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Note

Approaching the Extraterritoriality Debate:
The Human Rights Committee, the U.S. and the ICCPR

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I. Introduction

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ."¹

The International Covenant on Civil and Political Rights (ICCPR) was created after World War II and was one of the first efforts undertaken by the newly formed United Nations.² According to President Truman, the ICCPR was to be "an international bill of rights acceptable to all the nations involved . . . [it] will be as much part of international life as our own Bill of Rights is part of our own Constitution."³ After the ICCPR entered into force,⁴ the Human Rights Committee (HRC) was established to carry out its functions and to monitor its implementation.⁵ In fulfilling its responsibilities, the HRC has had to interpret various provisions of the ICCPR—a task that can often create tensions with member states. This is particularly true with the HRC's interpretation of Article 2(1), which deals with the geographic application of the treaty.⁶

The debate that has emerged over the language in Article 2(1) shows the impact that eight simple words can have in the arena of international human rights. The United States, along with other state parties, argue that the plain meaning of the language shows that the ICCPR only applies within a state's territory.⁷ However, the HRC, supported to some extent by an opinion of the International Court of Justice (ICJ), argues that the language requires states to apply the ICCPR extraterritorially as this would be more coherent with the purpose and provisions of the Covenant.⁸ This current debate presents the question of whether the HRC has over-interpreted the treaty and undermined its authority or whether it has taken a persuasive position establishing a new customary norm whereby states recognize and apply the rights and responsibilities enumerated in the ICCPR outside of their borders.

While it has taken a strong position on the ICCPR’s scope, the HRC will face difficulties in getting state parties to abide by its interpretation without support from major powers like the U.S. Yet in spite of the public disagreement between the U.S. and HRC over Article 2(1), it appears that the HRC's position may be having an incremental effect; the U.S., while still staunchly endorsing its own view, has provided limited reporting on its extraterritorial ac-

³ Id.
⁴ See ICCPR, supra note 1. The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992. Id.
⁵ ICCPR, supra note 1, art. 28(1). See also DOMINIC McGOGLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 6, 44 (1991) (noting that the HRC was approved only by a narrow vote during the drafting of the ICCPR).
⁶ ICCPR, supra note 1, art. 2(1).
⁷ U.S. Dep't of State, Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, ¶ 129, delivered to the Human Rights Committee, Oct. 21, 2005 [hereinafter Second and Third Periodic Reports].
tivities as a courtesy to the HRC. Although this alone is insufficient to establish a rule of customary international law, it might be considered as evidence of state practice and opinio juris. This suggests that the HRC’s position has persuasive appeal and, while the HRC faces challenges in its efforts to promote its interpretation, if it chooses to constructively engage state parties it may be able to achieve a favorable consensus in the future. On the other hand, if the HRC takes an antagonistic approach toward state parties, it could undermine the very support that it needs to ensure compliance with the ICCPR. Furthermore, by continuing an antagonistic approach with the U.S., the HRC is merely presenting opportunities for the U.S. to establish a persistent objector position.

This paper will begin with an analysis of the constraints that treaty bodies like the HRC face as they seek to enforce and interpret treaty language. It will then look at the formation of the ICCPR and its substantive provisions followed by an overview of U.S. ratification of the treaty and the various reservations, understandings and declarations that it made at the time. It will then delve into the Article 2(1) debate and examine how different interpretations of its language play out on the international stage. The paper will conclude by noting how the use of sound legal arguments and a policy of constructive engagement would be more beneficial for the HRC and may generate greater cooperation from state parties that oppose the HRC’s interpretation, such as the U.S.

II. Treaty Bodies and Treaty Interpretation

Like other legal texts, treaties are often the subject of interpretive debate among parties and the bodies created to implement their provisions. For the ICCPR, the task of implementing the agreement resides with the HRC. According to the Covenant, such implementation occurs primarily through regular state reports submitted to the HRC, which also has the authority to issue “such general comments as it may consider appropriate” to the parties. In carrying out such tasks, the HRC has also felt compelled to interpret various provisions of the ICCPR and has taken an active role in that regard.

Under the Covenant, for example, the HRC has the authority to review and comment on periodic reports required of state parties, but the treaty does not specify how frequently such reports must be submitted. Using its interpretive authority, the HRC determined that five years was a sufficient period for the regular reports submitted to the HRC, which also has the authority to issue “such general comments as it may consider appropriate” to the parties. In carrying out such tasks, the HRC has also felt compelled to interpret various provisions of the ICCPR and has taken an active role in that regard.

The HRC also has the authority to receive and consider inter-state complaints if both parties consent to the HRC’s authority, although this system has not yet been used. Dan E. Stigall, An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice (“UCMJ”) Over Civilians and the Implications of International Human Rights Law, 17 CARDOZO J. INT’L & COMP. L. 59, 97 (2009).

Using its interpretive authority, the HRC determined that five years was a sufficient period for the regular reports, but it further determined that Article 40(1)(b) granted it the authority to request supplemental reports from states in re-

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9. ICCPR, supra note 1, art. 40.
10. Id. art. 40(4).
12. ICCPR, supra note 1, art. 40. See also McGoldrick, supra note 5, at 50. The HRC also has the authority to receive and consider inter-state complaints if both parties consent to the HRC’s authority, although this system has not yet been used. Dan E. Stigall, An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice (“UCMJ”) Over Civilians and the Implications of International Human Rights Law, 17 CARDOZO J. INT’L & COMP. L. 59, 97 (2009).
13. ICCPR, supra note 1, art. 40(1)(b) (stating that state reports can be submitted “whenever the Committee so requests”). See also McGoldrick, supra note 5, at 67-68.

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sponse to particular events. The HRC has thus set the precedent not just for its authority to interpret the ICCPR but also for doing so in a way that enhances its monitoring powers. While the HRC’s interpretations on the reporting and commenting provisions of the ICCPR are more clearly implied in the text and thus less controversial, it is quite a different case when it comes to interpretation of Article 2(1), which deals with the scope of where the treaty applies.

While treaty bodies like the HRC often have interpretive authority, like states they are bound by the general rules of treaty interpretation as outlined in the Vienna Convention on the Law of Treaties (Vienna Convention). The Vienna Convention lays out a systematic approach toward interpreting treaties such as the ICCPR. According to Article 31, treaties are to be interpreted “in good faith” according to the “ordinary meaning... given to the terms of the treaty in their context and in the light of its object and purpose.” Like statutory interpretation in the United States, understanding an international treaty starts with the plain meaning of the text which is then considered in light of the context of the treaty itself.

