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Embedded International Law and the Constitution Abroad

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ESSAYS

EMBEDDED INTERNATIONAL LAW AND THE CONSTITUTION ABROAD

Sarah H. Cleveland*

*This Essay explores the role of “embedded” international law in U.S. constitutional interpretation, in the context of extraterritorial application of the Constitution. Traditional U.S. understandings of the Constitution’s application abroad were informed by nineteenth-century international law principles of jurisdiction, which largely limited the authority of a sovereign state to its geographic territory. Both international law and constitutional law since have developed significantly away from strictly territorial understandings of governmental authority, however. Modern international law principles of jurisdiction and state responsibility now recognize that states legitimately may exercise power in a number of extraterritorial contexts, and that legal obligations may apply to situations abroad over which states exercise “effective control.” International bodies, including the European Court of Human Rights, have applied the principle of effective control to constrain state conduct abroad. Prior to the Supreme Court’s decision in *Boumediene*, however, embedded international norms had produced a bifurcated approach to the extraterritorial Constitution. Rules governing the Constitution’s application to U.S. nationals abroad reflected an evolutionary relationship between international and constitutional norms, evolving largely in concert with modern international doctrines. The United States, however, asserted an entrenched approach to the Constitution’s extraterritorial application to aliens, that continued to be dictated by antiquated, territorial conceptions of international jurisdiction. In adopting a functional approach to extraterritoriality in *Boumediene*, the Supreme Court abandoned formalistic limits on the Constitution’s application based on formal sovereignty or citizenship, and returned to an evolutionary framework. Much work remains to be done in elaborating on the *Boumediene* test and apply-*

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ing it to particular constitutional provisions and contexts. But the Court's evolutionary approach opened a space for aligning U.S. domestic obligations more closely to contemporary international legal approaches, the expectations and obligations of our allies, and the modern realities of the exercise of state power.

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INTRODUCTION

What is, and what should be, the relationship between international law and the application of the U.S. Constitution abroad? Much academic ink has been spilled over the question whether international law should have a role to play in constitutional interpretation.¹ Much less attention has been devoted, however, to the reality that portions of U.S. constitutional doctrine have been influenced by international law over time, and to the question of what ongoing role international law should play once it has been “embedded” into constitutional doctrine in some form. By embedded international law, I mean an international law principle that has become incorporated into the interpretation of a principle of the American Constitution. This may occur as a result of constitutional text that references international law, such as the Article II Treaty Clause, or through judicial interpretation. It may, but does not necessarily, implicate originalism. The phenomenon arises whenever a constitutional pro-

1. A disproportionate share by this author. See generally Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 Chi.-Kent L. Rev. 393 (2007) (exploring use of foreign and international authority in *Dred Scott*); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) [hereinafter Cleveland, *International Constitution*] (examining historical use of international law in constitutional analysis).

vision has been informed by international law, regardless of the point in our nation's chronological history when this occurs. Once an international norm has become embedded in constitutional doctrine, what should the relationship be between the international law rule and constitutional doctrine as both develop over time? This Essay explores that neglected question in the context of extraterritorial application of the Constitution.

Consider two cases: In March 2007, the United States District Court for the District of Columbia, in *In re Iraq and Afghanistan Detainees Litigation*, dismissed a suit by alien detainees who alleged that they had been brutally tortured in the custody of U.S. military personnel in Iraq and Afghanistan.² Expressing deep sympathy for the plaintiffs, the court nevertheless rejected their claims under the Fifth and Eighth Amendments on the grounds that "nonresident aliens 'without property or presence in the United States' have no constitutional rights."³ The court relied centrally on the Supreme Court's 1950 decision in *Johnson v. Eisentrager*, which had held that enemy aliens with no connection to U.S. territory, who had been convicted and detained by U.S. government officials outside the United States, had no constitutional right to habeas jurisdiction in U.S. courts.⁴

Three months later, in June 2007, the highest court in the United Kingdom ruled in *R (Al-Skeini and others) v. Secretary of State for Defence*⁵ that the torture and murder of an alien detainee by British military personnel in Iraq could violate the European Convention on Human Rights.⁶ While noting that the European Convention was "primarily territorial" in scope,⁷ the Court nevertheless acknowledged that jurisdiction under the

2. 479 F. Supp. 2d. 85 (D.D.C. 2007), appeal pending, Arkan Mohammed Ali, et al. v. Rumsfeld, Nos. 07-5178, 07-5185, 07-5186 & 07-5187 (D.C. Cir.).

3. *Id.* at 101 (quoting *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007)); cf. *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007) (rejecting constitutional challenge to extraterritorial rendition of German national based on state secrets privilege).

4. 339 U.S. 763, 785 (1950).

5. [2007] UKHL 26, [2008] 1 A.C. 153 (appeal taken from Eng.) (U.K.). The United Kingdom opposed jurisdiction in the administrative court, which nevertheless found jurisdiction under the European Convention on Human Rights for acts that occurred in a British military facility in Iraq. *R (Al-Skeini and others) v. Sec'y of State for Def.* [2004] EWHC (Admin) 2911, (2005) 2 W.L.R. 1401 (Eng.). On appeal, the Secretary of State accepted that the abuse of appellant had occurred "within the jurisdiction" of the United Kingdom for purposes of the European Convention, since the events occurred in a British detention facility. *Al-Skeini*, [2007] UKHL ¶ 61, [2008] 1 A.C. at 197 (Rodger, Lord). The government nevertheless contested jurisdiction on the grounds that the Human Rights Act had not implemented the Convention extraterritorially. *Al-Skeini*, [2008] 1 A.C. at 164 (syllabus). On July 10, 2008, the appellant's family agreed to a £2.83 million settlement with the Ministry of Defense, which was accompanied by an admission of liability and an apology. Iraqis to Get £3m in MoD Damages, BBC News, July 10, 2008, at http://news.bbc.co.uk/2/hi/uk_news/7500204.stm (on file with the *Columbia Law Review*).

