights provisions of the UN Charter, "which . . . provides that the Organization and its members shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all . . .'"⁸¹ The State Department's analysis of the ICCPR indicated that the treaty rights were "similar in conception to the United States Constitution and Bill of Rights," and that "[t]he [Covenant] rights are primarily limitations upon the power of the State to impose its will upon the people under its jurisdiction."⁸² The representation that the Covenant reached "people under [the state's] jurisdiction" could be understood to indicate that the Administration at the time did not view the Covenant as rigidly limited by territory, particularly given the absence of any discussion of a territorial restriction.⁸³

Senate hearings were held on the treaty in 1979, but neither the testimony of then-Deputy Secretary of State Warren Christopher nor then-Legal Adviser Roberts Owen addressed the issue of geographic scope.⁸⁴ A background paper provided by the Congressional Commission on Security and Cooperation in Europe also states only that under the ICCPR, "state parties are obligated to ensure that the individuals *within their jurisdiction* enjoy a number of rights," but again without any mention of territory.⁸⁵ The failure to discuss territoriality more explicitly in the Carter-era transmittal package could simply indicate that no one thought to address the question. But, particularly given the general references made throughout to jurisdiction, nothing in the original transmittal package can be read as compelling the later 1995 Interpretation of strict territoriality.

⁸¹ *Id.* at v.

⁸² *Id.* at xi.

⁸³ This analogy to U.S. domestic laws could indicate recognition that the treaty could operate extraterritorially in some fashion, since domestic constitutional and statutory law at the time was recognized as having at least some extraterritorial scope. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 89 (1996) (discussing geographic scope of U.S. Constitution); RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986) (discussing extraterritorial application of U.S. statutes).

⁸⁴ International Human Rights Treaties: Hearings before the Senate Committee on Foreign Relations, 96th Cong., 1st Sess. 71 (1979).

⁸⁵ COMMISSION ON SECURITY AND COOPERATION IN EUROPE, FULFILLING OUR PROMISES: THE UNITED STATES AND THE HELSINKI FINAL ACT 170 (Nov. 1979) (emphasis added).

B. The George H.W. Bush Administration Position: Consent and Ratification

When the first Bush Administration again sought Senate approval of the Covenant in 1991, that Administration did not – so far as we can tell – take the position that the Covenant was territorially restricted.

Certainly by 1991, it could not be argued that some limited extraterritorial scope for the Covenant would have been a revolutionary idea. By that date the HRC had unquestionably put the extraterritorial scope of the Covenant at issue. In 1981, eleven years before the United States ratified the Covenant, in the individual petitions of *López Burgos* and *Lilian Celiberti de Casariego*, the HRC held that kidnapping of Uruguayan nationals “perpetrated by Uruguayan agents acting on foreign soil” gave rise to Covenant violations.⁸⁶ In both cases, the Committee maintained that Article 2(1) “does not imply that [a State Party] cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State.”⁸⁷ Invoking the object and purpose of the Covenant, the HRC observed that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”⁸⁸ Committee Member Tomuschat also set forth the individual opinion quoted in Section II(C) above, which offered a somewhat narrower theory of the extraterritorial scope of the Covenant.

In 1983, in reviewing individual communications submitted under the Optional Protocol of the ICCPR, the Committee concluded that Uruguay’s denial of a passport to a citizen residing in Mexico fell within the jurisdiction of the Covenant under Article 12.⁸⁹ This was essentially the same question posed to Eleanor Roosevelt by Lebanon in 1950, to which she had acknowledged that Article 12 would apply.⁹⁰ The Committee reasoned that “issu[ance] of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is ‘subject to the jurisdiction’ of Uruguay for that purpose,” and a passport is a means of enabling him ‘to leave any country, including his own’, as required by article 12(2) of the Covenant.” The Committee concluded that, with respect to a citizen resident abroad, Article 12(2) imposed obligations on the state of nationality as well as the State where the individual resided. It accordingly rejected a strict territorial restriction, reasoning that, “article 2 (1) of the Covenant

⁸⁶ *López Burgos*, *supra* note 28, at ¶ 12.1; accord U.N. Hum. Rts. Comm., *Views of the Human Rights Comm. Under Article 5, Paragraph 4, of the Optional Protocol to the Int’l Covenant on Civil and Political Rights*, ¶ 10.3, U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 1981) (concluding Uruguay’s extraterritorial arrest of Uruguayan national in Brazil and her later detention in Uruguay gave rise to Covenant violations).

⁸⁷ *Views of the Human Rights Comm. Under Article 5, Paragraph 4, of the Optional Protocol to the Int’l Covenant on Civil and Political Rights*, *supra* at ¶ 12.3.

⁸⁸ *Id.*

⁸⁹ U.N. Hum. Rts. Comm., *Views of the Human Rights Comm. Under Article 5, Paragraph 4, of the Optional Protocol to the Int’l Covenant on Civil and Political Rights*, ¶ 6.1, U.N. Doc. CCPR/C/18/D/77/1980 (Mar. 31, 1983).

⁹⁰ See text accompanying notes 71-72, *supra*.

could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.”⁹¹

While this history reasonably could have raised the issue, it appears that the Bush Administration in seeking Senate approval did *not* advance the view that the ICCPR applies exclusively within a State Party’s territory; nor did it otherwise challenge or address the position of the Committee. Instead, the George H.W. Bush Administration seems to have relied upon the Carter-era transmittal documents discussed above.

In the 1991 hearings before the U.S. Senate, Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs, testified ambiguously that “[t]he principal undertaking assumed by state’s [sic] parties is to provide those rights to all individuals within the territories, and subject to their jurisdiction without regard to race – and subject to their jurisdiction without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹² He went on to say that “[o]ur joining as a party to the covenant will provide additional, concrete evidence of our commitment to support respect for human rights everywhere, and will augment the force of the covenant as a principal instrument at the international level, for promoting and protecting human rights.”⁹³

Senator Helms later submitted a written question to Mr. Schifter for the record, which he answered as follows:

Question: Article 1, para 2 states that “[i]n no case may a people be deprived of its own means of subsistence.” If the U.S. ratifies the Covenant will we subject the U.S. to attacks by Iraq and others who argue American bombing attacks have deprived people of the means of subsistence?

Had the Bush Administration believed that the Covenant did not apply extraterritorially, that would have been the most obvious answer to the question. But instead, Mr. Schifter answered:

Answer: The United States is always subject to accusations such as those posited by the foregoing question when it employs force in the international arena. Ratification of the Covenant, will not, in the Administration’s judgment, make such accusations more likely or more convincing than they would otherwise be.⁹⁴

Again, none of these statements clearly indicates a belief that Covenant obligations were restricted to the U.S. territory. To the contrary, Senator Helms’ question suggests that he

⁹¹ *Supra* note 89.

⁹² International Covenant on Civil and Political Rights: Hearing Before the Senate Comm. on Foreign Relations, 102d Cong. 16, 5 (1992) (Statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs).

⁹³ *Id.*

⁹⁴ *Id.* at 81.

anticipated a reading of the Covenant that would give rise to extraterritorial obligations, and Mr. Schifter's answer did not rule out that possibility.

C. The Approving Senate

Consistent with Senator Helms' questions, the Senate that gave its advice and consent to ratification also did not take the position that the Covenant applied exclusively within a state's territory. To the contrary, the opening paragraph of the 1992 Senate Committee on Foreign Relations Report on the Covenant articulated a *disjunctive* statement of the Covenant's geographic scope:

[t]he Covenant guarantees a broad spectrum of civil and political rights . . . to all individuals within the territory or under the jurisdiction of the States Party The Covenant obligates each State Party to respect and ensure these rights, to adopt legislative or other necessary measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated.⁹⁵

The opening paragraph of the Senate Report thus sets out territory and jurisdiction as two *separate* grounds giving rise to Covenant obligations. In the only other place touching on this issue, the Report simply restates the language of Article 2(1) – that “[e]ach Party to the Covenant undertakes ‘to respect and to ensure’ to all individuals within its territory and under its jurisdiction the rights recognized in the Covenant,”⁹⁶ without further discussion. *Thus, the Senate Report appears to have either contemplated a disjunctive, rather than a conjunctive, reading of Article (2)(1), or at most did not opine on the question.* But again, nothing in the Report indicates that the Senate was advising and consenting only to the view that the Covenant applies exclusively within a state's territory.

D. Initial U.S. Report to the Human Rights Committee

Finally, the United States' Initial Report to the Human Rights Committee, submitted in July 1994, also did not address the territorial scope of the Covenant but only referenced “jurisdiction.” The Report's discussion of Article 2 is limited to addressing U.S. equal protection law and practices. The Report notes that “the doctrine of equal protection applies . . . with respect to the rights protected by the Covenant,” and that U.S. constitutional equal protection provisions “limit the power of government with respect to *all persons subject to U.S. jurisdiction*.”⁹⁷ In addressing Article 16 of the Covenant, the Report further observes that “All human beings *within the jurisdiction* of the United States are recognized as persons before the law.”⁹⁸ But again, the Report does not advance any territorial restriction. Nor does the Report elsewhere address the jurisdictional clause of Article 2(1).

⁹⁵ S. Exec. Rept. 102-23, at 1-2 (1992) (emphasis added).

⁹⁶ *Id.* at 4.

⁹⁷ U.N. Hum. Rts. Comm., *Initial Reports of States Parties Due in 1993: United States of America*, ¶ 78, U.N. Doc. CCPR/C/81/Add.4 (1994) (emphasis added).

⁹⁸ *Id.* at ¶ 513 (emphasis added).