In determining the context of a treaty, the Vienna Convention provides for analysis of the preamble and annexes and any agreements or instruments that all the parties to a treaty may have made in connection with the treaty. Along with such context, the Vienna Convention also allows for the use of related subsequent agreements or practices among the parties and also relevant rules of international law, which could include customary international law. After that point, the Vienna Convention permits use of supplemental means to confirm the meaning of a treaty and this includes the “preparatory work” of the treaty and the “circumstances of its conclusion.” Such supplemental means are also permitted to determine what the meaning of a treaty is, if the ordinary meaning is “ambiguous or obscure” or would lead to a “manifestly absurd or unreasonable” result. Thus, in interpreting international treaties, international bodies like the HRC are bound by specific rules of interpretation that require the plain meaning as the starting point of analysis and inquiry into context and treaty formation only if such plain meaning is ambiguous.

Along with the obligation to abide by the rules of international law outlined in the Vienna Convention, there are also other practical reasons why treaty bodies should follow the accepted rules of treaty interpretation. For any treaty to have force, the body charged with its implementation must have credibility, especially with those states that are parties to the treaty. The effectiveness of any treaty, after all, depends on the cooperation of its parties,
and where a treaty body fails to follow accepted rules of treaty interpretation in conflict with its parties, it undermines the overall support required to implement the treaty.\textsuperscript{22}

The legal force of a treaty body's interpretations will often depend on the "persuasiveness and analytical rigor" of their legal argument.\textsuperscript{23} While human rights treaty bodies seek to promote human rights and the mandate of their treaty, if they neglect the terms of the treaty and their obligation to abide by the Vienna Convention, they ultimately minimize the impact of their actions.\textsuperscript{24} To prevent such an occurrence and to ensure that their positions have influence with state parties, treaty bodies such as the HRC should ensure that their arguments are strong and reasoned, based on sound methodologies and grounded in leading international authorities.\textsuperscript{25}

One way that a treaty body conveys its legal arguments on treaty interpretation is through general comments. While some contend that a treaty body's positions in their general comments are authoritative,\textsuperscript{26} most recognize that such comments are not binding on state parties although they can carry significant legal weight.\textsuperscript{27} Furthermore, a persuasive general comment can establish subsequent practices and has the potential to generate new binding norms in customary international law\textsuperscript{28} such that disregard of general comments by state parties would constitute bad faith.\textsuperscript{29} Overall, while treaty bodies are bound by the Vienna Convention's rules on treaty interpretation, it is also in their practical interest to follow such rules as doing so enhances their credibility and the likelihood that state parties will cooperate and promote their position.

## III. Formation and Structure of the ICCPR

Prior to WWII the presence or absence of human rights in a country was largely a domestic concern, within the sovereign realm of state governments.\textsuperscript{30} However, after the horrific war crimes of WWII and the rise of the United Nations there emerged a new interna-

\textsuperscript{22} Mechlem, supra note 15, at 924.
\textsuperscript{23} Id. at 922.
\textsuperscript{24} Id. at 931–34, 938, 945–46 (criticizing the Committee on Economic, Social and Cultural Rights' use of General Comments by noting that its credibility was weakened by comments imposing obligations on non-parties and by comments which sought to expand the extraterritorial scope of the treaty but which only resulted in greater confusion and uncertainty).
\textsuperscript{28} Mechlem, supra note 15, at 930.
\textsuperscript{30} See George A. Critchlow, Stopping Genocide Through International Agreement When the Security Council Fails to Act, 40 Geo. J. Int'l L. 311, 321–22 (2009) (noting that the classical view of sovereignty held that it "trumps all else" as it resided in the state rather than the individual); see also Robert Jackson, The Global Covenant: Human Conduct in a World of States 308 (2000) (stating that the traditional concept of sovereignty was "no guarantee of domestic well-being . . . [it was] merely the framework of independence within which the good life can be pursued and hopefully realized").
ational consensus. What emerged were stronger efforts to promote individual human rights and their enforcement as reflected in the UN Charter, the Universal Declaration of Human Rights, the Convention Against Genocide and the ICCPR. The UN Charter, while stating as one of its purposes the promotion of human rights, did not fully specify such rights and, because of this, the Universal Declaration of Human Rights (hereinafter UDHR) was adopted by the General Assembly. While the UDHR was an important step in enumerating human rights on an international stage, like the American Declaration of Independence, the UDHR was not intended to be a legally binding instrument but rather a "common standard of achievement."

Out of these early and bold efforts to promote a new international norm respecting individual human rights emerged the ICCPR, which has been referred to as the "hard law" version of the UDHR. While the ICCPR includes and expands upon many of the rights laid out in the UDHR, its most significant and historic feature is that it was one of the first legally binding international human rights instruments. Furthermore, the fact that the ICCPR was adopted and has been ratified by states from all corners of the world shows that it was not limited to particular states and ideologies but rather represented burgeoning international human rights norms accepted by nearly all cultures. The emergence of the ICCPR on the world stage was thus the first time that a truly international agreement was created that bound states to specific human rights obligations.

Referring to the "inherent dignity of the human person," the ICCPR built upon the foundational rights referenced in the UN Charter and the UDHR and included a list of wide ranging rights to be recognized and enforced by state parties. According to its provisions, parties agree to respect and ensure the rights to self-determination, life, privacy, due...
thought and religion, and the right to be free from torture and arbitrary arrest, among other guaranties. The ICCPR further states that all of the rights in the covenant apply equally to men and women, which was also a significant step in the trajectory of human rights.

While most of the rights enumerated in the ICCPR are not the subject of much dispute, some of its other provisions have caused reservations among state parties. For example, it prohibits propaganda for war and also bans advocacy of hatred that incites not just violence but also hostility or discrimination. Although such provisions seem to promote important values of tolerance, they also have the potential to conflict with other values, such as respect for freedom of speech, particularly in a country like the U.S., where such a right is nearly sacrosanct. So while the ICCPR enumerates several important rights as inherent for every individual, applying its template of rights domestically may be problematic, even in states with strong reputations for supporting human rights.