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

7. *Al-Skeini*, [2008] 1 A.C. at 164 (syllabus).

Convention could reach certain extraterritorial conduct by state officials, and apparently was sufficient to reach the beating and murder of Mr. Mousa, an alien in a British detention facility in Iraq.⁸

The parallels between the two cases are striking. Both cases involved claims by persons traditionally considered enemy aliens (citizens of a nation with which the defendant government was at war). Both cases alleged severe abuse at the hands of the government's military personnel. Both involved alleged harms committed in detention facilities operated by the defendant governments in a war zone. Yet jurisdiction over the claims of extraterritorial conduct was found in the United Kingdom and rejected in the United States.⁹

One could attempt to explain these differences on the grounds that the laws under which the claims arose—a treaty in the United Kingdom and the federal Constitution in the United States—might have distinctive approaches to geographic scope.¹⁰ I would argue, however, that international law concepts of jurisdiction have shaped the extraterritorial applications of state obligations under both of these instruments.

The European Convention provides no explicit guidance on its geographic application, other than to state in Article 1 that States Parties must afford the protections of the Convention “to everyone within their jurisdiction.”¹¹ Both the jurisprudence of the European Court of Human Rights, which is charged with evaluating state compliance with the Convention, and the Law Lords in *Al-Skeini*, have looked to principles of jurisdiction under public international law in order to inform the scope of a state's extraterritorial obligations under the Convention.¹²

The U.S. Constitution similarly contains few textual indicators of its geographic scope, other than occasional provisions that are explicitly limited to the “States,”¹³ or that expressly refer to the United States's “juris-

8. *Id.* ¶ 6, 1 A.C. at 178 (Bingham, Lord).

9. Notably, the alien status of the claimants (and particularly their enemy alienage), and the corresponding issues of social compact and membership, played a significant role in the U.S. litigation and were irrelevant to the U.K. case.

10. There were other differences between the cases, particularly with respect to remedies. The suit in *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 88, 91 (D.D.C. 2007), was a suit for damages and declaratory relief under the Constitution and the Alien Tort Statute, 28 U.S.C. § 1350 (2006), while the *Al-Skeini* claimants sought a declaration and “a full, open, independent [public] inquiry.” *Al-Skeini*, [2007] UKHL ¶ 26, [2008] 1 A.C. at 188 (Bingham, Lord). Apparently, however, a suit for damages in tort was also available to the litigants under English law. *Id.* ¶ 35, 1 A.C. at 190 (Rodger, Lord).

11. Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 6, at 224.

12. See *infra* Parts IV.D.1 (analyzing views of European Court of Human Rights on extraterritorial application of human rights), IV.D.2 (discussing *Al-Skeini* and Law Lords' views on extraterritorial application of human rights).

13. E.g., U.S. Const. art. I, § 2, cl. 3 (defining representative voting structure in Congress); *id.* art. II, § 1, cl. 2 (defining voting structure in electoral college); *id.* art. IV, § 4 (guaranteeing a “republican form of government” to every state). The Uniformity

diction.”¹⁴ The Fifth and Eighth Amendment provisions at issue in *In re Iraq and Afghanistan Detainees Litigation* contain no explicit geographic limitation (and facially apply to “persons,” not to citizens).¹⁵ Determining the application of the Constitution to extraterritorial activities of state authorities accordingly has been largely left to judicial interpretation, and international rules regarding the jurisdiction of sovereign states have played an important role.

Traditional doctrines regarding the geographic scope of U.S. constitutional protections derive from nineteenth-century international law principles of jurisdiction, which largely limited the lawful jurisdiction of a sovereign state to its geographic territory. The strict territorial limitations on international jurisdiction were overstated at the time, however, and have long since been abandoned.¹⁶ Instead, international law now recognizes that states may legitimately exercise power in a number of extraterritorial contexts, and also imposes legal responsibility on states for their actions abroad. Regional human rights tribunals, the U.N. treaty bodies, and the International Court of Justice (ICJ) all have recognized that human rights obligations travel with a state when a state or its agents place persons or territories under the state’s “effective control.”¹⁷ Despite this evolution in international law doctrine, in the aftermath of September 11, 2001, the United States government continued to maintain that aliens detained by the United States outside of U.S. sovereign territory were not entitled to constitutional protection—a position which was embraced by the district court in *In re Iraq and Afghanistan Detainees Litigation*.¹⁸

Enter the Supreme Court’s 2008 decisions in *Boumediene v. Bush*¹⁹ and *Munaf v. Geren*.²⁰ In *Boumediene*, the Court held that the Suspension Clause applied to alien detainees at Guantánamo Bay due to the practical

Clause is limited to the “United States.” Id. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.”).

14. Id. amend. XIII (stating slavery and involuntary servitude shall not exist “within the United States, or any place subject to their jurisdiction”); id. amend. XIV, § 1 (recognizing citizenship for “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof”); id. amend. XVIII, § 1 (prohibiting “manufacture, sale, or transportation of intoxicating liquors within . . . the United States and all territory subject to the jurisdiction thereof”).

15. Id. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); id. amend. VIII (prohibiting infliction of “cruel and unusual punishments”).