E. The Emergence of the 1995 Interpretation

Thus, it was apparently not until 1995 – eighteen years after the United States first signed the treaty and 3 years after ratification – in oral questioning during the United States’ first appearance before the Committee, that the State Department first articulated the view that ICCPR obligations are limited exclusively to U.S. territory. On the morning of March 29, while the U.S. was orally presenting the Initial U.S. Report to the Committee, Committee Member Klein inquired about the United States’ view of the application of the Covenant to the conduct of U.S. officials abroad. Consistent with Committee procedures, two days later, then-Legal Adviser Conrad Harper responded to the question, providing an oral answer that presumably would have been developed and cleared within the U.S. Government in the intervening period. Harper expressed the view that Article 2(1) obligations were limited “to within a Party’s territory”:

[Question:] Recalling that the United States Supreme Court had taken a narrow view on the binding effect of public international law on United States officials serving outside the United States, [Committee Member Klein] asked whether the Government took a similar view with regard to the applicability of the Covenant.⁹⁹

[Answer:] Mr. Klein had asked whether the United States took the view that the Covenant did not apply to government actions outside the United States. The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a party’s territory. Article 2 of the Covenant expressly stated that each State party undertook to respect and ensure the rights recognized “to all individuals within its territory and subject to its jurisdiction.” That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words “within its territory” had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party’s territory.¹⁰⁰

On examination, the 1995 Interpretation asserts three propositions: (1) that unless otherwise specified, treaties were presumed to apply only within a party’s territory; (2) that the “and” in Article 2(1) operated conjunctively, not disjunctively; and (3) that “within its territory” was added to limit the Covenant’s obligations to a Party’s territory. But despite extensive examination, we have not been able to locate any underlying legal analysis conclusively establishing any of these three elements of the 1995 position.

The first proposition – a “presumption” against the extraterritorial application of *multilateral treaties* – is simply unfounded. We are unaware of any general doctrine that multilateral treaties

⁹⁹ U.N. Hum. Rts. Comm., 53rd Sess., 1405th mtg., Mar. 29, 1995 (morning), ¶ 55, U.N. Doc. CCPR/C/SR.1401 (April 17, 1995).

¹⁰⁰ 1995 Interpretation, *supra* note 1.

are presumptively limited to a state's territory.¹⁰¹ To the contrary, multilateral treaties are intended to be instruments of international law that create obligations across many international borders, so if anything, the opposite presumption should control. Generally applied, a "presumption" that treaty parties contract solely for domestic effect would assume that treaties such as the Genocide Convention, for example, were crafted to permit a contracting state to commit genocide anywhere outside a country's territorial borders, notwithstanding the universal, peremptory prohibitions of the Convention.

The second proposition – that the word "and" in Article 2(1) operates conjunctively – may or may not be correct, but as explained above, even when "and" is read in the conjunctive, an interpretation must still be adopted regarding the territorial limit to be placed on the obligations to respect and ensure.

Third and finally, as detailed above, although the *travaux* indicate an understanding among states to territorially restrict in some way a state's obligations to "ensure" rights under the Covenant, the negotiating history reviewed in Section II suggests that it was an overstatement to assert that that negotiating history evidences a "clear understanding" that *all* Covenant obligations would be "limited to a State Party's territory." As Section II explained, the *travaux* do not in fact convey a clear intent to preclude extraterritorial operation of the obligation to honor Covenant rights in all circumstances. Rather, the travaux reflect the contracting states' desire to avoid affirmative obligations to *ensure* rights in situations over which they lacked sufficient legislative and jurisdictional authority. As a whole, the negotiating history comports best not with the 1995 Interpretation, but rather, with a modestly extraterritorial "effective control" interpretation.

The question from the Committee that elicited Legal Adviser Harper's answer appears to have been addressing the Supreme Court decision two years before in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), in which the Court had held that Article 33 of the UN Convention and Protocol on the Rights of Refugees did not apply on the high seas. In litigating *Sale*, the United States had urged the Court not to recognize any extraterritorial application for Article 33 of the Refugee Convention. The emergence of the 1995 Interpretation soon after *Sale* suggests that the

¹⁰¹ Legal Adviser Harper may have had in mind the Supreme Court's discussion of a presumption against extraterritorial application of *statutes* in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1994). In that case, the Court construed both Article 33 of the Refugee Convention and a federal statute, but its discussion of a presumption against extraterritoriality was directed not against a treaty – the Refugee Convention – but rather, against Section 243(h) of the INA, the federal statute. *See id.* at 173-74 (addressing "the presumption that *Acts of Congress* do not ordinarily apply outside our borders") (emphasis added); *id.* at 188 ("*Acts of Congress* normally do not have extraterritorial application unless such an intent is clearly manifested."). In *Sale*, the Supreme Court construed Article 33 of the Refugee Convention to be coterminous with the domestic statute, which the Court had concluded used terms of art that limited its operation to U.S. territory. *See id.* at 171-80. The Supreme Court has regularly applied the presumption that Congress does not intend to legislate extraterritorially when it enacts statutes, *see, e.g., Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949), most recently in *Morrison v. National Australian Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010), where the Court reaffirmed "the wisdom of the presumption against extraterritoriality." As that Court noted, however, this statutory presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters" – a sharp distinction to treaties, which *per se* create international obligations. *Id.* at 2877. Furthermore, to the extent that the 1995 Interpretation contemplated a presumption against the extraterritorial application of *treaties*, it appears to misconstrue Article 29 of the Vienna Convention on the Law of Treaties, which was drafted to ensure that a treaty will presumptively apply to a state's *entire* territory, not that it will presumptively apply *only* in its territory. *See* VCLT Art. 29 ("[A] treaty is binding upon each party in respect of its *entire* territory.") (emphasis added).

then-Legal Adviser's views may have been informed by newfound concerns regarding the territorial scope of that particular treaty.

But it is not clear why concerns about the extraterritorial reach of the Refugee Convention should be equally imposed on a very different treaty, the ICCPR. Nevertheless, once the 1995 Interpretation was stated, it was largely repeated over and over without substantial further analysis.¹⁰² Yet none of these statements of position engaged in the kind of detailed examination of language, negotiating history, context, object and purpose, and contemporaneous understandings that the VCLT requires, and which finally has been conducted here.

IV. Subsequent Developments

Since the United States advanced the 1995 Interpretation, the United States has become ever more isolated in its purely territorial interpretation of the Covenant's scope. Other legal developments have undermined that position, including further recognition of the potential extraterritorial reach of the Covenant by: (1) the Human Rights Committee; (2) the International Court of Justice, and (3) foreign states such as Australia, Belgium, Germany, the Netherlands, and the United Kingdom – states that, *inter alia*, are important U.S. allies in the conflict in Afghanistan. Although a number of states have taken public positions on the Covenant's geographic scope, we are aware of only one other state – Israel – that has offered a strictly territorial reading of the Covenant's scope before the Committee. Moreover, (4) although not construing the ICCPR and thus not directly implicating this discussion, regional human rights tribunals increasingly have recognized particular extraterritorial human rights treaty obligations in contexts where states exercise effective control abroad. Taken together, these legal developments have rendered increasingly unsustainable a continued adherence to a strictly territorial reading of the applicability of the ICCPR.

¹⁰² As noted above, in its Second and Third periodic reports, submitted in 2005, the United States reiterated the view that “the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party,” this time including a two page annex. 2005 Report, Annex I. The United States again asserted this view, without pertinent elaboration, in its 2006 responses to the Committee's List of Issues and in the U.S. Government's 2007 Observations to the Human Rights Committee's General Comment 31. The George W. Bush Administration also repeated the position in litigation. Brief for Respondents at 71 n.34, *Boumediene v. Bush*, Nos. 06-1195, 06-1196, 2007 WL 2972541 (Oct. 9, 2007) (stating that “the ICCPR applies only within the ‘territory’ of member nations. That limitation was drafted precisely to foreclose application of the ICCPR to areas such as ‘leased territories,’ where a signatory country would be acting ‘outside its territory,’ although perhaps ‘technically within its jurisdiction for certain purposes.’”). Significantly, the *Boumediene* Court did not embrace that view or otherwise address the extraterritorial application of the ICCPR to Guantánamo, although the Court did find Guantánamo to be *de facto* U.S. territory. *Boumediene v. Bush*, 553 723, 755 (2008) (noting “the obvious and uncontested fact that the United States . . . maintains *de facto* sovereignty over this territory”). Finally, in *Hamdan*, four members of the Court found the Covenant relevant outside the territorial United States through the application of statute to the lawful composition of military commissions there. *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 n.66 (2006) (Kennedy, J., concurring).

A. Human Rights Committee

Since the United States' ratification of the Covenant, the Human Rights Committee has repeatedly sustained, and elaborated upon, its view that the Covenant applies to a variety of extraterritorial acts by a State Party.

- In reviewing Iran's report in 1993, for example, the Committee condemned an Iranian religious authority's issuance of a *fatwa* calling for the murder of Salman Rushdie, a foreign national residing abroad, who was not an individual "within the territory" and thus would not be protected under a rigid territorial understanding of the Covenant.¹⁰³
- In 1998, the Committee expressed concern regarding the actions of Belgian soldiers in Somalia as part of the UN Operation in Somalia, but noted with approval "that the State Party has recognized the applicability of the Covenant in this respect."¹⁰⁴
- In both 1998 and 2003, the Committee condemned Israel for failing to "fully apply" the Covenant in its occupied territories.¹⁰⁵ The Committee saw this duty to "fully apply" the Covenant as arising from "the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, [and] the exercise of effective jurisdiction by Israeli security forces therein."¹⁰⁶
- Most recently, in 2006, the Committee rejected the United States' position that Covenant obligations do not extend to U.S. treatment of persons outside U.S. territory, including on Guantánamo and elsewhere.¹⁰⁷

¹⁰³ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Comments of the Human Rights Comm.: Iran (Islamic Republic of)*, ¶ 9, U.N. Doc. CCPR/C/79/Add.25 (Aug. 3, 1993) ("The Committee also condemns the fact that a death sentence has been pronounced, without trial, in respect of a foreign writer, Mr. Salman Rushdie, for having produced a literary work and that general appeals have been made or condoned for its execution, even outside the territory of Iran. The fact that the sentence was the result of a fatwa issued by a religious authority does not exempt the State party from its obligation to ensure to all individuals the rights provided for under the Covenant, in particular its articles 6, 9, 14 and 19.").