Because such rights are binding on state parties, the ICCPR also devised a system of enforcement to ensure that states abide by their obligations. This is done primarily through two major functions of the HRC. The first is the reporting requirement whereby state parties must submit periodic reports to the HRC along with any supplemental reports that it requests. The second mechanism is the inter-state complaint system in which states can police one another by submitting complaints to the HRC, although this system requires that all parties involved first consent to the HRC's competence to consider the issue. A subsequent Optional Protocol also permits the HRC to hear complaints from individuals. However, not all state parties have agreed to it, and even under the protocol, the HRC is only allowed to issue "views" on such complaints, not binding judgments.

The HRC also has the authority to issue General Comments on provisions of the ICCPR, however such comments are not binding on the state parties. In spite of this, the HRC's general comments are considered persuasive authorities, but only so long as the HRC retains its credibility as the authoritative interpreter of the ICCPR. Because of the credibility given to the HRC, its decisions and views have a "norm-creating property that can serve

44. Id. art. 14.
45. Id. art. 18.
46. Id. art. 7.
47. Id. art. 9.
48. Id. art. 3.
49. Id. art. 20.
51. Harland, supra note 36, at 188.
52. See ICCPR, supra note 1, art. 41(1) ("A State Party . . . may at any time declare . . . that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State party is not fulfilling its obligations.").
54. Harland, supra note 36, at 188.
55. See ICCPR, supra note 1, art. 40(4) ("The Committee . . . shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties."); see, e.g., Keith, supra note 34, at 98.
56. See Stigall, supra note 12, at 76.
to create customary international law” which would be binding on states.57 Thus, the ICCPR was set up with strong substantive provisions but with a somewhat weaker enforcement mechanism as the HRC’s primary means of enforcing the treaty rests in self-reporting by state parties. However, there is the potential for stronger enforcement if the HRC uses its interpretative authority to foster binding norms.

One further limitation on enforcement of the ICCPR is in the text of the covenant itself. Under Article 4, state parties are permitted to derogate from their obligations in emergency situations where the “life of the nation” is in danger, but only to the extent that is “strictly required by the exigencies of the situation.”58 While the ICCPR allows for such exceptions, the derogation authority only applies to certain provisions as, even in emergency situations, state parties still must protect against arbitrary deprivation of life, torture, slavery, or threats to freedom of thought and religion.59 One of the major problems with derogation, however, is the definition of “public emergency” and the question of who has the authority to determine when it exists.60 So while the provisions of the ICCPR lend strong support for human rights, the covenant creates a hierarchy of such rights and permits states to discharge some of their duties in times of emergency.

The ICCPR was originally established to build on the growing postwar consensus supporting human rights by creating obligations on states to enforce them. In many ways, the Covenant was the first time in history that an international human rights treaty created binding obligations on so many states in the international system. While creating one of the strongest human rights covenants in history, the ICCPR also established a relatively weak system of enforcement. The HRC, while having the power to require reports from state parties and issue general comments, ultimately lacked any power to significantly leverage state parties to uphold their obligations, making implementation of the ICCPR highly dependent on the cooperation of state parties and the authority of the HRC.

IV. U.S. Ratification of the ICCPR

The U.S. signed the ICCPR on October 5, 1977, over ten years after it was adopted by the U.N. General Assembly, and ratified it over fifteen years later on June 8, 1992.61 The delay was due, in part, to fears that the ICCPR’s obligations would diminish U.S. institutions and sovereignty and threaten its federal system of government.62 Because of such fears, the U.S. placed certain qualifications on its ratification. As is common practice among states, the

57. Id. at 76, 98-99 (customary international law is not binding on “persistent objectors,” which are states that continuously and consistently object to norms that are in the process of becoming customary international law).
58. ICCPR, supra note 1, art. 4(1).
59. Id. art. 4(2).
60. McGoldrick, supra note 5, at 302-03. The HRC has not provided a clear definition of public emergency, only stating that not all wars or natural disasters constitute public emergencies as they may not involve threats to the life of the nation. See also Julie Debeljak, Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act, 32 MELB. U. L. REV. 422, 441 (2008).
62. Id.
U.S. attached specific reservations, understandings and declarations (RUDs) to its ratification to make certain that its ICCPR obligations would not conflict with existing domestic law in the U.S.\textsuperscript{63} The Human Rights Committee noted the RUDs attached to the U.S. ratification by stating that it "regrets the extent of the ... reservations, declarations and understandings to the Covenant ... taken together, they intended to ensure that the United States has accepted what is already the law of the United States."\textsuperscript{64}

The U.S. was specifically concerned with the ICCPR's prohibition of hate speech,\textsuperscript{65} its definition of torture,\textsuperscript{66} its restrictions on capital punishment,\textsuperscript{67} and its ban on charging juveniles as adults.\textsuperscript{68} With these reservations, the U.S. relied on its own jurisprudence as its guide, seeking to fit the ICCPR into existing domestic laws. For example, the U.S. agreed to the ban on hate speech so long as this provision would not go beyond existing U.S. free speech jurisprudence.\textsuperscript{69} It also stated that it would define torture and "cruel, inhuman or degrading treatment or punishment"\textsuperscript{70} within existing domestic definitions of torture based on the Eighth Amendment.\textsuperscript{71} For capital punishment, the U.S. also reserved the right to impose it on any person (including those under eighteen years of age), citing existing constitutional protections for defendants and restrictions on its use.\textsuperscript{72} With respect to its reservations, the U.S. followed a trend of fitting the ICCPR into its existing domestic laws such that they would have no additional affect on the U.S. legal system.

The U.S. also issued several understandings when it ratified the ICCPR. Among them, it noted that while the ICCPR prohibited various forms of discrimination\textsuperscript{73} in applying its provisions, the U.S. would continue to follow its constitutional mandate of equal protection and its different judicial standards to evaluate discriminatory laws.\textsuperscript{74} The U.S. government also stated its understanding that the ICCPR would not upset its federal system of govern-
ment by requiring the national government to go beyond its constitutionally authorized powers. These understandings, along with others pertaining to criminal procedure, also were part of an effort to ensure that the ICCPR would not conflict with current U.S. jurisprudence or upset the balance in its federal system. Like its reservations, the understandings which the U.S. appended to its ratification also sought to conform the ICCPR to existing domestic laws so that they would not create additional obligations (except for regular reporting) and thus would have no additional external affect on the U.S. legal system.