16. It is arguable that eighteenth-century standards were quite different. See Philip Hamburger, *Beyond Protection*, 109 Colum. L. Rev. 1823 (2009). This is not the occasion to examine how much of the earlier conceptions so excellently laid out by Philip Hamburger have survived.

17. See *infra* Part IV (discussing international bodies’ treatment of obligations flowing from effective control).

18. 479 F. Supp. 2d. 85, 109 (D.D.C. 2007).

19. 128 S. Ct. 2229 (2008).

20. 128 S. Ct. 2207 (2008).

features of United States authority over the base.²¹ The Supreme Court did not rely on formal attributes of sovereignty or territory, but instead applied a pragmatic, functional test to the question.²² The Supreme Court accordingly brought U.S. extraterritoriality doctrine substantially in line with modern international law principles of jurisdiction and state responsibility. *Munaf* was a statutory habeas case, involving the access of U.S. citizens detained in Iraq to habeas review in the U.S. courts.²³ But that decision also applied a functional analysis of the nature of U.S. control to determine the applicability of extraterritorial limits on U.S. power.²⁴

This Essay takes the *Boumediene* and *Munaf* decisions as an opportunity to explore the dynamic relationship between international law and extraterritorial application of the Constitution. Part I sets forth the contemporary international rules of extraterritorial jurisdiction, including classical rules regarding the ability of states to lawfully regulate conduct abroad, as well as broader concepts of jurisdiction as an exercise of power or sovereignty (whether lawful or unlawful) and the related concept of state responsibility for extraterritorial conduct.

Part II demonstrates that our contemporary doctrines regarding the Constitution's extraterritorial scope are informed by embedded international law norms. I argue that prior to the decision in *Boumediene*, these embedded international norms had produced a bifurcated approach to the extraterritorial Constitution. Rules governing the Constitution's application to U.S. nationals abroad had evolved in concert with modern international conceptions of jurisdiction and state responsibility, while, at least in the view of the U.S. government and some lower courts, rules regarding application of the Constitution to aliens remained tied to formalistic, antiquated nineteenth-century territorial conceptions of jurisdiction.

Part III examines the appropriate role of embedded international norms as constitutional and international law evolve and identifies three potential approaches to embedded international norms, which I call *evolutionary*, *entrenchment*, and *substitution* approaches. I argue that pre-*Boumediene* extraterritoriality doctrine had been characterized by an evolutionary approach for citizens and an entrenchment approach for aliens.

Part IV then returns to the modern international law conception of jurisdiction as control, under which international and regional bodies have held that rights apply to extraterritorial conduct over persons or

21. 128 S. Ct. at 2259–62.

22. *Id.* at 2259; see discussion *infra* notes 224–232.

23. *Munaf*, 128 S. Ct. at 2213 (noting case “concern[s] the availability of habeas corpus relief arising from the . . . detention of American citizens who voluntarily traveled to Iraq and are alleged to have committed crimes there”).

24. See *id.* at 2217 (“[A]ctual custody by the United States suffices for jurisdiction, even if that custody could be viewed as ‘under . . . color of’ another authority” (quoting 28 U.S.C. § 2241(c)(1) (2006))).

places that occurs within a state's "effective control." I explore the elaboration of this principle in the jurisprudence of the Inter-American Commission on Human Rights, the International Court of Justice, the European Court of Human Rights, and the U.N. treaty bodies that have most extensively considered this issue—namely, the Human Rights Committee and the Committee Against Torture.

Part V applies the three approaches to embedded international norms identified in Part III to the Supreme Court's decisions in *Boumediene* and *Munaf*. Although the full implications of these decisions are presently unclear, I argue that the decisions collectively created a space for bringing U.S. doctrine in line with contemporary international approaches to extraterritorial jurisdiction. They thus can be understood as reasserting an evolutionary relationship between the extraterritorial Constitution and international law.

Part VI demonstrates that our contemporary doctrines regarding the Constitution's extraterritorial scope are informed by embedded international law norms. I argue that prior to the decision in *Boumediene*, these embedded international norms had produced a bifurcated approach to the extraterritorial Constitution. Rules governing the Constitution's application to U.S. nationals abroad had evolved in concert with modern international conceptions of jurisdiction and state responsibility, while, at least in the view of the U.S. government and some lower courts, rules regarding application of the Constitution to aliens remained tied to formalistic, antiquated nineteenth-century territorial conceptions of jurisdiction.

This Essay concludes by offering preliminary observations regarding the implications of an effective control test for extraterritorial application of the Constitution. While the concept of effective control itself continues to be elaborated, effective control offers a promising standard for understanding constitutional extraterritoriality that is both workable and comports with the expectations of U.S. allies, U.S. responsibility under international law, and the modern realities of the exercise of state power abroad.

I. THE INTERNATIONAL LAW OF JURISDICTION

Jurisdiction is a multifaceted concept, with many different meanings under both international and domestic law.²⁵ International law commonly employs the term "jurisdiction" to refer to the ability of a state to lawfully exercise its domestic authority over persons or property.²⁶ Inter-

25. As Justice Scalia has observed, "Jurisdiction . . . is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

26. See Antonio Cassese, *International Law* 49 (2d ed. 2005) ("The power of the central authorities of a State to exercise public functions over individuals located in a territory is called 'jurisdiction.'"); 1 Oppenheim's *International Law* §§ 136–137 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (describing jurisdiction as concerning "extent

national law further breaks down the ability to exercise authority into three related categories: jurisdiction to prescribe, jurisdiction to enforce, and jurisdiction to adjudicate. Jurisdiction to prescribe, or prescriptive jurisdiction, refers to the authority of the lawmaking arm of the state to make, or prescribe, legal rules applicable in a particular context. Jurisdiction to enforce refers to the authority of the state to enforce the rules that it has made. Finally, jurisdiction to adjudicate refers to the power of a court to lawfully exercise its authority over a person or property to resolve a legal dispute. These forms of jurisdiction, although integrally related, vary in important respects. For example, a state may lawfully exercise its prescriptive jurisdiction to regulate extraterritorial conduct in certain contexts (such as when the extraterritorial conduct has sufficient effects within the state's territory), and may do so without another state's consent. But a state may not exercise its enforcement jurisdiction in the territory of another state without that state's consent.