¹⁰⁴ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Comm.: Belgium*, ¶ 14, U.N. Doc. CCPR/C/79/Add.99 (Nov. 19, 1998).

¹⁰⁵ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Comm.: Israel*, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998). The Committee reaffirmed its position in 2003. U.N. Hum. Rts. Comm., *Concluding Observations of Human Rights Comm.: Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) ("The Committee . . . reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.").

¹⁰⁶ *Concluding Observation: Israel* (1998), *supra*, ¶ 10.

¹⁰⁷ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Comm.: United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3 (Sept 15, 2006) (noting "with concern the restrictive interpretation made by the State party of its obligations under the Covenant," because of "its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in times of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice").

Perhaps most significantly, in 2004, the Committee adopted General Comment 31, which set forth the Committee's most comprehensive statement regarding the circumstances when extraterritorial actions implicate Covenant rights. As the Committee explained:

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. This means that a State party must *respect and ensure* the rights laid down in the Covenant *to anyone within the power or effective control of that State Party*, even if not situated within the territory of the State Party. . . . [The principle that Covenant rights must be available to all individuals] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.¹⁰⁸

At the time, the United States expressed its disagreement with this aspect of the General Comment, based on the 1995 Interpretation set forth above.¹⁰⁹ The United Kingdom, by contrast, indicated that it believed the Committee's vision of extraterritorial application of the Covenant was overbroad, and responded to General Comment 31 by acknowledging that "its obligations under the ICCPR can in principle apply to persons who are taken into custody by British forces and held in British-run military detention facilities outside the United Kingdom."¹¹⁰ Nevertheless, it remains the position of the Human Rights Committee that a person who is under the power or effective control of the Committee is under the state's "jurisdiction" for purposes of the Covenant and is thereby protected by Covenant rights. The Committee has not subsequently elaborated extensively on the meaning of "effective control."

B. International Court of Justice

The International Court of Justice has twice indicated that obligations under the ICCPR, as well as other human rights treaties, apply to a state's exercise of jurisdiction abroad. The ICJ's approach is consistent with the court's view that either "physical control" of a territory or complete or "effective control" over operatives or conduct abroad can give rise to state responsibility for violations of international law.¹¹¹

In its 2004 Advisory Opinion in the *Israeli Wall Case*, for example, the ICJ held that Israel's exercise of jurisdiction over the Occupied Palestinian Territories triggered Israel's obligations

¹⁰⁸ Hum. Rts. Comm., *General Comment No. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), ¶ 10 (emphasis added).

¹⁰⁹ See 2007 Observations, at ¶¶ 3-9.

¹¹⁰ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Sixth Periodic Report, United Kingdom of Great Britain and Northern Ireland* (Nov. 2006), ¶ 59, U.N. Doc. CCPR/C/GBR/6 (May 2007). The UK position is discussed at greater depth in Section IV(C)(4), *infra*.

¹¹¹ *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 65 (June 27) (noting that state must exert "effective control" over operatives in foreign territory to incur liability for human rights violations).

under the ICCPR and other human rights treaties.¹¹² The court began its consideration of Article 2(1) of the ICCPR by noting that “[t]his provision can be interpreted as covering only individuals who are both present within a state’s territory and subject to that state’s jurisdiction. It can also be construed as covering both individuals present within a state’s territory and those outside that territory but subject to that state’s jurisdiction.”¹¹³ The court then observed that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.”¹¹⁴ The court reasoned that “[c]onsidering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.”¹¹⁵ In other words, the court concluded that the object and purpose of the treaty supported application of the Covenant when a state exercised jurisdiction outside the national territory. The ICJ noted that the “constant practice” of the Human Rights Committee was consistent with this reading, and that “the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory.”¹¹⁶ The court cited the Committee’s early cases involving extraterritorial kidnappings by Uruguay and denial of a citizen’s passport abroad, as well as its more recent decisions recognizing Israel’s responsibility under the Covenant in the Occupied Territories.¹¹⁷

Significantly, the ICJ also found that the Covenant *travaux* “confirm[ed] the Committee’s interpretation of Article 2”:

[The *travaux*] show that, in adopting the wording chosen, the *drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory*. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.¹¹⁸

The ICJ thus concluded that the Covenant “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”¹¹⁹

¹¹² *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 108-111 (July 9).

¹¹³ *Id.* at ¶ 108.

¹¹⁴ *Id.* at ¶ 109.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (noting, *inter alia*, that the Committee “has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany.”).

¹¹⁸ *Id.* at ¶ 109 (emphasis added) (citing preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Record of the General Assembly, Tenth Session, Annexes*. A/2929, Part II, Chap. V, para. 4 (1955)).

¹¹⁹ *Legal Consequences of the Wall*, *supra* note 112, at ¶ 111.

In 2005, in the *Congo* case, the ICJ reaffirmed this approach in recognizing that Uganda's occupation in the northeastern part of Congo gave rise to obligations under international human rights and humanitarian law treaties. The court reiterated that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' particularly in occupied territories."¹²⁰ The court echoed HRC Member Tomuschat's view that "the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."¹²¹

C. Views of Other States Parties

VCLT Article 31(3)(b) establishes that "subsequent [state] practice in the application of [a] treaty which establishes the agreement of the parties" is a primary interpretive source, in addition to treaty text taken in context and object and purpose. The Supreme Court also consistently has recognized that it is appropriate to examine post-ratification understandings and practice, in addition to the drafting and negotiating history of the treaty.¹²² Other states' interpretations can be persuasive evidence, including of the reasonableness of an interpretation of a treaty's terms, and because it is generally optimal for the U.S. to align with other partners in our interpretation of a treaty's terms.

Despite the clearly and repeatedly asserted U.S. territorial position since 1995, only one other state – Israel – has taken the position before the Human Rights Committee that the Covenant is categorically limited to a State Party's territory, and it did so only in the last few months. Other U.S. allies (Australia, Belgium, Germany, the Netherlands, and the United Kingdom) have instead acknowledged the possibility of some form of extraterritorial application of the Covenant or asserted their commitment to some form of extraterritorial compliance with the ICCPR. These statements to the Committee, reviewed below, call into question the "inescapable" textual clarity at the heart of the 1995 Interpretation, even while suggesting that the full extent of the

¹²⁰ *Case Concerning Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 243 (Dec. 19) (citing *Legal Consequences of Wall*, 2004 I.C.J. at 178–81).

¹²¹ *Legal Consequences of the Wall*, 2004 I.C.J. 136 at 179. More recently, in indicating provisional measures in the dispute between Georgia and Russia, the ICJ observed that "there is no restriction of a general nature in CERD relating to its territorial application" and found that Articles 2 and 5 of the CERD "generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory." *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, 2008 I.C.J. 353 (Oct. 15), ¶ 109.

¹²² See, e.g., *Abbott*, 130 S. Ct. at 1993 ("The 'opinions of our sister signatories' . . . are 'entitled to considerable weight.'") (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176, (1999) (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985))); *Medellin v. Texas*, 552 U.S. 491, 507 (2008) (noting that the Court has "considered as aids to its interpretation [of treaties] the negotiation and drafting history of the treaty as well as the post-ratification understanding" of the parties.) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)) (internal quotations omitted); *United States v. Stuart*, 489 U.S. 353, 366 (noting that "[n]ontextual sources" such as "a treaty's ratification history and its subsequent operation" may help the Court in giving effect to the intent of the Treaty parties); *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (criticizing the Court for failing to "give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us" and noting that "[o]ne would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they have an actual role in applying would be (to put it mildly) all the more relevant").

Covenant's application beyond a state's territory remains unsettled. In addition, the government and Supreme Court of another key ally, Canada, without specifically addressing the ICCPR, have also recognized the possibility of some human rights obligations abroad.

1. Australia

In 2008, the Committee asked Australia to clarify as part of its Fifth Periodic Report whether Australia considers its agents abroad to be bound by Australia's obligations under both the Covenant and its Second Optional Protocol (on the death penalty).¹²³ In its 2009 reply,¹²⁴ Australia stated that it "*accepts that there may be exceptional circumstances in which the rights and freedoms set out under the Covenant may be relevant beyond the territory of a State party,*" while noting that the jurisdictional scope of the Covenant under international law is unsettled.¹²⁵ Australia elaborated as follows:

17. . . . Although Australia believes that the obligations in the Covenant are essentially territorial in nature, Australia has taken into account the Committee's views in general comment No. 31 on the circumstances in which the Covenant may be relevant extraterritorially.

Australia believes that a high standard needs to be met before a State could be considered as effectively controlling territory abroad. It is not satisfied in all, or necessarily any, cases in which Australian officials may be operating beyond Australia's territory from time to time. *The rights under the Covenant that a State party should apply beyond its territory will be informed by the particular circumstances. Relevant factors include the degree of authority and degree of control the State party exercises, and what would amount to reasonable and appropriate measures in those circumstances.*

18. *The only circumstances in which Australia would be in a position to afford all the rights and freedoms under the Covenant extraterritorially would be where it was exercising all of the powers normally exercised by a sovereign State, such as having the power to prescribe and enforce laws, as a consequence of an occupation, a consensual deployment, or a United Nations mandated mission. In no other circumstances could it be said that Australia was in a position to give effect to all of the rights in the Covenant. However, even in these cases, Australia may have obligations to ensure that the existing penal laws of the territory remain in force in line with the obligations upon an Occupying Power or have an obligation to respect the sovereignty of the Host State.*¹²⁶

¹²³ U.N. Hum. Rts. Comm., *List of Issues To Be Taken up in Connection with the Consideration of the Fifth Periodic Report of Australia*, ¶ 4, U.N. Doc. CCPR/C/AUS/Q/5 (Nov. 24, 2008).