The final qualifications that the U.S. made in ratifying the ICCPR were its general declarations on the ICCPR as a whole. One of the major declarations was that the U.S. did not view the substantive rights in the ICCPR as self-executing, thus requiring congressional action before it would take effect in the U.S. Furthermore, the U.S. is one of the only countries to declare that the substantive provisions of the ICCPR do not create private rights of action for individuals. However, while this declaration seems to place a major limitation on the ICCPR as the U.S. views it, the U.S. also declared that it would recognize the HRC’s competence to hear inter-state complaints, a declaration which it had the option to decline, and which enhanced the authority of the HRC. So the U.S. position is that the ICCPR cannot be enforced by individuals, but it can be enforced by other state parties.

The other major U.S. declaration dealt with the balance between the ICCPR and domestic constitutional protections, as it noted that where the ICCPR provides fewer protections for certain rights than domestic law, such states should abide by their domestic protections. The U.S. declarations thus drew clear lines around application of the ICCPR. While it recognized that states could issue complaints against one another, it also prohibited individuals from doing so and reinforced the primacy of domestic law in protecting the substantive rights in the Covenant.

What is important to note, however, is the absence of any U.S. declaration as to whether the ICCPR applies extraterritorially. Some might view this as evidence that the U.S. accepted this view when it ratified the treaty, but it could also mean that U.S. policymakers assumed that the ICCPR would not apply extraterritorially due to the plain text of the treaty, and efforts to apply it beyond a state’s boundaries had not yet taken hold. A decade after

75. Id. at United States of America Declarations (1).

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters ....

Id.

76. Id. at United States of America Declarations (3).

77. Harland, supra note 36, at 195.

78. Id. at United States of America Declarations (2).

79. Id.

Parties to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant .... [F]undamental human rights existing in any State Party may not be diminished .... [because] the Covenant recognizes them to a lesser extent ....

Id.
U.S. ratification and the emergence of the Global War on Terror (GWOT), however, brought this issue to the fore and the question of whether or not the treaty applied extraterritorially created a much more significant division between the U.S. and the HRC.

V. Article 2(1) and the Debate Over Extraterritoriality

The ICCPR granted authority to the HRC to interpret its provisions and provide guidance to state parties. However, when the HRC interpreted the language of Article 2(1) as requiring extraterritorial application, it was unsettling to some of the state parties and raised questions as to whether the HRC went too far in attempting to broaden the scope of the treaty. The language in question states that parties to the ICCPR agree to ensure the rights entrusted in it to all individuals “within its territory and subject to its jurisdiction.”

The U.S. holds the position that this language limits the ICCPR to individuals who are both in their jurisdiction and within their territory, rendering the treaty inapplicable outside of its territory. The HRC, however, determined that such language means that the ICCPR is binding on state parties wherever they exercise “effective control,” even if that happens to be beyond their borders. This debate has taken on greater significance as the Global War on Terror has seen the U.S. engaging itself in various countries to fight al-Qa’ida and other transnational terrorist networks. Ultimately, while the Vienna Convention would dictate a plain reading of the text that would seemingly favor the U.S. position, the HRC has presented sound arguments also based on the Vienna Convention’s rules on treaty interpretation.

A. U.S. Position

In supporting its legal argument, the U.S. emphasizes plain language and treaty history, in accordance with the Vienna Convention, which requires that any interpretation begin with the ordinary meaning of the text. Perhaps the strongest argument for the U.S. position is that the plain language itself connects the phrase “within its territory” and the phrase “subject to its jurisdiction” with the conjunctive “and,” implying that both conditions must be met before the ICCPR applies.

While recognizing the clarity of the language, the U.S. has also addressed the context of the drafting and adoption of the treaty. When it submitted its second and third periodic re-

80. The Netherlands also took exception to the HRC's interpretation of Article 2(1) as it sought to resist the HRC's request that it report on actions of Dutch soldiers in Srebrenica. Michael Dennis, Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation, 100 AM. SOC’Y INT’L. L. PROC. 86, 88 (2006).
81. ICCPR, supra note 1, art. 2(1).
82. Matthew Waxman, Principal Deputy Dir. of Policy Planning, U.S. Dep’t of State, Opening Statement to the U.N. Human Rights Comm. (Jul. 17, 2006), available at http://2001-2009.state.gov/g/drl/rls/70392.htm (“[i]t is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party.”).
83. Centre for Civil and Political Rights [CCPR], General Comment No. 31 [80], 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 (Mar. 29, 2004) [hereinafter General Comment No. 31].
84. Vienna Convention, supra note 16, art. 32.
85. See ICCPR, supra note 1, art. 2(1).
ports to the committee in 2006, the U.S. noted the role that the U.S. delegate, Eleanor Roosevelt,\(^86\) played in drafting and proposing the language of Article 2(1).\(^87\) At the time the text was being debated, the former first lady said that the U.S. was "particularly anxious" about assuming obligations "to ensure the rights recognized in \ldots [the ICCPR] to the citizens of countries under United States occupation."\(^88\) She further described, "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 leased territories."\(^89\) During the debate over the text of Article 2(1), then, it was clear that the drafters were considering the question of extraterritoriality as Mrs. Roosevelt clearly articulated the reasons for why the U.S. was proposing such language to limit the external application of the covenant.

The recognition that the term "within its territory" qualified the broader scope of a state's overall jurisdiction continued through the adoption phase of Article 2(1) and the ICCPR itself. When the draft of the ICCPR was sent to the U.N. General Assembly, for example, the Secretary-General included annotations to Article 2(1) which noted the limitations of the proposed language and the resulting debate that took place:

> There was some discussion on the desirability of retaining the words "within its territory" \ldots [as] it was thought that a state should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because it was not within its territory \ldots. On the other hand it was contended that it was not possible for a state to protect the rights of persons subject to its jurisdiction when they were outside of its territory \ldots.\(^90\)

In describing the opposition to the proposed Article 2(1) language, the Secretary-General also noted that objectors questioned whether limiting the ICCPR to the territorial boundaries of a state would conflict with other provisions such as respecting the freedom of any individual to return to his or her home country.\(^91\) The Secretary-General's notes explicitly show that during the drafting phase there was an active debate over extraterritoriality that centered on the language of Article 2(1).\(^92\) Those drafters who supported extraterritorial application challenged the proposed language and, specifically, sought to remove the phrase "within its territory" from the provision.\(^93\) The language that exists today, then, was opposed by those drafters who wanted the ICCPR to apply externally.

Ultimately, the question over whether the plain meaning of the proposed Article 2(1) language permitted extraterritorial exceptions dissipated when the draft of the ICCPR was under consideration in the General Assembly. After the ICCPR was sent to the appropriate General Assembly committee for consideration, representatives continued to contest the

\(^86\) Eleanor Roosevelt had an "immensely important influence" in the creation of the International Covenant on Civil and Political Rights. McGoldrick, supra note 5, at 4.