States presumptively enjoy prescriptive jurisdiction within their own territory. This is not invariably the case, however, as international law recognizes that states lack such jurisdiction over diplomats of another state who are within their territory.²⁷ Modern international law also recognizes that states may lawfully exercise prescriptive jurisdiction outside their sovereign borders in a number of contexts: over persons in their territorial waters; over vessels and aircraft bearing the state's flag; over the state's own nationals abroad; over persons who have directly harmed the state's nationals abroad; over persons seeking to harm the state's vital interests, where an action abroad has effects within the jurisdiction; and over persons whose conduct violates principles of universal concern, such as piracy or genocide.²⁸ These concepts of prescriptive jurisdiction, however, as well as the related jurisdictions to enforce and to adjudicate, address contexts in which international law recognizes that a state may *lawfully* exercise authority extraterritorially. They do not address the circumstances in which a state may be held legally *responsible* for its actions abroad, regardless of whether the exercise of extraterritorial power was lawful or unlawful. Instead these are concepts that address jurisdiction as *legal authority*.

As discussed in more detail in Part IV, *infra*, international law also conceptualizes the "jurisdiction" of a state more broadly to refer simply to the *de facto* exercise of power, regardless of whether that exercise is lawful. In this sense, jurisdiction refers to an exercise of the state's sover-

of each state's right to regulate conduct," including "over persons, property or circumstances . . . abroad").

27. Restatement (Third) of the Foreign Relations Law of the United States § 464 (1987) (stating diplomats are immune "from the exercise by the receiving state of jurisdiction to prescribe in respect of acts or omissions in the exercise of the agent's official functions, as well as from other regulation that would be incompatible with the agent's diplomatic status").

28. *Id.* § 402 & cmts. d-h (recognizing jurisdiction to prescribe on these grounds).

eignty.²⁹ Jurisdiction as power or control addresses not whether a state acted lawfully, but whether the state, in fact, exercised its power in a manner that could give rise to state responsibility under international law. Jurisdiction as control addresses a pragmatic, fact-based question regarding whether the state exercised its authority, not the legal question of whether the state did so validly.

Some modern commentators have maintained that it is jurisdiction as control that is referenced when modern human rights treaties discuss the jurisdictional scope of treaty obligations.³⁰ Most questions of extra-territorial application of human rights protections addressed in Part IV, however, would also be encompassed by the classical prescriptive jurisdiction principle that a state may regulate the conduct of its own agents abroad.

The concept of jurisdiction in international human rights treaties is closely linked to the international law concept of state responsibility, since it is the exercise of jurisdiction that gives rise to legal obligations under the treaties.³¹ In addressing whether the United States was legally responsible under international law for harms committed by the U.S.-supported Nicaraguan contras, the ICJ concluded that state responsibility for acts directly committed by third parties may arise in two ways: where a state exercises sufficient “overall control” over a nonstate group for the group to be considered a *de facto* organ of the state (even if the state did not control any specific operation of the group), or where the state controls a specific operation by a group that otherwise is not suffi-

29. Sovereignty, of course, is itself a slippery concept. See generally Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, et cetera*, 68 *Fordham L. Rev.* 1 (1999) (examining the many meanings of sovereignty).

30. See Marko Milanovi, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 *Hum. Rts. L. Rev.* 411, 429 (2008) (noting “classical doctrine of jurisdiction” over “the conduct of persons” and notion of jurisdiction as “power that a state exercises over a territory and its inhabitants . . . may be related, but they cannot possibly be the same”); see also Olivier De Schutter, *Globalization and Jurisdiction: Lessons from the European Convention on Human Rights*, 6 *Baltic Y.B. Int’l L.* 185, 190–93 (2006) (“[T]he fact that States may affect situations beyond their national borders, by adopting acts which are clearly attributable to them in the meaning of . . . the ILC’s Articles on State Responsibility, raises a question of the relationship between the notion of ‘jurisdiction’ and the notion of national territory.”); Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 *Isr. L. Rev.* 503, 513–14 (2007) (discussing jurisdiction and extraterritorial applicability of human rights obligations).

31. According to the International Law Commission’s Articles on State Responsibility, a state incurs legal responsibility under international law where the act “(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.” *Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2, *in Report of the International Law Commission: Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 68, U.N. Doc. A/56/10 (Sept. 6, 2001)*.

ciently linked to the state to be considered an arm of the state.³² The ICJ reiterated these “complete dependence” and “direction or control” bases for state responsibility in its 2007 *Genocide* judgment.³³ The ICJ also has recognized that a state’s exercise of de facto control over a territory gives rise to legal liability under international law. Thus, in the 1971 *Namibia* judgment, the court held that “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”³⁴

Modern international law also recognizes the validity of extraterritorial state conduct in other contexts, such as in the law of armed conflict, which allows a state to utilize force against another state in self-defense, and to exercise legal authority over a territory that is under its military occupation.³⁵ The developing concept of responsibility to protect also seeks to establish an obligation on the international community to intervene to prevent mass atrocities occurring on the soil of another state.³⁶ International law, in short, recognizes a substantial range of state conduct outside of a state’s borders and establishes principles for determining both when such conduct is legitimate and when it exposes the state to legal liability.