¹²⁴ U.N. Hum. Rts. Comm., *Replies to the List of Issues (CCPR/C/AUS/Q/5) To Be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, ¶¶ 16-18, U.N. Doc. CCPR/C/AUS/Q/5/Add.1 (Feb. 5, 2009).

¹²⁵ *Id.* at ¶ 16 (emphasis added).

¹²⁶ *Id.* at ¶¶ 17-18.

Australia, in other words, recognized that there are circumstances in which the Covenant may be relevant extraterritorially, which in turn depend on the degree of authority and control that a State Party exercises in particular circumstances. Like Eleanor Roosevelt in the negotiation of the Covenant, Australia took the position that *all* rights under the Covenant could be afforded only in situations where it “was exercising all of the powers normally exercised by a sovereign State,” including prescriptive (legislative) powers, (although even in this circumstances, in the context of an occupation, Australia’s obligations might be limited by conflicting obligations under the international law of occupation). Australia thus appeared to leave open the possibility that there could be circumstances of less complete control where some, though not all, Covenant rights could apply.

With respect to the Committee’s question regarding Australia’s acceptance of extraterritorial obligations under the Second Optional Protocol, which provides that “[n]o one within the jurisdiction of a State party to the present Protocol shall be executed,”¹²⁷ Australia accepted that, “consistent with the principle that Covenant rights may be relevant beyond the territory of a State party, [this obligation] may also in appropriate circumstances be relevant outside Australia’s territory.” With respect to this obligation, Australia indicated that it “regards those circumstances as being restricted to cases in which Australia is exercising all of the powers normally exercised by a sovereign Government, including the power to prescribe and carry out sentences imposed by courts. In no other circumstances would Australia be in a position to give effect to the obligation in article 1, paragraph 1 of the Second Optional.”¹²⁸ This position appears consistent with the view that obligations to ensure Covenant rights, including rights that would require comprehensive control over the local penal system to protect, would not apply extraterritorially in situations where a State Party exercised insufficient control over the local legal regime to give them effect.

2. Belgium

As noted above, in 1998, the Committee expressed concern regarding alleged abuses by Belgian soldiers who were part of the UN Operation in Somalia, and asked the Belgian delegation several questions regarding application of the Covenant to that conduct. The Committee indicated that “there could be no doubt that actions carried out by Belgium’s agents in another country fell within the scope of the Covenant.”¹²⁹ Belgium responded to the questioning by suggesting that it considered the Covenant to apply where Belgium exercised “jurisdiction” abroad.¹³⁰ In its

¹²⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 3d Comm., 44th Sess., 82d plen. mtg., U.N. Doc. A/RES/44/128 (1990).

¹²⁸ *Id.* at ¶ 22.

¹²⁹ Human Rights Comm., *Summary Record of the 1707th Meeting: Belgium*. CCPR/C/SR.1707 (Oct. 27, 1998), ¶ 2.

¹³⁰ *Id.* at ¶ 22 (response of Belgium) (“Many members had asked how Belgium’s commitments under the Covenant and other international instruments could be implemented when Belgian nationals committed certain acts outside the country – for instance in Somalia. Irrespective of where an act was committed, Belgian jurisdiction applied, as could be seen by the proceedings instituted in Belgium against a number of Belgian nationals in which some had been convicted and others acquitted 270 investigations had been launched into those events and some of them had

Concluding Observations from the session, the Committee noted with approval “that the State Party has recognized the applicability of the Covenant in this respect.”¹³¹

In its 2004 Concluding Observations on Belgium’s Fourth Periodic Report, the Committee expressed concern

that the State party is unable to confirm . . . that the Covenant automatically applies when it exercises power or effective control over a person outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace enforcement operation.¹³²

The Committee indicated that “[t]he State party should *respect* the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for example in the case of peacekeeping missions or NATO military missions, and should train the members of such missions appropriately.”¹³³

In its Fifth Periodic Report to the Committee, submitted in 2009, Belgium responded that

*[w]hen members of such armed forces are deployed abroad, as for example in the context of peacekeeping or peace enforcement operations, Belgium ensures that all persons who come under its jurisdiction enjoy the rights recognized in the International Covenant on Civil and Political Rights.*¹³⁴

Belgium observed that the provisions of the Covenant were taught to all National Defense personnel; that the Covenant generally was directly enforceable in Belgian courts, and that “[i]n this context, Belgium must accept liability in cases where it has failed to meet its obligations under the Covenant.” Belgium further observed that “[s]oldiers participating in peace missions or NATO military missions who fail to fulfil any of the obligations to which they are subject under the Covenant are subject to trial before a Belgian court” and would be sentenced under Belgian criminal law. Moreover, “[t]he legality of the rules of engagement, for troops sent on missions abroad, is increasingly being tested against the provisions of the Covenant and those of other human rights instruments. This is also happening in cases involving Belgian participation in missions for international organizations.” Belgium additionally concluded that

already been completed.”). Committee Member Lallah responded that “it was very gratifying to hear that the Covenant was held to be applicable to Belgium in respect of the incidents that had occurred in Somalia.” *Id.* at ¶ 52.

¹³¹ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Comm.: Belgium*, ¶ 14, U.N. Doc. CCPR/C/79/Add.99 (Nov. 19, 1998).

¹³² U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Belgium*, ¶ 6, U.N. Doc. CCPR/CO/81/BEL (Aug. 12, 2004).

¹³³ *Id.* (emphasis added).

¹³⁴ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Fifth Periodic Report: Belgium*, 15, U.N. Doc. CCPR/C/Bel/5 (July 17, 2009) (emphasis added).

[a] State may incur international liability for contravening the Covenant where an international tribunal finds that the State in question has failed to fulfil its obligations under the Covenant. As the International Court of Justice emphasized in an advisory opinion, a State's international liability and the obligation to make reparation for damage caused by its unlawful conduct arise from all its international obligations, including those contained in the Covenant. In terms of legal principles, then, Belgium could incur international liability for breaches of the Covenant. In the event that this should happen, there can be no doubt that the State would comply with any decision of an international tribunal and would terminate such breaches without delay.¹³⁵

Belgium, in other words, appears to have accepted relatively robust legal obligations under the Covenant for the conduct of its military abroad.

3. Germany

In its 2004 Concluding Observations regarding Germany's Fifth Periodic Report, the Committee expressed

concern that Germany has not yet taken a position regarding the applicability of the Covenant to persons subject to its jurisdiction in situations where its troops or police forces operate abroad, in particular in the context of peace missions. It reiterates that the applicability of the regime of international humanitarian law does not preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of its agents outside their own territories. The State party is encouraged to clarify its position and to provide training on relevant rights contained in the Covenant specifically designed for members of its security forces deployed internationally.¹³⁶

Germany responded in 2005 that

Pursuant to Article 2, paragraph 1, Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction.

Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.

...

The training it gives its security forces for international missions includes tailor-made instruction in the provisions of the Covenant.¹³⁷

¹³⁵ *Id.*

¹³⁶ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Germany*, ¶ 11, U.N. Doc. CCPR/CO/80/DEU (May 4, 2004).

¹³⁷ U.N. Hum. Rts. Comm., *Comments by the Government of Germany to the Concluding Observations of the Human Rights Committee*, 3, U.N. Doc. CCPR/CO/80/DEU/Add.1 (April 11, 2005) (emphasis added). For further

Germany thus has committed to complying with Covenant rights abroad, without clarifying in what contexts Germany considers persons abroad to be “subject to its jurisdiction.”

4. United Kingdom

The United Kingdom’s position on geographic scope of the Covenant has evolved over time through exchanges with the Human Rights Committee. In its Sixth Periodic Report, submitted in 2006, the UK responded to the Committee’s assertion in General Comment 31 that the Covenant applies to persons who are within the State Party’s territory and to persons subject to its jurisdiction. The UK stated that “[t]he Government considers that this obligation, as the language of article 2 of ICCPR makes very clear, is essentially an obligation that States Parties owe territorially, i.e. to those individuals who are within their own territory and subject to the jurisdiction of the United Kingdom.”¹³⁸ Unlike the United States, however, the UK did not absolutely reject extraterritorial application of the Covenant. The UK instead stated that

*[t]he Government considers the Covenant can only have such [extraterritorial] effect in very exceptional cases. The Government has noted the Committee’s statement that the obligations of ICCPR extend to persons “within the power or effective control of the forces of a State Party acting outside its territory.” Although the language adopted by the Committee may be too sweeping and general, the Government is prepared to accept, . . . that, in these circumstances, its obligations under the ICCPR can in principle apply to persons who are taken into custody by British forces and held in British-run military detention facilities outside the United Kingdom.*¹³⁹

The UK apparently has taken this position by analogizing such a detention facility to an embassy, over which states exercise jurisdiction abroad.

In its 2008 Concluding Observations regarding this Report, the Committee indicated that it was “disturbed about” the United Kingdom’s statement “that its obligations under the Covenant can only apply to persons who are taken into custody by the armed forces and held in British-run military detention facilities outside the United Kingdom in exceptional circumstances.” The Committee expressed its view that the “State party should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control.”¹⁴⁰

discussion, see Manfred Nowak, *Deployment of Forces Abroad: The Applicability of Fundamental Human Rights During the Deployment Abroad of the Bundeswehr*, Heinrich Boll Foundation/Al Germany/Institute of International Law, University Kiel (Berlin) (June 16, 2008).