\(^87\) See Waxman, supra note 82.

\(^88\) Dennis, supra note 80, at 89–90.

\(^89\) Id. at 90.


\(^91\) Id.

\(^92\) Id.

\(^93\) Id.
intra-territorial language “within its territory” on the grounds that it could restrict other rights in the Covenant, including the right of foreign nationals to have access to the courts of their nationality. While in committee, representatives favoring extraterritorial application suggested deleting the phrase “within its territory and,” because of such fears that it would ultimately limit the substantive guarantees of the ICCPR. China and France requested a vote to remove that phrase, but it failed by a tally of fifty-five to ten and Article 2(1) was adopted as a whole by a vote of eighty-seven to zero.

The drafters of the ICCPR, and the representatives that adopted it, understood that the language of Article 2(1) would have the effect of limiting the ICCPR to a state party’s territory, and seriously considered editing the language to allow the Covenant to be applied extraterritorially. However, the context of the Covenant’s construction quite clearly shows that such changes were soundly rejected when the article was adopted. As the U.S. State Department contends, “the territorial limitation in Article 2, far from being inconsistent with the object and purpose of the treaty, reflects the clear and expressed intention of those countries that negotiated the instrument.”

The early position of the U.S., as expressed by Mrs. Roosevelt, was that it did not want the treaty to be applied extraterritorially because of its significant postwar commitments in Europe and Asia, and the resulting responsibilities that would befall the U.S. in those areas. However, as the debate over extraterritoriality heated up during the Global War on Terror, other voices in the U.S. have rejected extraterritoriality for broader reasons. Seeing the debate as an effort to juxtapose Human Rights Law onto International Humanitarian Law (IHL), critics argue that such peacetime human rights should not apply during war. Those that favor keeping human rights law separate from IHL contend that mixing the

94. Id.
95. Id.
97. See Waxman, supra note 82.
98. International Humanitarian Law is also referred to traditionally as the Law of Armed Conflict or the Law of War. The different terminology describing legal rules during warfare is largely a product of different groups seeking to use their own vocabulary. See THE HANDBOOK OF ARMED CONFLICT 9 (Dieter Fleck ed., 1995) (noting that the term “International Humanitarian Law” is not referred to in the original Geneva Conventions); see also Gregory P. Noone, The History and Evolution of the Law of War Prior to World War II, 47 NAVAL L. REV. 176, 177 n.5 (2000) (citing a representative of the ICRC who said, “We use the term—humanitarian law—to avoid the word—war.”); see also Francoise J. Hampson, Teaching the Law of Armed Conflict, ESSEX HUM. RTS. REV., Jul. 2008, at 4, available at http://projects.essex.ac.uk/ehrr/V5N1/Hampson.pdf (noting the “strange” use of the term IHL after 1977 when Additional Protocol I merged the humanitarian “Law of Geneva” with the rules relating to the means and methods of combat because now “humanitarian” law includes rules that could permit the lawful killing of civilians as collateral casualties).
99. Hansen, supra note 61, at 37 (“[H]uman rights law should apply in armed conflict only if states consent to incorporating it into existing humanitarian law or agree to completely replace humanitarian law . . . . However, a subtle, ominous shift towards displacing humanitarian law with human rights law is underway, absent state consent.”).
100. It is interesting to note that Jean Pictet, one of the great proponents of human rights on the global stage and an official in the International Committee of the Red Cross during and after WWII, endorsed the traditional view that human rights law and IHL should be viewed as two separate but complementary systems. JEAN PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 15 (A. W. Sjöhoff
two, absent the consent of state parties, could provoke military resistance and diminish the credibility of human rights or, at worst, could prolong conflict by over-regulating the battlefield.101 Furthermore, replacing IHL with Human Rights Law could also deprive those involved in war of certain protections under IHL which exceed those provided for under Human Rights Law.102 Those that fear a merger of the two fields view efforts to externalize the ICCPR as one foundational step in that direction, which may be another reason why countries such as the U.S. are strongly opposing the HRC’s interpretation.103

The interpretational dispute between the U.S. and the HRC has been playing itself out on the international stage as the U.S. has engaged itself militarily in various countries in the Global War on Terror. The U.N. Special Rapporteur on Iraq, for example, called on coalition forces in Iraq to abide by the ICCPR’s guarantee of access to courts in dealing with detainees, even those being held for terrorist acts.104 The HRC has called on the U.S. to abide by the ICCPR in Iraq and Afghanistan and also at its detention facilities at Guantánamo Bay, Cuba,105 but the U.S. has steadfastly refused to apply the ICCPR to its operations in any of these countries.106 Yet, in rejecting the application of the ICCPR, the U.S. is not stating that such areas are ungoverned by any authorities. On the contrary, the U.S. position is that it is bound by the requirements and protections in the Constitution and laws of the U.S., along with those mandated under IHL.107 Under IHL, the U.S. is permitted to “take all the measures” needed to restore public order and safety in occupied countries108 which includes the power to intern individuals for security reasons.109 Such wartime actions would directly conflict with the ICCPR.110 Ultimately, the schism between the U.S. interpretation of Article 2(1) and that of the HRC has important effects on the world stage, particularly with respect to U.S. efforts in the GWOT.

One final note on the U.S. approach to the external application of the ICCPR pertains to

trans., 1975) ("H[umanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime.").

102. Id. at 48 (noting that a person protected under IHL could be subject to harsher punishment once prosecuted, including hard labor or monetary fines).
103. Id. at 4, 7.
110. See ICCPR, supra note 1, art. 12 ("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.").
the ability of state parties to derogate their responsibilities under the ICCPR.\textsuperscript{111} The U.S., after all, could have sought an Article 4 derogation for its international actions in the GWOT simply by citing the public emergency created by September 11, 2001 and the ongoing threat of transnational terrorism. However, had it done so, the U.S. would have effectively been admitting that the ICCPR applies extraterritorially. The U.S. is not alone in refusing to make such a derogation under the ICCPR for actions outside of its territory. In fact, no other state party to the ICCPR has claimed an Article 4 derogation for actions outside of their territory as it has so far only been used for internal emergencies.\textsuperscript{112}

The U.S. position on Article 2(1) of the ICCPR is based on a plain reading of the text and the history of the Covenant's construction. It concludes that the unanimously adopted language had the specific purpose of limiting the ICCPR to a state party's territorial bounds.\textsuperscript{113} It further argues that the language was explicitly debated and fleshed out during the drafting and adoption phases and subsequent efforts to edit the text to allow for extraterritorial application were soundly defeated.\textsuperscript{114} It is a strong legal argument well grounded in the Vienna Convention's rules of treaty interpretation and has been the basis for U.S. actions in the GWOT.