II. THE NINETEENTH CENTURY: JURISDICTION AS GEOGRAPHY

Prevailing nineteenth-century international law principles established that a nation’s legal jurisdiction to regulate conduct was coterminous with its territory.³⁷ Principles of comity and rules of international

32. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 62 (June 27) (“[T]here is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.”); *id.* at 65 (“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”).

33. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* (Order of Feb. 26, 2007) at 140, 142, available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (on file with the *Columbia Law Review*).

34. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 54 (June 21). The court’s jurisprudence regarding jurisdiction under human rights treaties is examined *infra* Part IV.

35. See, e.g., *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*] (providing occupying power with authority to “subject the population of the occupied territory to [penal] provisions which are essential to enable the Occupying Power to fulfil its obligations . . . to maintain the orderly government of the territory”).

36. See generally Int’l Comm’n on Intervention and State Sovereignty, *The Responsibility to Protect* (2001).

37. Henry Wheaton, *Elements of International Law* § 78 (Richard Henry Dana, Jr. ed., Boston, Little, Brown & Co. 1866) (“[N]o State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not.”).

law in the Westphalian system directed states to respect the sovereign jurisdiction of others and to avoid jurisdictional conflicts. The lawful jurisdiction of the state accordingly was territorially limited. Chief Justice Marshall famously articulated the principle in *The Schooner Exchange*, noting “[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”³⁸ Marshall then elaborated: “This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.”³⁹

While Chief Justice Marshall was referring to all aspects of the lawful jurisdiction of a state, explicit reference to international law in the context of jurisdiction to adjudicate can be found in *Pennoyer v. Neff*,⁴⁰ in which the Court invoked public international law rules to limit the personal jurisdiction of the U.S. state courts to persons within their respective territories. Recognizing that the U.S. states maintained many characteristics of independent sovereigns, Justice Field began his analysis by applying

two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. . . . One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists . . . that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.⁴¹

This rule, he concluded, precluded the exercise of jurisdiction to adjudicate over a defendant absent personal service of process or voluntary appearance within the territory.⁴² Although the Fourteenth Amendment had not yet gone into effect at the time the claim arose, Justice Field read the Fourteenth Amendment Due Process Clause as incorporating this jurisdictional principle.⁴³

This rigid limitation of a state’s lawful jurisdiction to its sovereign territory, however, overstated the international rule even at the time. In *The Schooner Exchange*, Chief Justice Marshall recognized that the princi-

38. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

39. *Id.* at 137.

40. 95 U.S. 714 (1877), overruled in part by *Shaffer v. Heitner*, 433 U.S. 186 (1977).

41. *Id.* at 722 (citations omitted).

42. *Id.* at 733.

43. *Id.*

ple of strict territoriality did not absolutely prohibit the exercise of authority in foreign territory. To the contrary, "all sovereigns [had] consented to a relaxation in practice, in cases under certain peculiar circumstances."⁴⁴ Likewise, the principle of absolute territorial sovereignty had begun to erode even before *Pennoyer* was decided, as commentators have noted.⁴⁵ Courts also increasingly recognized the constitutional power of the government to act abroad.⁴⁶ But the Westphalian conception of the equality and mutual respect owed to territorial states was the prevailing conception of the day.

Indeed, in the nineteenth century, international law was still unsettled regarding whether a state could exercise jurisdiction over its own citizens abroad. Writing in the 1830s, Wheaton believed that states could not exercise such jurisdiction.⁴⁷ In 1909, Justice Holmes held that U.S. statutes lacked effect in the territory of another sovereign, but he acknowledged that, "in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep, to some extent, the old notion of personal sover-

44. 11 U.S. (7 Cranch) at 136; see also Wheaton, *supra* note 37, §§ 79, 111 (discussing exceptions to territorial limits on jurisdiction).

45. See *Burnham v. Superior Court*, 495 U.S. 604, 611 (1990) (plurality opinion) ("Recent scholarship has suggested that English tradition [regarding territorial jurisdiction] was not as clear. . ."); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *Yale L.J.* 289, 308 (1956) ("[T]he law concerning the sufficiency and the necessity of personal service within the state in personal actions . . . remained unsettled at least until . . . *Pennoyer v. Neff*."); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 *Sup. Ct. Rev.* 241, 255 (noting of English law pre-*Pennoyer* "[t]he defendant's presence in England seems to have been less a reason for asserting jurisdiction than an obviation of a reason why it should not be asserted; it could hardly be said that personal presence was the basis for jurisdiction"); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 *U.C. Davis L. Rev.* 1027, 1029 (1995) (noting "long before Justice Field decided *Pennoyer*, the English . . . had already given up on requiring service in the forum"). For a critique of *Pennoyer's* reliance on international conflict of law rules, see Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 *Nw. U. L. Rev.* 1112, 1115-16 (1981) (noting "*Pennoyer's* rigid principles" did not come from "our English heritage of due process, but rather the international sovereignty theories of French and Dutch scholars"); see also Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 *Rutgers L. Rev.* 1071, 1130-35 (1994) (tracing evolution of nineteenth century conflicts doctrine leading to *Pennoyer*).

46. See *In re Ross*, 140 U.S. 453, 475, 479 (1891) (upholding establishment of overseas consular courts pursuant to treaty power); *Jones v. United States*, 137 U.S. 202, 212-13, 224 (1890) (invoking international authorities to hold that United States could adopt criminal legislation for overseas possessions).