¹³⁸ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Sixth Periodic Report: United Kingdom of Great Britain and Northern Ireland*, ¶ 59, U.N. Doc. CCPR/C/GBR/6 (May 18, 2007) (emphasis added).

¹³⁹ *Id.*; see also *supra* notes 109-110.

¹⁴⁰ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain & Northern Ireland*, 3-4, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008).

The United Kingdom reiterated and elaborated on its position in 2009, as follows:

24. The UK's human rights obligations are primarily territorial, owed by the government to the people of the UK. The UK, therefore, considers that the ICCPR applies within a state's territory. The UK considers that the Covenant could only have effect outside the territory of the UK in very exceptional circumstances. *We are prepared to accept that the UK's obligations under the ICCPR could in principle apply to persons taken into custody by UK forces and held in military detention facilities outside the UK. However, any such decision would need to be made in the light of the specific circumstances and facts prevailing at the time.*

25. We repeat our previous assurances to the Committee that we condemn all acts of abuse and have always treated any allegations of wrongdoing brought to our attention extremely seriously. We have already assured the Committee that police investigations are carried out where there are any grounds to suspect that a criminal act has or might have been committed by service personnel, and/or where the rules of engagement have been breached. Where there is a case to answer, individuals will be prosecuted by Court Martial. The procedure at a Court Martial is broadly similar to a Crown Court and the proceedings are open to the public.

26. The Armed Forces are fully aware of their obligations under international law. They are given mandatory training which includes specific guidance on handling prisoners of war. The practical training now provided for the Army deploying on operations provides significantly better preparation in dealing with the detention of civilians than ever before. There are some failings that the Army has already recognised and taken specific action to rectify as part of its process of continuous professional development. Other UK personnel deploying to operational theatres who are likely to be involved in activities that require an understanding of these international obligations are also given appropriate guidance.

27. Reparation will be paid to victims or their families where there is a legal liability to do so resulting from the unlawful activities of any member of the UK armed forces. Claims for death and personal injury can be brought under UK common law and compensation may be payable for human right breaches under the Human Rights Act where that applies.¹⁴¹

The UK, in short, has accepted “exceptional” application of the Covenant extraterritorially, which it has indicated “in principle” can include persons in the custody of British forces who are held in British-run military detention facilities abroad, which the UK has analogized to embassies for jurisdictional purposes.

¹⁴¹ U.N. Hum. Rts. Comm., *Information received from the United Kingdom on the Implementation of the Concluding Observations of the Human Rights Committee*, at 6, U.N. Doc. CCPR/C/GBR/CO/6/ADD.1 (Nov. 3, 2009) (emphasis added).

5. The Netherlands

The Netherlands has been understood by some commentators as asserting that the Covenant did not apply abroad.¹⁴² But in fact, the Dutch position appears to have been misunderstood, and the Netherlands has recently confirmed that they recognize the application of Covenant obligations abroad in situations in which the Netherlands have “full and effective control.”

In its 2001 concluding observations, the Committee expressed concern regarding the Netherlands’ failure to investigate the alleged involvement of Dutch peacekeeping forces in the events surrounding the fall of Srebrenica in July 1995. The Committee raised this under the obligation to ensure the right to life under Article 6, and requested that the Netherlands “complete its investigations as to the involvement of its armed forces in Srebrenica as soon as possible, publicize these findings widely and examine the conclusions to determine any appropriate criminal or disciplinary action.”¹⁴³ The Netherlands responded with a description of domestic measures that had been taken to investigate the events, but then stated:

the Government disagrees with the Committee’s suggestion that the provisions of the International Covenant on Civil and Political Rights are applicable to the conduct of Dutch blue helmets in Srebrenica (para. 8). Article 2 of the Covenant clearly states that each State Party undertakes to respect and to ensure to all individuals “within its territory and subject to its jurisdiction” the rights recognized in the Covenant, including the right to life enshrined in article 6. It goes without saying that the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope of that provision. The strong commitment of the Netherlands to investigate and assess the deplorable events of 1995 is therefore not based on any obligation under the Covenant.¹⁴⁴

Although some have misread this response as rejecting the Covenant’s application beyond Dutch territory, as noted, *the statement is properly understood as rejecting the proposition that “Dutch blue helmets,” who were part of a multilateral peacekeeping mission, exercised sufficient control over “the citizens of Srebrenica” to bring them within Dutch jurisdiction for purposes of ensuring them from harm by third parties.* The statement asserts three potential claims: (1) that the Dutch forces did not exercise sufficient effective control to give rise to jurisdiction in this context – a principle recognized under the European Convention on Human Rights in *Banković v. Belgium*;¹⁴⁵ (2) that the actions of a State Party’s military forces which are part of a

¹⁴² Michael J. Dennis & Andre M. Surena, *Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice*, 2008 Eur. Hum. Rts. L. Rev. 714, 717; Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 Am. J. Int’l L. 119, 125 (2005).

¹⁴³ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Netherlands*, 4, 8, U.N. Doc. CCPR/CO/72/NET (Aug. 27, 2001).

¹⁴⁴ U.N. Hum. Rts. Comm., *Replies of the Government of the Netherlands to the concerns expressed by the Human Rights Committee in its Concluding Observations (CCPR/CO/72/NET)*, at 4-5, U.N. Doc. CCPR/CO/72/NET/Add.1 (April 29, 2003).

¹⁴⁵ *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

multilaterally-controlled peacekeeping mission do not fall within the State's "jurisdiction" – a proposition recognized by the ECHR in the *Behrami* case;¹⁴⁶ and (3) that the obligations at issue – to protect the citizenry of a foreign country from harms committed by third parties – implicated obligations to "ensure" rights under the Covenant, not obligations to respect rights against direct violations by agents of the State Party, and that such an obligation to ensure required greater extraterritorial control than the Dutch forces exercised. Each of these positions turns on the question whether the Netherlands exercised sufficient *control* for the relevant human rights obligations to apply, not on a position that the Covenant did not apply abroad. And as indicated the above, the Netherlands in fact recognize application of Covenant obligations when they exercise full and effective control.

6. Canada

Neither Canada's government nor its courts appear to have specifically addressed the extraterritorial application of the ICCPR before the Human Rights Committee. However, both have recognized the potential application of international human rights law to actions of Canadian officials abroad in some circumstances, and at times have applied varying forms of an effective control test. In the *Khadr* litigation, the Canadian Supreme Court held that the Charter of Rights and Freedoms applies exceptionally where Canadian authorities violate fundamental international human rights obligations abroad.¹⁴⁷ In the *Amnesty International* litigation, Canada contended that its detention activities in Afghanistan did not violate its "international human rights obligations, to the extent that they have extraterritorial effect."¹⁴⁸ The government advanced an "effective control" interpretation of extraterritorial human rights obligations, arguing that human rights obligations should not be recognized where a state engaging in multilateral operations lacked "effective control" over persons and territory abroad, as in that case.¹⁴⁹ The government also contended that overseas detentions consistent with the law of armed conflict were not "arbitrary" under international human rights law.¹⁵⁰

¹⁴⁶ *Behrami v. France*, Eur. Ct. H.R. App. Nos. 71412/01 & 78166/01 (Grand Chamber, sitting May 2, 2007), reprinted in 46 I.L.M. 746 (2007).

¹⁴⁷ See *Canada v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28, ¶ 24 (Can.) (finding that extraterritorial conduct of Canadian officials in interrogating Omar Khadr on Guantánamo and sharing intelligence violated the Charter, since "the regime providing for the detention and trial of Mr. Khadr at the time . . . constituted a clear violation of fundamental human rights protected by international law"); reaffirmed by *Canada v. Khadr*, [2010] 1 S.C.R. 44, 2010 SCC 3, ¶ 14 (Can.) (noting application of the Charter to Canadian conduct abroad that is "contrary to Canada's international obligations or fundamental human rights norms"); cf. *R. v. Hape*, 2007 SCC 25 (Can.) (noting that "participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations" could violate the Charter).

¹⁴⁸ Government's Factum, *Amnesty Int'l Canada v. Canada*, [2008] 4 F.C.R. 546, ¶ 82.

¹⁴⁹ *Id.* at ¶¶ 62-66.

¹⁵⁰ *Id.* at ¶ 80. The appellate court distinguished *Khadr* on citizenship and other grounds, and agreed that the government lacked effective control in the context presented. *Amnesty International Canada v. Canada*, 2008 FCA 401, [2009] 4 F.C.R. 149, ¶ 25.

7. Israel

Israel is the only foreign country of which we are aware that has expressed the view to the Human Rights Committee that the Covenant categorically does not apply outside its territory and to our knowledge, it has done so only in the last few months. Historically, Israel's position before the Committee that the Covenant did not apply fully in the occupied territory has focused less on strict territoriality, and more on a claim regarding its lack of complete control over that territory and a *lex specialis* view that the law of armed conflict was the dominant body of law applicable there. Only this year, did Israel supplement this position before the Committee with an argument that the Covenant is geographically restricted, which it asserted without substantial analysis or explanation.

In 1998, three years after Legal Adviser Conrad Harper made his statement on behalf of the U.S. to the Committee, Israel stated during its first appearance before the Committee that "the Covenant and similar instruments *did not apply directly to the current situation* in the occupied territories."¹⁵¹ Significantly, however, at the time Israel did not adopt a strict interpretation position that the Covenant did not apply extraterritorially. Instead – like Eleanor Roosevelt – Israel (1) addressed whether the obligation to *ensure* applied in this context; it did not address the obligation to respect; (2) contended that most governance authorities in the occupied territory were under local control and that Israel therefore did not exercise "jurisdiction," and (3) further contended that international humanitarian law primarily applied in the occupied territory, rather than human rights law, which is an argument based on IHL as the *lex specialis*, not one based on extraterritoriality. Thus, Israel asserted:

21. . . . [T]he interpretation of article 2, paragraph 1, of the Covenant, under which States parties undertook to *ensure* rights to all individuals "within its territory and subject to its jurisdiction," had been exhaustively discussed by a number of eminent legal authorities. *The central question which had faced Israel in preparing its report to the Committee was whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction.* In the *Cyprus v. Turkey* case, the European Commission of Human Rights had equated the concept of jurisdiction with actual authority and responsibility in terms of civil or military control over the territory.