\textbf{B. HRC Position}

Whereas the U.S. looks to ordinary meaning and treaty history in interpreting Article 2(1), the HRC looks more to the purposes of the ICCPR, the good faith requirement that it imposes on state parties, and how it relates to other provisions of the Covenant. The HRC laid out its official position on the meaning of Article 2(1) when it issued its General Comment No. 31, which declared:

\begin{quote}
[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 . . . . Covenant rights . . . must also be available to all individuals, regardless of nationality or statelessness . . . . This principle 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. . . \footnote{General Comment No. 31, supra note 83, ¶ 10 (emphasis added).}
\end{quote}

In other words, while the U.S. reads the phrase "within its territory and subject to its jurisdiction" as requiring both conditions to be met, the HRC views the phrase disjunctively, reading the \textit{"and"} as meaning \textit{"and/or."}\footnote{Id. at 89.} Prior to issuing its General Comment, the HRC had been taking a more piecemeal approach toward Article 2(1), recognizing its literal meaning and finding extraterritorial application only in "exceptional circumstances" when states acted against their own citizens living abroad.\footnote{Id. at 88-89.} However, with General Comment No. 31, the HRC "abandoned the literal reading altogether."\textsuperscript{118} Furthermore, its comment also sought to define jurisdiction as being any place where a state party has "effective con-
trol,"119 which could include territories that a country occupies or leases outside of its borders. This position on Article 2(1) as promulgated by the HRC in its General Comment is not binding,120 but it does serve as a persuasive authority, compliance with which depends upon its acceptance by state parties.121

In taking the position that the ICCPR applies extraterritorially, the HRC can also point to opinions of the ICJ, which tend to support its position. In 2004, the ICJ issued an advisory opinion in the case where Israel (a State Party) had constructed a security wall in the Palestinian territories.122 The ICJ held that Israel was bound to apply the ICCPR in the occupied territories and that its construction of the wall was a breach of its obligations under the ICCPR as it denied Palestinians the right to freedom of movement123 provided under Article 12(1).124 In determining that the ICCPR applied extraterritorially, the ICJ referenced an earlier advisory opinion where it held that the ICCPR was not excluded by IHL and applied during armed conflict.125 After determining that human rights law operated in conjunction with IHL, the ICJ then determined that the language of Article 2(1) was ambiguous enough such that it could be interpreted according to either the U.S. position or that of the HRC.126 Because the ICJ said such language was ambiguous, it then looked to the purpose and construction of the treaty and determined that the drafters did not intend to "allow States to escape from their obligations when they exercise jurisdiction outside their national territory."127

However, while the ICJ laid out its advisory opinion endorsing extraterritoriality, some legal scholars have pointed out that the court's legal conclusion may have exceeded the bounds of its reasoning. For example, the ICCPR provision that the ICJ said had been breached by Israel, Article 12(1), is expressly limited to a state party's territory as it recognizes freedom of movement only for "[e]veryone lawfully within the territory of a state."128 As such, for the ICJ to be relying on Article 12(1) meant that it was technically viewing the

119. General Comment No. 31, supra note 83, ¶ 10.
120. Stigall, supra note 12, at 76.
121. See Mechlem, supra note 15, at 924.
122. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter The Wall Case].
123. Id. at 191–92.
124. ICCPR, supra note 1, art. 12(1) ("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.").
125. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) (holding that the ICCPR "does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency" and further noting that while the ICCPR applied in conjunction with IHL, on questions of deprivation of life which cannot be derogated, for example, IHL is to be used to determine what constitutes arbitrary deprivation).
127. Id.
128. ICCPR, supra note 1, art. 12(1).
West Bank and Gaza as Israeli territory (at least for the purposes of the ICCPR), meaning that the Covenant was thus not being applied extraterritorially.129 Regardless, even if the ICJ advisory opinion endorsing the HRC’s interpretation did not exceed its reasoning, it ultimately is not binding law on state parties to the ICCPR.130

Another persuasive judicial authority suggests a more limited view of extraterritoriality compared to the ICJ. The European Court of Human Rights (ECtHR) ruled on the question of extraterritoriality and held that the drafters of the ICCPR “definitively and specifically confined” its territorial scope.131 The ECtHR went on to state: “[I]t is difficult to suggest that the exceptional recognition by the Human Rights Committee of certain instances of extraterritorial jurisdiction . . . displaces in any way the territorial jurisdiction expressly conferred by that Article . . . .”132 So while the ICJ opinion in the case of the security wall in the Palestinian territories lent support to the HRC position, its conclusion that the ICCPR is externally applicable is challenged by another major international judicial body. Neither is binding on state parties, but the presence of both provides persuasive authorities for both sides of the debate.

In spite of the shortcomings of the HRC’s opinion due to the treaty’s plain meaning and construction and the ICJ and ECtHR opinions, the HRC’s reasoning behind General Comment No. 31 refocuses attention on the essential purpose of the ICCPR.133 It also exposes the potential that a strict interpretation of Article 2(1) could undermine such purpose by carving out enclaves where parties to the ICCPR would not be bound to apply its substantive provisions.134 In General Comment No. 31, the HRC stressed the Vienna Convention’s requirement that state parties abide by the terms of their treaties in good faith135 and noted that the essence of the ICCPR was to confer rights on individuals136 to be protected, not just respected, by state parties.137 The essence of the ICCPR, then, was to focus on individuals and not states or territories. Because of this essential purpose to promote basic rights for all human beings, failure to respect the application of such rights extraterritorially or even to protect such rights against invasion by private parties domestically would constitute bad faith in violation of the Vienna Convention.138

Advocates of extraterritoriality also challenge claims that the U.S. originally intended the language of Article 2(1) to apply domestically because of its postwar commitments. While it is true that the U.S. did not want to apply the ICCPR to postwar Europe and Asia,
advocates of extraterritoriality argue that the main fear of the U.S. at that time was that it would be responsible for human rights violations committed by others in occupied areas, not that it feared scrutiny for its own actions.\textsuperscript{139} In highlighting the spirit of the ICCPR, the HRC has taken a strong legal position on extraterritoriality, reminding state parties of their obligation to support the ICCPR in good faith and seeking the moral high ground in the Article 2(1) debate.