47. Wheaton, *supra* note 37, § 78.

eignty alive.”⁴⁸ English courts in the late nineteenth century recognized the power to regulate citizens’ conduct abroad in some contexts.⁴⁹

During this period, the international law principle of strict territorial jurisdiction was read into the Constitution’s individual rights clauses to aggressively limit their application to persons (whether citizens or noncitizens) subject to U.S. power abroad. The 1891 case of *In re Ross* upheld the conviction of a seaman for murder on a U.S. vessel by a U.S. consular court in Japan.⁵⁰ Justice Field, who also authored the opinion in *Pennoy v. Neff*, again turned in part to principles of territorial jurisdiction to deny the constitutional rights to a grand and petit jury.

By the Constitution a government is ordained and established “for the United States of America,” and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.⁵¹

Field’s invocation of territorial jurisdiction to limit the Constitution’s application in this case, however, was problematic. True, nothing in international principles of jurisdiction allowed the United States to impose its own constitutional requirements on Japan or Japanese subjects, but this was not the question presented. Nor was the question whether a U.S. court could exercise jurisdiction over the defendant at all (as was the question in *Pennoy*). Instead, the question at issue was whether, once the United States *chose* to exercise its authority abroad, it was required to do so consistent with constitutional constraints. Field thus applied a jurisdictional principle that was intended to address whether the United States could lawfully act overseas at all, to prevent the United States, when

48. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355–56 (1909); see also *The Hamilton*, 207 U.S. 398, 403 (1907) (asserting U.S. state’s laws apply to its own citizens on high seas).

49. *British S. Afr. Co. v. Companhia de Moçambique*, [1893] A.C. 602, 624 (H.L.) (appeal taken from Eng.) (U.K.) (asserting English court could inquire into overseas title and award damages for any trespass committed); *Hart v. Gumpach*, [1872] 4 L.R.-P.C. 439, 463–64 (appeal taken from P.R.C. & Japan) (U.K.) (granting English courts jurisdiction to try actions for libel and other personal wrongs brought against British citizens living in China in service of Emperor of China).

50. 140 U.S. at 453.

51. *Id.* at 464 (citation omitted).

it chose to act abroad, from being constrained by the Constitution.⁵² The invocation of jurisdictional constraints, judged from a modern international law perspective, was problematic for an additional reason. The fact that the defendant was enlisted on a U.S.-flagged vessel and was assimilated to the status of a U.S. citizen established valid grounds for the United States to exercise extraterritorial jurisdiction over him, as Field largely acknowledged.

Importantly for the holding in *Boumediene*, Field also asserted that granting the constitutional protection of a grand and petit jury would be "impracticable" due to "the impossibility of obtaining a competent" jury in Japan.⁵³ "The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution."⁵⁴

Decisions following the Spanish-American War modified the principle in *In re Ross* and applied it to occupied or newly acquired territories fully under U.S. control. *Neely v. Henkel* held that constitutional protections could not apply to the trial of a U.S. citizen by the U.S. military in U.S.-occupied Cuba for violations of Cuban law.⁵⁵ Disregarding the current state of de facto U.S. authority over Cuba, Justice Harlan rejected the constitutional claims on the grounds that "those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."⁵⁶ "When an American citizen commits a crime in a foreign country," Harlan reasoned, "he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people."⁵⁷ The Court's ruling, which was reaffirmed in *Munaf*, thus rested on the fiction that Neely was being tried by a foreign state, since the United States only claimed a "temporary occupancy and control of Cuba."⁵⁸ The Court ignored the facts that Cuba was subject to exclusive U.S. authority and that the trial would be conducted by the U.S. military.

In deference to the Court, however, Justice Harlan may have been concerned about another aspect of international law that complicates the application of either the Constitution or human rights law to a zone of military occupation. Longstanding rules of armed conflict obligate an

52. See Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 82–83 (1996) [hereinafter, Neuman, *Strangers to the Constitution*] (analyzing "slippery" logic of Field's opinion).

53. *In re Ross*, 140 U.S. at 464.

54. *Id.* This aspect of the holding was abandoned in *Reid v. Covert*, which held that Fifth and Sixth Amendment protections applied to the peacetime capital trials of U.S. civilians abroad. 354 U.S. 1, 7–9 (1957); see *infra* text accompanying notes 68–70.

55. 180 U.S. 109, 122–23 (1901); see also *Fleming v. Page*, 50 U.S. (9 How.) 603, 611 (1850) (holding that territory under U.S. military occupation was not subject to U.S. statutes until Congress extended them there).

56. *Neely*, 180 U.S. at 122.

57. *Id.* at 123.

58. *Id.* at 120–21.

occupying state to preserve the local municipal laws, to the extent possible.⁵⁹ As the Court noted elsewhere in the opinion, the treaty with Spain transferring Cuba to U.S. authority provided that the United States “assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property.”⁶⁰ The Court may have plausibly assumed that if, in fact, the U.S. occupation was to be temporary, then the effort to impose unfamiliar U.S. constitutional criminal trial procedures on a civil legal system would have been unworkable.

Territoriality principles were sufficiently powerful to lead the Court to hold in the *Insular Cases* that nonfundamental constitutional provisions would not apply even on territories over which the United States claimed full sovereignty, even to U.S. citizens. Unlike *Neely*, which addressed the temporary occupation of Cuba, the territories at issue in the *Insular Cases* (including Puerto Rico, the Philippines, Alaska, and Hawaii) were subject to formal U.S. sovereignty. Nevertheless, territoriality principles had become sufficiently embedded in extraterritoriality doctrine that even sovereign U.S. territories were found not fully subject to the Constitution.