22. The problem became even more involved when consideration moved from the abstract question of *jurisdiction and control* to the more practical question of the actual extent of responsibilities for actions taken within a territory itself. One issue was the applicability in that territory of the norms and principles of international law pursuant to the Hague and Geneva Conventions, which covered situations involving foreign occupation within the general framework of a state of hostilities. The question thus arose to what extent such norms and principles were compatible with the provisions of the

¹⁵¹ U.N. Hum. Rts. Comm., 63rd Sess., 1675th mtg., ¶ 27, U.N. Doc. CCPR/C/SR.1675 (July 21, 1998) (emphasis added). The Initial Report filed by Israel did not address Article 2(1) or the geographic scope of the Covenant. U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of States Parties Due in 1993, Addendum Israel*, U.N. Doc. CCPR/C/81/Add.13 (June 2, 1998).

Covenant, which had been developed in the context of a normal relationship between State, Government, citizens and internal population.

...

24. Under the Middle East political process, which consisted of a series of agreements still in the course of implementation, Israel had transferred power over and responsibility for more than 90 per cent of the population of the West Bank and Gaza Strip to a Palestinian autonomous authority. The Palestinian Authority had a duty to exercise its powers in a manner consistent with internationally accepted norms and it would be inappropriate for Israel to include in its report information on, for instance, respect for freedom of religion or freedom of the press in the areas concerned, since it did not have the proper authority to do so.

25. . . . In the exercise of [its remaining] responsibilities, Israel remained committed to upholding the relevant norms and principles of human rights as set down in humanitarian law. . . .

27. [Moreover], Israel had constantly maintained that the Southern Lebanese Army exercised independent responsibility for actions in that territory. The only activities conducted by the Israeli army in Southern Lebanon were measures of self-defence.¹⁵²

The Human Rights Committee apparently also did not view Israel's answer as a categorical rejection of any extraterritorial Covenant obligations, but responded by indicating that it was "deeply concerned" that Israel continued to deny its responsibility "to *fully* apply the Covenant in the occupied territories."¹⁵³ Pointing to "the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" the Committee reiterated its opinion that, "under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bank where Israel exercises effective control."¹⁵⁴

In 2003, the Committee reiterated its view that under the existing circumstances, the Covenant applied to benefit the people of the occupied territories "for all conduct" by State authorities "that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law."¹⁵⁵ Israel responded briefly in 2007 by asserting "the non-applicability of the ICCPR to the present armed conflict against Palestinian terrorism, which is governed by the laws of armed conflict."¹⁵⁶

¹⁵² *Id.* (emphasis added).

¹⁵³ U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Israel*, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at ¶ 11.

¹⁵⁶ U.N. Hum. Rts. Comm., *Comments by the Government of Israel on the Concluding Observations of the Human Rights Committee*, 4, U.N. Doc. CCPR/CO/78/ISR/Add.1 (Jan. 24, 2007).

Finally, in the List of Issues for Israel's Third Periodic Report, the Committee asked

In light of the repeated observations of the Committee on the responsibility of the State party under international law to apply the Covenant in the Occupied Palestinian Territory (OPT), regardless of any state of armed conflict (CCPR/CO/78/ISR, para. 11, and CCPR/C/79/Add.93, para. 10), and the view expressed in this regard by the International Court of Justice in its Advisory Opinion of 9 July 2004, with reference to the Supreme Court decision of 30 June 2004 (HCJ, 2056/04), what measures has the State party taken to ensure full application of the Covenant to its activities in the OPT?¹⁵⁷

In its 2010 response, issued only this summer, Israel stated that its periodic report “did not refer to the implementation of the Convention in these areas for several reasons, ranging from legal considerations to the practical reality.”¹⁵⁸ Significantly, Israel asserted that given recent developments it clearly could no longer “be said to have *effective control* in the Gaza Strip, in the sense envisaged by the Hague Regulations.”¹⁵⁹ It also reasserted a *lex specialis* argument that although “there may well be a convergence between” human rights law and IHL “in some respects,” these two bodies of law “nevertheless remain distinct and apply in different circumstances.”¹⁶⁰

It was only at this point – in July 2010 – that finally, Israel for the first time articulated to the HRC a territorial restriction on the Covenant itself:

Furthermore, Israel has never made a specific declaration in which it reserved the right to extend the applicability of the Convention with respect to the West Bank or the Gaza Strip. Clearly, in line with basic principles of interpretation of treaty law, and in the absence of such a voluntarily-made declaration, the Convention, *which is a territorially bound Convention, does not apply, nor was it intended to apply, to areas outside its national territory.*¹⁶¹

This Israeli statement remains unclear in several respects. First, it is unclear what Israel meant by making a “declaration” reserving the right “to extend” the Covenant to the West Bank or Gaza. Nothing in the Covenant provides for such a declaration. Nor does Israel provide any fuller analysis for its view – particularly in light of the views of the Committee, the ICJ, or the

¹⁵⁷ U.N. Hum. Rts. Comm., *List of Issues To Be Taken up in Connection with the Consideration of the Third Periodic Report of Israel* (CCPR/C/ISR/3), ¶ 1, U.N. Doc. CCPR/C/ISR/Q/3 (Nov. 17, 2009).

¹⁵⁸ U.N. Hum. Rts. Comm., *Replies of the Government of Israel to the List of Issues (CCPR/C/ISR/Q/3/) To Be Taken up in Connection with the Consideration of the Third Periodic Report of Israel (CCPR/C/ISR/3)*, at 3, U.N. Doc. CCPR/C/ISR/Q/3/Add.1. (July 12, 2010) (advance unedited version).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (emphasis added).

internationally-accepted standards for treaty interpretation that have been reviewed here – as to why the Covenant is “territorially bound.”

D. Developments in Related Bodies of Law

Finally, the recognition of some limited extraterritorial application of regional human rights treaties in regional human rights bodies such as the European Court of Human Rights¹⁶² and the Inter-American Commission on Human Rights¹⁶³ means that important U.S. allies in Europe and Latin America are already subject to extraterritorial human rights treaty obligations in certain circumstances, based on various concepts of effective control.

Although not interpreting the ICCPR, these holdings of regional human rights tribunals undermine the categorical presumption claimed by the 1995 Interpretation (extrapolating from the Supreme Court’s *Sale* decision) against the non-extraterritorial application of human rights treaties. They further confirm that many states that are close U.S. allies – including states upon which we depend for cooperation in law enforcement, intelligence, military and other counterterrorism activities – are already subject to legal regimes that recognize the extraterritorial application of such obligations in certain exceptional contexts. This suggests both that workable models for applying human rights standards in these contexts are already under development, and that our allies may themselves be unable to engage in cooperative activities with the United States if they perceive that our legal obligations and policies diverge significantly from their own fundamental human rights obligations in extraterritorial contexts.

Finally and significantly, the U.S. Supreme Court has now recognized extraterritorial application of fundamental statutory and constitutional habeas corpus rights to aliens held in military detention at Guantánamo, based in significant part on the nature of U.S. control there.¹⁶⁴ The Court has also accepted, with respect to U.S. citizens, the availability of Fifth and Sixth Amendment protections abroad,¹⁶⁵ and statutory habeas protection for citizens in U.S. custody in

¹⁶² See, e.g., *Al-Saadoon v. U.K.*, Decision on Admissibility, App. No. 61498/08, ¶ 87 (2010) (recognizing application of European Convention where UK exercised “exclusive control” over detention facilities in Iraq); *Medvedyev v. France*, App. No. 3394/03, ¶ 67 (2010) (recognizing application of European Convention where France “exercised full and exclusive control” over capture of ship on the high seas); *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 567, 588 (2004) (recognizing application of the Convention to “persons who are in the territory of another state but who are found to be under the former state’s authority and control through its agents operating—whether lawfully or unlawfully—in the latter state”); *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 132 (recognizing potential for “exceptional” extraterritorial application of the “primarily territorial” European Convention).

¹⁶³ *Saldaño v. Argentina*, Petition, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L./V/II.102, doc. 6 rev., ¶ 19 (1999) (construing obligations under the American Convention on Human Rights as “linked to authority and effective control, and not merely to territorial boundaries”); *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 37 (1999) (applying “authority and control” standard to extraterritorial application of the American Declaration on the Rights and Duties of Man).

¹⁶⁴ See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁶⁵ *Reid v. Covert*, 354 U.S. 1 (1957).

Iraq.¹⁶⁶ By contrast, the D.C. Circuit recently rejected the application of constitutional habeas corpus to out-of-theater detainees in U.S. custody in Afghanistan, based in large part on the multiple indicia that the United States lacked sufficient control in that context.¹⁶⁷ The court rejected, on the one hand, the claim that a military base lease was sufficient to establish extraterritorial application of the Suspension Clause, and on the other, that a level of control constituting “*de facto* sovereignty” was required. The court nevertheless observed that, in contrast to Guantánamo, the U.S. operations in Afghanistan occur on foreign soil under the law of a foreign sovereign, and in an active theater of war, and that application of constitutional habeas would be impracticable in this context.