Along with focusing on the purpose of the ICCPR, the HRC has also noted situations where a literal interpretation of the Covenant would conflict with other provisions or where it could create an absurd result. There are certain provisions granting rights, after all, which could presumably be exercised outside of the territory of one’s home state.\textsuperscript{140} Article 12(4), for example, permits individuals the right to re-enter their home countries,\textsuperscript{141} which, in order to be exercised (and thus subject to protection by the home state), would require the individual to be outside the state’s territory.\textsuperscript{142} Furthermore, Article 1(3) has an express extraterritorial element, as it states: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”\textsuperscript{143}

The text of this provision clearly imposes an extraterritorial obligation on state parties and would ultimately be mute if the ICCPR only applied domestically. The HRC’s analysis of the extraterritoriality of the ICCPR highlights important areas of textual inconsistencies that would emerge under a strict interpretation of Article 2(1).

As it stands now, state parties to the ICCPR are not bound to adopt the extraterritorial view of the HRC which likely deviates from the Vienna Convention’s rules on treaty interpretation as it does not cohere with either the plain language or the construction of the ICCPR. Furthermore, the advisory opinion from the ICJ, while giving strength to the HRC’s interpretation, is ultimately limited by the reasoning that the court used in coming to its conclusion. The ECtHR’s holding further dampens support for the HRC’s claims as it provides a persuasive authority to counter that of the ICJ. In many ways, the HRC faces “an uphill struggle in seeking to implement its views on extraterritorial application of the ICCPR.”\textsuperscript{144} In spite of this, the HRC has discovered important intra-Covenant contradictions that would emerge based on a literal interpretation of Article 2(1) and have presented sound legal arguments that will eventually have to be addressed. In emphasizing the purpose of the Covenant and the duties of state parties, the HRC is also setting a moral benchmark that could develop into \textit{opinio juris}, one of the elements required to establish custo-


\textsuperscript{140} McGoldrick, \textit{supra} note 90, at 48.

\textsuperscript{141} ICCPR, \textit{supra} note 1, art. 12(4) ("No one shall be arbitrarily deprived of the right to enter his own country.").

\textsuperscript{142} See McGoldrick, \textit{supra} note 90, at 48 ("The right is devoid of substance if it can only be exercised when the individual is already within the territory of their own country.").

\textsuperscript{143} ICCPR, \textit{supra} note 1, art. 1(3) (emphasis added).

\textsuperscript{144} Dennis, \textit{supra} note 80, at 90.
mary international law. However, now that the HRC has pronounced its position on Article 2(1), the question remains as to how it will approach state parties like the U.S. in seeking to promote acceptance of its opinion.

VI. Article 2(1) and the Global War on Terror

One area in which to analyze the HRC’s approach is the GWOT. After all, the debate between the U.S. and the HRC over the interpretation of Article 2(1) has come into sharper focus as the U.S. has engaged itself internationally to combat transnational terrorism. The extraterritoriality debate has emerged as the HRC has requested reporting on U.S. activities in areas such as Afghanistan, Iraq and Guantánamo Bay, while the U.S. has resisted such reporting as exceeding the scope of the Covenant. Along with revealing the HRC’s approach toward promoting its position on Article 2(1), the extraterritoriality debate in the GWOT also underscores the importance of treaty interpretation and its real world effects.

Prior to the GWOT, the U.S. submitted its first periodic report to the HRC in 1994 (just a few years after it ratified the ICCPR), but its second and third periodic reports were not submitted until after the start of the GWOT in 2005.145 In the combined 2005 reports, the U.S. did not address its extraterritorial activities, in spite of a 2004 letter from the HRC requesting such information.146 In the consolidated report, the U.S. noted the HRC’s position and stated that it would:

[R]espond to the Committee’s concerns as fully as possible, notwithstanding the continuing difference of view between the Committee and the United States concerning certain matters relating to the ... scope of [the ICCPR] ... [T]he United States respectfully reiterates its firmly held legal view on the territorial scope of application of the Covenant.147

The HRC responded to the combined report by submitting a list of issues which restated its request for information on U.S. activities beyond its borders, particularly in Afghanistan, Iraq and Guantánamo Bay.148

In response to the HRC’s list of issues, the U.S. reasserted its view of Article 2(1), but it did address many of the HRC’s questions relating to extraterritorial actions “as a courtesy” to the committee.149 In addressing the HRC’s request, the U.S. provided reports that it had previously submitted to the U.N. Committee Against Torture and reemphasized that it is

145. See Tara J. Melish, From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies, 34 YALE J. INT’L L. 389, 406 (2009). See also Concluding Observations, supra note 105, ¶ 2 (stating that the HRC emphasized that the 2005 reports were “seven years overdue”).
146. Second and Third Periodic Reports, supra note 7, at Annex I.
147. Id. ¶ 3.

Please indicate in detail how the State Party ensures full respect for the rights enshrined in the Covenant in relation to its actions to combat terrorism (a) in Afghanistan; (b) in Iraq, (c) in any other place outside its territory, and (d) on its own territory, in particular when it holds detainees ... Please provide updated information on the identity, place of origin, place of deprivation of liberty and number of persons held in Guantánamo as well as information on the release of such persons and the date of their release ....

149. Id.
bound by domestic law, which prohibits all U.S. officials "from engaging in torture, at all times, and in all places" and that the main dispute for the U.S. was only that the ICCPR did not apply.\footnote{150} In affirming the binding domestic and international authorities prohibiting torture or cruel treatment, the U.S. did acknowledge that some individuals engaged in such acts during GWOT operations, but that it "deplores those abuses" and has continued to investigate and prosecute the perpetrators.\footnote{151}

The U.S. has strongly adhered to its position against extraterritorial application of the ICCPR, but it has never claimed that it is not bound by any human rights obligations abroad. Thus, the U.S. was merely telling the HRC that it was bound by laws and obligations separate from those in the ICCPR.\footnote{152} Furthermore, in making such claims, the U.S. has not callously rejected the HRC's requests but has shown itself willing to engage the body and to address its concerns over U.S. actions outside of its territory. This, coupled with the affirmation by the U.S. that international human rights obligations exist extraterritorially, suggests the potential for collaboration with the HRC.