The most prominent of these cases, *Downes v. Bidwell*, looked to international rules of conquest to hold that acquiring territory by treaty necessarily brought the power to “prescribe upon what terms the United States will receive its inhabitants, and what their status shall be.”⁶¹ The Court thus held that the United States’s acquisition of territory by treaty brought powers of colonial governance recognized under international law that were only minimally constrained by the Constitution, unless and until Congress “incorporated” such territories into the United States.⁶²

59. Fourth Geneva Convention, *supra* note 35, art. 64 (“The penal laws of the occupied territory shall remain in force . . .”).

60. 180 U.S. at 121.

61. 182 U.S. 244, 279 (1901).

62. *Id.* at 279–80; see also *Fleming v. Page*, 50 U.S. (9 How.) 603, 617–18 (1850) (“[T]he laws of nations . . . [determine] the rights which a sovereign acquires, and the powers he may exercise in a conquered country . . .”). International law principles of jurisdiction have also been employed in other constitutional contexts. See, e.g., *Burnet v. Brooks*, 288 U.S. 378, 387–88, 406 (1933) (applying “the principles of jurisdiction recognized in international relations” to reject Fifth Amendment due process challenge to taxation of U.S. estate of foreign national); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122–24 (1923) (construing Eighteenth Amendment’s application to “all territory subject to” U.S. jurisdiction in light of international law principles of territorial jurisdiction); see also *United States v. Wong Kim Ark*, 169 U.S. 649, 666–67 (1898) (construing application of Fourteenth Amendment’s natural born citizenship clause to persons born “subject to the jurisdiction” of United States in light of international law); *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (holding Indians “are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the . . . fourteenth amendment, than . . . the children born within the United States, of ambassadors or other public ministers of foreign nations”). Territorial principles also appear in cases defining U.S. international boundaries, vertical federalism cases including the Supreme Court’s original jurisdiction and the Eleventh Amendment, and horizontal federalism cases construing the Full Faith

The Court's ultimate solution was to infuse the Constitution with powers deduced from international law, mediated by some limited constitutional protections.

The nineteenth- and early twentieth-century decisions addressing application of constitutional rights abroad thus both relied upon the international principle of territorial jurisdiction, and misapplied it. The conclusion that constitutional provisions would not apply abroad was consistent with a territorial conception that a nation's municipal law did not apply outside its borders. But this principle was not applied to the question whether the United States could exercise its legal authority abroad. All of the cases addressed situations in which the United States was already exerting power abroad. The principle of territorial jurisdiction was applied, not to address whether the United States had authority to act, but to hold that constitutional limitations should not confine that action. Once U.S. jurisdiction to prescribe was established, however, nothing in international jurisdictional principles prevented domestic constitutional constraints from also applying. Nevertheless, this misplaced application of territorial jurisdiction became deeply embedded in extraterritoriality doctrine.

Juxtaposed with these cases holding that constitutional provisions were largely unavailing to citizens or noncitizens outside the territorial United States is the 1886 decision in *Yick Wo v. Hopkins*, which affirmed that Fourteenth Amendment due process and equal protection applied universally "to all persons within the territorial jurisdiction," including noncitizens.⁶³ The reference to territory was a throwaway—the case involved only the rights of aliens in the United States. No question regarding the geographic scope of these protections was raised in the briefs or the opinion.⁶⁴ The statement nevertheless gained potency in future cases, by negative implication, when it was invoked to demonstrate that constitutional protections did not reach aliens outside the United States.

Johnson v. Eisentrager, the Cold War opinion holding that convicted enemy aliens outside sovereign United States territory lacked constitutional habeas protections, accordingly found a strong negative pregnant in the language of *Yick Wo*:

[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, "[t]hese provisions are universal in their application, to all persons within the territorial

and Credit Clause. See generally Cleveland, *International Constitution*, supra note 1, at 51–63 (discussing cases).

63. 118 U.S. 356, 369 (1886).

64. The Court also cited with approval an earlier decision that had upheld the constitutional claims of an alien who had not yet entered the United States. *Id.* at 374 (citing *Chy Lung v. Freeman*, 92 U.S. 275 (1875)).

jurisdiction . . .” And in *The Japanese Immigrant Case*, the Court held its processes available to “an alien, who has entered the country, and has become subject in all respects to its jurisdiction. . . .”⁶⁵

Chief Justice Rehnquist’s opinion in *United States v. Verdugo-Urquidez* relied on *Yick Wo* and *Eisentrager* for the same proposition.⁶⁶

In the twentieth century, the expansion of U.S. interests abroad began eroding the principle against extraterritorial application of the Constitution, at least for U.S. nationals. *United States v. Curtiss-Wright Export Corp.* suggested that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens.*”⁶⁷ The doctrine of strict territoriality was finally laid to rest, at least for U.S. citizens abroad, in *Reid v. Covert*.⁶⁸ The *Reid* Court distanced itself from the nineteenth-century doctrines to hold that the constitutional rights to grand and petit jury protected civilian citizens tried for capital crimes on U.S. military bases overseas. The Court did not formally overturn *In re Ross*, nor did it explicitly rely on developments in international law in reaching this conclusion. Instead, the various opinions for the majority relied primarily on endogenous constitutional considerations—either that basic principles of limited and delegated powers required that the Constitution apply to protect citizens subject to U.S. custody abroad, as Justice Black’s plurality opinion held,⁶⁹ or that extraterritorial application of constitutional protections was not “impracticable and anomalous” in circumstances where the United States was fully in control, and where citizens were facing capital charges, as Justices Harlan and Frankfurter held in concurrence.⁷⁰ Lower federal courts have since recognized the Constitution’s application in circumstances where the United States exercises complete jurisdiction and control, even where the United States does not enjoy full territorial sovereignty.⁷¹ In *United States v. Tiede*, the court applied this principle to the United States’s criminal trial of foreign nationals in American-occupied Berlin, but did so in reliance on internal constitutional principles of limited government, rather than on rules of international jurisdiction.⁷²

Modern constitutional doctrine also has abandoned a strictly territorial approach to jurisdiction in other contexts. Personal jurisdiction

65. 339 U.S. 763, 771 (1950) (citation omitted).