V. Implications

Based upon the foregoing comprehensive review of (1) the Covenant’s language in context; (2) object and purpose; (3) negotiating history; (4) U.S. positions; (5) interpretations of other States Parties; (6) interpretations of the U.N. Human Rights Committee; and (7) ICJ rulings, as Legal Adviser, I have now reached the considered judgment that the 1995 Interpretation is *not* compelled by either the language or the negotiating history of the Covenant. I further find that the 1995 Interpretation stands in significant tension with the treaty’s object and purpose, as well as with interpretations of important U.S. allies, the ICJ, and the Human Rights Committee.

Instead, I believe that an interpretation of Article 2(1) that is truer to the Covenant’s language, context, object and purpose, negotiating and ratification history, and subsequent understandings of other States Parties, as well as the interpretations of other international bodies, would

- (1) distinguish between the obligations to “respect” and to “ensure” in Article 2(1);
- (2) hold that in fact, the Covenant *does* impose obligations on a State Party’s extraterritorial conduct in certain exceptional circumstances – specifically, that a state is obligated to *respect* rights of individuals under its control in circumstances in which the State exercises authority or effective control over a particular person or context; and
- (3) acknowledge that the Covenant only imposes positive obligations on a state to *ensure* rights – whether by legislating extraterritorially or otherwise affirmatively protecting its nationals or other individuals abroad from the acts of third parties or entities – for individuals who are both within the territory and subject to the jurisdiction of the State Party, because attempting to protect persons under the primary jurisdiction of another sovereign otherwise could produce conflicting legal authorities.

Under this interpretation, a state acquires obligations under the Covenant along a sliding scale based upon its own actions. *First*, where a state refrains from acting with regard to a person or territory, it acquires no Covenant obligations toward that person. *Second*, once a state exercises authority or effective control over an individual or context, it becomes obligated to respect Covenant rights to the extent of that exercise of authority. *Third and finally*, when individuals

¹⁶⁶ *Munaf v. Geren*, 553 U.S. 674 (2008).

¹⁶⁷ *Al Maqaleh v. Gates*, 605 F.3d 84, 95, 97-99 (D.C. Cir. 2010).

are within the state's territory and also subject to its jurisdiction, the state becomes obligated to affirmatively *ensure* Covenant rights to that individual.

The obvious practical question is how recognition of some extraterritorial reach to the ICCPR would alter our current policy positions. Answering this question will require further work with the interagency process, to define the precise contours of the Covenant's extraterritorial application for the United States in light of our operations around the world, and the precise policy implications of a revised U.S. position. On examination, however, for at least four reasons, modifying the U.S. position to reflect the better interpretation of the ICCPR – that the treaty extends to some U.S. conduct abroad – should have a salutary effect on our international reputation, without dramatic impact on our actual practices abroad:

First, a revised understanding of the potential extraterritorial scope of the ICCPR that comports with the treaty's text, context, object and purpose, negotiating history, and subsequent interpretation by States Parties and international authorities, would remain limited. As noted above, the most plausible understanding of the Covenant's scope, taking all the above factors into consideration, appears to be that the obligations to respect Covenant rights would apply only where the United States itself directly exercises authority or "effective control" over a particular context, including over a person or location. *Any broader obligation to affirmatively ensure Covenant rights through legislation or otherwise would apply only in circumstances where an individual is both within the territory and jurisdiction of the United States.* Thus, Mrs. Roosevelt's concern about avoiding legislative or other obligations to ensure rights in situations of overlapping legal authority – whether in temporary or partial occupation or otherwise – would remain fully protected.¹⁶⁸

Any extraterritorial application of Covenant obligations would require the exercise of significant U.S. control over a situation. As indicated by the various statements by States Parties to the HRC discussed above, there are a number of constraints on such findings of control. For example, national and regional courts and other international bodies previously have found that effective control for purposes of establishing jurisdiction under other human rights conventions was *not* satisfied (1) over the conduct of active hostilities;¹⁶⁹ (2) in situations where another state took the action in question;¹⁷⁰ or (3) where a nation's military forces participated in U.N.-controlled peacekeeping or other operations.¹⁷¹ Significantly, President Obama has already

¹⁶⁸ Cf. *Al Maqaleh v. Gates*, 605 F.3d at 97 (contrasting Guantánamo, where "[t]he United States has maintained its total control of Guantánamo Bay for over a century," with Bagram, where "there is no indication of any intent to occupy the base with permanence" and the laws of the foreign sovereign apply); *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) ("the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base").

¹⁶⁹ *R (Al-Skeini and others) v. Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. 153 (appeal taken from Eng.) (U.K.), *Al-Skeini v. U.K.*, App. No. 55721/07 (no jurisdiction over shootings by British patrols in Iraq); *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 132 (no jurisdiction over NATO bombing strike).

¹⁷⁰ *Saldaño v. Argentina*, Petition, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 19 (1999).

¹⁷¹ *Behrami v. France*, App. No. 71412/01 (2007); *Saramati v. France*, App. No. 78166/01 (2007).

adopted the standard of “effective control” in Executive Order 13491 as the basis for securing “compliance with the treaty obligations of the United States.”

Second, many obligations to respect rights recognized by the ICCPR already apply to U.S. conduct overseas through the operation of other international legal obligations – including the Geneva, Genocide and Torture Conventions, which have recognized extraterritorial effect, as well as customary international law rules from human rights as well as international humanitarian law.

Third, any recognition of extraterritorial obligations under the ICCPR will not alter the fact that the U.S. Senate conditioned its consent to ratification for the ICCPR on a series of reservations, understandings and declarations, which would apply equally to any extraterritorial application of the Covenant. These include a specific understanding that the ICCPR is not self-executing. Thus, although obligations under the Covenant would be legally binding on the U.S., extraterritorial reach of the Covenant would not increase the United States’ domestic judicial exposure under the Covenant, since whether or not the Covenant reaches extraterritorially, it cannot be directly enforced by individuals in U.S. courts.

Fourth and finally, it is our considered opinion that modification of the U.S. position regarding extraterritorial application of the ICCPR would have only limited implications for current USG operations overseas in the actual conduct of the armed conflict with Al Qaeda in Afghanistan and elsewhere, or any other armed conflict, given our understanding of the *lex specialis* role of international humanitarian law in governing those operations and the complementary fundamental rights protections in the human rights and IHL regimes. Under the doctrine of *lex specialis*, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict outside a nation’s territory are found, not in the broader corpus of international human rights law, but in the more specific rules (*lex specialis*) of international humanitarian law, including the Geneva Conventions of 1949, the Hague Regulations of 1907, and other international humanitarian law instruments, as well as in the customary international law of armed conflict.¹⁷²

As noted above, many of these IHL rules already comport with those in international human rights law. For example, international human rights law and the law of armed conflict contain many protections that are complementary and mutually-reinforcing – notably in prohibiting torture, cruel treatment, or harm to protected civilians and in requiring fair process. President

¹⁷² The ICCPR’s drafters seem to have expressly assumed that in wartime, Covenant obligations would be accommodated to IHL through tailored derogations that were consistent with IHL. Under the ICCPR’s derogation clause, Article 4, the drafters plainly expected states parties might need to derogate from some clauses in wartime. Mrs. Roosevelt invoked the recent international humanitarian law treaties that had been drafted, including “the four [1949] conventions recently drawn up at Geneva, and that in order for the Covenant to take “full advantage of those conventions which had been carefully worked out,” Article 4 should provide that “No derogation may be made by any State under this provision which is inconsistent with international law or with international agreements to which such State is a party.” U.N. Hum. Rts. Comm’n., 6th Sess., 195th mtg., ¶¶ 44-45, U.N. Doc. E/CN.4/SR.194 (May 25, 1950) (USA). See also U.N. Hum. Rts. Comm’n., *Report of the 8th Session, 14 April to 14 June 1952*, ¶¶ 277-280, U.N. Doc. E/CN.4/669 (1952) (discussing current Article 4).

Obama has already directed U.S. policy and practices to comply with these principles, including in non-international armed conflicts. For example, Executive Order 13,491 on Ensuring Lawful Interrogations, was adopted “to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions,” and the Convention Against Torture, based on a standard of “effective control.” The Executive Order accordingly provides that

in situations of armed conflict, consistent with the requirements of . . . the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person . . . *whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.*

Id., Preamble and Sec. 3(a) (emphasis added). Various drafters in international human rights law and international humanitarian law also have drawn from the other body of law in developing aspects of new instruments. For example, the Commentaries to Additional Protocol II to the Geneva Conventions make clear that a number of provisions in the Protocol were modeled on comparable provisions in the ICCPR.¹⁷³ In addition, we note that a time of war, standing alone, plainly does not suspend the operation of the Covenant to matters within the scope of its application. To cite only two obvious examples, a State Party’s participation in a war would in no way excuse it from respecting and ensuring rights to have or adopt a religion or belief of one’s choice or the right and opportunity of every citizen to vote and to be elected at genuine periodic elections.¹⁷⁴

Nevertheless, the legal rules that govern the conduct of armed conflict itself come from international humanitarian law. It is IHL that supplies the content of a state’s international legal obligations with respect to the actual conduct of hostilities in armed conflict outside its territory. In particular, recognition of a U.S. obligation to respect rights under the Covenant in situations under our authority or effective control would be consistent with our current understandings regarding substantive U.S. legal obligations in the operation of an armed conflict, and would not significantly impact current targeting or detention standards:

a. *Targeting.* Under traditional understandings of the law of war, by its nature, armed conflict involves lawful killing outside of a judicial setting. With regard to targeting, a

¹⁷³ For example, preambular paragraph 2 of Additional Protocol II acknowledges that “international instruments relating to human rights offer a basic protection to the human person.” See also Commentary on AP II, ¶¶ 4428–30. Article 72 of Additional Protocol I provides that “The provisions of this Section [“Treatment of persons in the power of a party to the conflict”] supplement the rules of humanitarian protection in the Fourth Geneva Convention, *as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.*” (emphasis added).