In spite of the fact that the U.S. responded to the HRC's list of issues on extraterritorial activities, the committee persisted in requiring more in-depth reporting from the U.S. on its actions abroad. The HRC said that it appreciated the U.S. response and "welcomes" U.S. efforts to address its concerns.\footnote{153} However, the Committee also said that it "regrets that only limited information" was provided and complained that the U.S. refused to "address certain serious allegations of violations" of the ICCPR.\footnote{154} The HRC challenged the U.S. position on extraterritoriality and its "failure" to fully consider its obligation to ensure, not just respect, the ICCPR's substantive provisions.\footnote{155} The HRC also criticized the U.S. for continuing to adhere to its position even after General Comment No. 31 was issued, saying that it should recognize the external application of the ICCPR and "review its approach and interpret the Covenant in good faith . . . in light of its object and purpose."\footnote{156}

So while the U.S. government has shown itself willing to provide limited responses in areas that it does not deem under the authority of the ICCPR, the HRC has responded with rather blunt language instructing the U.S. to abide by the committee's interpretation of Article 2(1). It is noteworthy that the HRC takes its position of promoting human rights obli-


\footnotesize{[\textit{In rejecting treaty body supervision in these limited areas, the United States does not claim immunity from the binding rules of international human rights . . . .}\textit{R}ather, its argument is a narrow jurisdictional one: treaty bodies, as a technical matter, lack jurisdiction over the United States in such areas . . . .}

gations seriously, but in approaching the dispute in this way and with such language the HRC has the potential to alienate an important state party to the ICCPR, which may be open to a more engaging approach. Furthermore, by continuing to press the issue as it has, the HRC is allowing the U.S. to continue to lodge its opposition to extraterritorial application of the ICCPR. This provides it with a persistent objector status, which would mean that if any customary norm recognizing extraterritoriality was established, the U.S. would not be bound. Rather than providing opportunities for the U.S. to object, the HRC should instead encourage continued cooperation and courtesy reports as this may help to establish state practice by which the U.S. would be bound.

The long-standing hesitancy of the U.S. to submit itself to such extraterritorial obligations, after all, is likely a reflection of its “self-awareness as the world’s sole remaining military superpower” having greater international responsibilities and therefore requiring greater flexibility to address them. The U.S. approach of being actively engaged with the ICCPR, while cordonning off certain areas based on a valid reading of the treaty, should not be condemned but rather recognized as a “mediation tactic” or a “compromise strategy to conserve U.S. human rights engagement” as the U.S. seeks to promote the treaty but also to preserve its ability to act internationally.

Because of the unique position of the U.S., its reliance on a strong argument interpreting Article 2(1) and its important role in international human rights, the HRC should seek more to persuade rather than to condemn. The willingness of the U.S. to engage and even provide courtesy reports on extraterritorial actions should not be easily dismissed, but rather should be encouraged, as should a continuing dialogue. The HRC is relying, after all, on an interpretation that goes against plain meaning and treaty construction and ultimately is not controlling on state parties. In spite of these limitations, its argument is reasoned and raises important areas where a plain reading of Article 2(1) would lead to potentially absurd results.

Utilizing a more diplomatic approach, the HRC could give greater effect to its extraterritorial argument seeking to persuade state parties and by fostering an international norm recognizing the application of ICCPR rights to all individuals regardless of where they are or what country is in effective control of their territory. Reaching out to non-governmental organizations, utilizing international media, and staying engaged with important government leaders is one way to promote such a norm. Furthermore, if the U.S. continues to provide courtesy reports to the HRC regarding extraterritorial activities, it could establish a “subsequent practice” for purposes of the Vienna Convention which

158. Id. at 436.
159. See id. (noting the domestic pressures in the U.S. to completely disengage with international bodies like the ICJ or ICC because of the possibility that they could exercise jurisdiction over U.S. military interventions).
160. See generally Stigall, supra note 12, at 95–96 (arguing that the extraterritorial application of the ICCPR is in the process of becoming customary international law which would become binding on all state parties) (“[O]nce this nascent practice blooms into customary international law, there will be no distance one may travel to elude it.”).
161. Vienna Convention, supra note 16, art. 31(3).
could establish acceptance of the HRC's interpretation. However, if the HRC were to take the contrary path and engage in the shaming of important state parties like the U.S., whose main contention is jurisdictional rather than substantive, it could not only make such countries less willing to engage in a debate over the scope of the Covenant, but it could also diminish the overall credibility of the HRC as well.

VII. Conclusion

The ICCPR is one of the most important human rights treaties to have emerged in history, mainly because it was the first time that state parties from all parts of the world were bound to ensure individual human rights. The primary dispute that has emerged, however, has been one of jurisdiction. The HRC claims that Article 2(1) gives the covenant extraterritorial effect whereas the U.S. claims that the provision limits the ICCPR only to the domestic realm of state parties. Based on the plain language of the treaty and the history of its construction, the U.S. has a strong argument showing that the drafters of the covenant intended for it to be limited to the domestic boundaries of a state. However, while the HRC has gone beyond the plain language of the treaty language, it has offered persuasive arguments for an extraterritorial application based on the overall purpose of the treaty and on instances where a plain reading would conflict with other provisions. This dispute has played itself out internationally, particularly in the GWOT, as the U.S. has objected to the HRC's requests for reporting on activities in Afghanistan, Iraq and Guantánamo, among other locations. However, after some prodding by the HRC, the U.S. has provided limited courtesy reports on its actions abroad while reaffirming its interpretation of Article 2(1).

Right now the HRC is at a crossroads on the issue of extraterritorial application of ICCPR. Its initial responses to the U.S. have been highly critical and dismissive of any contrary interpretations of Article 2(1). If it continues down this path it may very likely jeopardize any future collaboration between itself and the U.S. or other state parties that agree with the U.S. position on the ICCPR's jurisdiction. On the other hand, it could take a more diplomatic and engaging approach to the U.S. by recognizing its efforts to compromise, which could ultimately establish a "subsequent practice" that would enhance the HRC's position. Also, by resorting to reasoned analysis and persuasive engagement, the HRC can also promote a norm of universal application of the ICCPR to any individual regardless of what country has effective control over the territory where they reside. Such norms would become binding through customary international law, thus muting the dispute over the interpretation of Article 2(1) so long as the HRC does not continue to give the U.S. opportunities to establish itself as a persistent objector. The HRC, and human rights for that matter, would be better suited by taking the latter approach as it would foster greater cooperation by state parties and refocus the discussion away from questions of jurisdiction and back where they should always be—on the promotion of human rights.