¹⁷⁴ Mrs. Roosevelt specifically stated that “it was unfortunately necessary to take the threat of war or other serious situations into account and that was the reason for the provisions of article 4. However, even in time of war there were some basic rules of conduct which States must observe.” U.N. Hum. Rts. Comm’n., 6th Sess., 195th mtg., ¶ 44, U.N. Doc. E/CN.4/SR.194 (May 25, 1950) (USA).

killing that satisfies the requirements of the international law of armed conflict is not an extrajudicial killing and does not violate human rights law. Customary international law prohibitions on extrajudicial killing already apply in extraterritorial contexts. However, as even the U.N. Special Rapporteur on extrajudicial killings recently acknowledged, whether a particular killing is lawful – and thus not an arbitrary deprivation of life under either human rights treaties or customary international law – “is to be determined by the applicable *lex specialis*.”¹⁷⁵ The Special Rapporteur observed that targeted killing is “lawful” in an armed conflict, among other contexts, “when the target is a ‘combatant’ or ‘fighter,’”¹⁷⁶ so long as the killing complies with other requirements of international humanitarian law, including the principles of distinction and proportionality.

On the other hand, the legality of a killing *outside* the context of armed conflict is governed by human rights standards or international legal rules regarding the use of force. Thus, as I recently stated for the Administration, a killing in an armed conflict that complies with the laws of armed conflict is not an extrajudicial killing,¹⁷⁷ and could not be considered an “arbitrary deprivation of life” under Article 6 of the ICCPR.

b. *Detention*. Similarly, the law of war permits certain forms of lawful detention in armed conflict as a means of conducting the war. In the current situation, appropriate procedures for identifying persons who may be detained in a non-international armed conflict are not comprehensively codified by treaty, and must be drawn by analogy from the Geneva Conventions and other IHL sources. The Third and Fourth Geneva Conventions and other relevant bodies of international humanitarian law set forth the procedures for identifying persons who may lawfully be detained in an international armed conflict – be they privileged or unprivileged belligerents, or civilians who constitute an imperative threat to security. With respect to belligerents, the Third Geneva Convention speaks to the procedures that pertain, including the provision in Article 5 that in cases of doubt, a belligerent’s status shall be “determined by a competent tribunal.” For civilians detained as an imperative threat to security, Article 43 of the Fourth Geneva Convention stipulates that an “appropriate court or administrative board” shall examine the basis for detention, while Article 78 provides that during an occupation, the State Party’s internment “shall be made according to a regular procedure” which “shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay.” Article 78 adds that a periodic review must be undertaken by a “competent body” established by the Occupying Power. The commentary on Article 78 elaborates that such an appeal shall be entrusted *either* to a ‘court’ or a ‘board.’”¹⁷⁸ Both

¹⁷⁵ U.N. Hum. Rts. Comm., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum Study on Targeted Killings*, ¶ 29, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

¹⁷⁶ *Id.* at ¶ 30.

¹⁷⁷ Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting, American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

¹⁷⁸ See discussion in Jelena Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*, 87 Int’l Rev. Red Cross 375, 386 (June 2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p375/\\$File/irrc_858_Pejic.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p375/$File/irrc_858_Pejic.pdf).

the Third and Fourth Conventions further provide that persons detained under the laws of war shall be registered with the ICRC and held in officially-recognized places of detention accessible to the ICRC.

Nothing in this IHL regime suggests that detention in an international armed conflict that comports with these requirements would nevertheless constitute “arbitrary detention” under Article 9 of the ICCPR, or would somehow violate Article 9(4) of the Covenant’s mandate that anyone deprived of his liberty “shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Likewise, at least in an armed conflict occurring on a territory controlled by another state, detention in a non-international armed conflict does not require that such persons be entitled to the equivalent of a habeas corpus proceeding before a domestic court in order to test the legality of their detention under the laws of war.

We recognize that with respect to the provision of remedies and oversight mechanisms, international human rights law does appear to impose somewhat more extensive obligations than the law of armed conflict. Article 2 of the ICCPR provides that states shall provide an “effective remedy” for Covenant violations. IHL, of course, provides for criminal accountability for grave breaches of the Geneva Conventions, including Common Article 3. Other international criminal law principles such as crimes against humanity also apply both in and outside of armed conflict contexts. And the Convention Against Torture (CAT) criminalizes extraterritorial acts of torture, and has been implemented by the United States in its domestic criminal code. *See* 18 U.S.C. 2340A. Legal obligations to provide remedies to victims themselves are less robust under IHL, although as a matter of policy the U.S. military commonly provides compensation to certain victims in armed conflict.

In some cases, we might be criticized for failing to provide a remedy for human rights violations occurring abroad. But although recognition of the limited application of the ICCPR abroad could subject U.S. conduct to international oversight mechanisms such as the HRC or the Special Rapporteurs, those mechanisms have long been in place and already long have considered U.S. activities abroad to be appropriate subjects for examination. Because the ICCPR is not self-executing, claims of a failure to provide a remedy under the ICCPR could not be heard in U.S. courts. We may be criticized in some quarters for perceived under-compliance – as was certainly the case when we ratified the Covenant in the first place. But we believe that we can make a robust defense of our practices. In making this defense, acknowledging that certain obligations abroad that others already assume apply to us should not adversely affect that dynamic. To the contrary, the United States should receive significant credit in the international community for finally acknowledging that certain of our activities outside United States are subject to international legal obligations, and not just policy constraints.

In short, for years the United States has consistently adhered to certain standards of conduct in its overseas operations of all types. Although the U.S. has claimed to follow those rules solely as a matter of policy, it has been proven untenable – in U.S. courts, in international fora, and in the

court of public opinion – for the United States to do otherwise.¹⁷⁹ Formally acknowledging that we will henceforth treat certain of our announced standards of conduct abroad – such as the prohibition on torture and inhumane treatment – as *legal treaty obligations*, not merely as official policy or even as customary international law, will significantly enhance the United States’ credibility and standing as an international leader in respecting and promoting the international rule of law.

Finally, in recognizing that the ICCPR applies extraterritorially in certain circumstances, the United States would *not* thereby be accepting or acquiescing in every interpretation of human rights law henceforth adopted by the Human Rights Committee, by other international bodies or by the NGO advocacy community, any of which on occasion may assert broader understandings of the content of particular rights than does the United States. Nor are we recommending that the United States accept as authoritative the Human Rights Committee’s own understanding of the geographic scope of the ICCPR. Rather, this opinion recommends revising our understanding of the extraterritorial applicability of the ICCPR for the simple reason that after this detailed review, the Legal Adviser’s Office no longer believes that the 1995 Interpretation is the best reading of the treaty. An interpretation of Article 2(1) that better comports with the Covenant’s text, object and purpose, negotiating and ratification history, as well as the overwhelming weight of international authority on this question, would provide that the Covenant *does* impose certain obligations on a State Party’s extraterritorial conduct under the circumstances outlined herein.

VI. Conclusion

In sum, given the foregoing comprehensive review of (1) the Covenant language in context; (2) object and purpose; (3) negotiating history; (4) U.S. positions; (5) interpretations of other States Parties; (6) interpretations of the Human Rights Committee; and (7) ICJ rulings, as Legal Adviser, I have now reached the considered judgment that the 1995 Interpretation is *not* compelled by either the language or the negotiating history of the Covenant. I further find that the 1995 interpretation stands in significant tension with the treaty’s object and purpose, as well as with interpretations of important U.S. allies and the Human Rights Committee. Based on all of the foregoing, I conclude that:

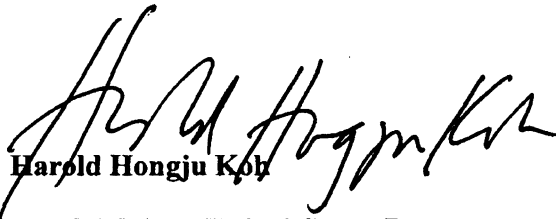
An interpretation of Article 2(1) that is truer to the Covenant’s language, object and purpose, negotiating and ratification history, and subsequent understandings of other States Parties, as well as the interpretations of other international bodies, would distinguish between the Article’s obligations to “respect” and to “ensure.” It would provide:

- (1) that in fact, the Covenant does impose obligations on a State Party’s extraterritorial conduct in certain exceptional circumstances – specifically, that a state is obligated to respect rights under its control in circumstances in which the State exercises authority or effective control over a particular person or context without regard to territory; but*

¹⁷⁹ One example of a policy the U.S. has adopted because there is no meaningful legal alternative is the policy prohibiting return of Guantánamo detainees to a place where they more likely than not would face torture. Absent such a policy commitment, domestic courts likely would not have deferred to Executive Branch transfer decisions, and cooperation from U.S. allies in relocating GTMO detainees and in other counterterrorism activities would have been extremely difficult to secure.

- (2) *that the Covenant only imposes positive obligations on a state to ensure rights – whether by legislating extraterritorially or otherwise affirmatively protecting its nationals or other individuals abroad from the acts of third parties or entities – for individuals who are both within the territory and subject to the jurisdiction of the State Party, because attempting to protect persons under the primary jurisdiction of another sovereign otherwise could produce conflicting legal authorities.*

The detailed analysis set forth above still leaves several important questions to be considered, especially with respect to the application of the “effective control” test in particular contexts, the precise scope of the “*lex specialis*” doctrine, and specific operational implications of moving away from the position advanced in the 1995 Interpretation. We will encourage further government-wide dialogue on those questions, so that our evolving policies can fully take into account operational considerations, accurate treaty interpretation, and the current state of international law.

A handwritten signature in black ink, appearing to read "Harold Hongju Koh". The signature is fluid and cursive, with the first name "Harold" being more prominent.

Harold Hongju Koh

Legal Adviser, United States Department of State

October 19, 2010