66. 494 U.S. 259, 271–73 (1990).

67. 299 U.S. 304, 318 (1936) (emphasis added).

68. 354 U.S. 1, 7–9 (1957); see also *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 236–37, 249 (1960) (extending right to constitutional protection in *Reid* to noncapital trials).

69. *Reid*, 354 U.S. at 5–7.

70. *Id.* at 74–75 (Harlan, J., concurring in the result).

71. Gerald L. Neuman, Closing the Guantanamo Loophole, 50 *Loy. L. Rev.* 1, 15–34 (2004) (discussing application of constitutional rights to Panama Canal Zone, Pacific Trust Territories, and U.S. Sector in Berlin, among others).

72. 86 F.R.D. 227, 239 (U.S. Ct. Berlin 1979).

under Fourteenth Amendment due process no longer restricts a state's jurisdiction to adjudicate claims involving defendants within its territory, but recognizes jurisdiction based on "effects" within a state's territory⁷³ or other forms of minimum contacts, while also considering questions of reasonableness.⁷⁴ The Court has explicitly recognized due process protections for alien corporations overseas in this context.⁷⁵ The evolution away from strict territoriality was inspired by the same concerns that gave rise to modern international law conceptions of jurisdiction—increased travel of persons and goods across borders and the rise of modern forms of transportation and communication.⁷⁶ But here again, although the international and domestic doctrines have evolved in parallel, the Court has not explicitly linked the evolution in personal jurisdiction doctrine to changes in international conceptions of jurisdiction. The Court instead appears to be unconscious of the international law roots of the doctrine.

Prior to *Boumediene*, however, the abandonment of strict territoriality principles for aliens abroad was less complete. *Eisentrager*, which predated *Reid v. Covert* by nearly two decades, had rejected the application of constitutional habeas to alien enemy belligerents with no connection to the United States who had been convicted in military tribunals and detained abroad.⁷⁷ Despite the absence of jurisdiction, the Court had also offered sweeping language regarding the absence of Fifth Amendment protections for aliens abroad.⁷⁸ The dissenters condemned this language

73. *Calder v. Jones*, 465 U.S. 783, 789 (1984) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

74. The now latent international law concept of territorial sovereignty nevertheless retains some potent force in the purposeful availment prong of contemporary personal jurisdiction doctrine. See, e.g., *World-Wide Volkswagen*, 444 U.S. at 297 (noting defendant that "purposefully avail[ed] itself of the privilege of conducting activities in the forum State" had clear notice that it was subject to suit there (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))). The concept of territorial sovereignty also retains force in the persistence of tag jurisdiction in U.S. jurisprudence. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (upholding "jurisdiction based on physical presence [in the forum] alone").

75. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987).

76. See, e.g., *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957) (noting "the fundamental transformation of our national economy" resulting in "increasing nationalization of commerce," while "modern transportation and communication have made it much less burdensome" to defend against suit in another state); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (noting out-of-state corporation's "systematic and continuous" activities and "large volume of interstate business" in Washington). But see *Asahi*, 480 U.S. at 106–07, 114 (finding exercise of jurisdiction unreasonable in light of complex international transaction that gave rise to case).

77. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) ("[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

78. *Id.* at 783 ("The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses . . ."). The actual conclusion regarding the extraterritorial application of the Fifth Amendment, however, was quite narrow. *Id.* at 785

as dicta at the time,⁷⁹ and there was good reason to believe that at least the broader claims of the *Eisentrager* opinion were modified by the revolutionary holding in *Reid*. *Eisentrager* also purported to rely extensively on assumptions regarding international and comparative law for the proposition that enemy aliens at home or abroad enjoyed limited or no constitutional protection.⁸⁰ Whatever the validity of these assumptions at the time, they are of dubious validity under foreign and international law today.

In *United States v. Verdugo-Urquidez*, which rejected application of the Fourth Amendment to the search of an alien's property abroad, and in the recent litigation over U.S. treatment of alien detainees in Iraq, Afghanistan, and Guantánamo Bay, courts had largely retained the terri-

(“We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”).

79. *Id.* at 792–93 (Black, J., dissenting) (“The Government’s petition . . . presented no question except that of jurisdiction; and neither party has argued, orally or in briefs, that this Court should pass on the sufficiency of the petition.”).

80. See *id.* at 768 (majority opinion) (“We are cited to no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.”); *id.* at 769 (invoking “inherent distinctions recognized throughout the civilized world between citizens and aliens”); *id.* (“Citizenship as a head of jurisdiction . . . was old when Paul invoked it in his appeal to Caesar.”); *id.* at 769 n.7 (invoking numerous international law commentators for historic distinction between friendly and enemy aliens); *id.* at 772 (“Chancellor Kent, after considering the leading authorities of his time, declared the law to be that ‘. . . in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such.’”); *id.* (invoking Court’s “earlier teaching that in war ‘every individual of the one nation must acknowledge every individual of the other nation as his own enemy’”); *id.* at 773 (noting principle that aliens are not required to serve in U.S. forces in wartime “also is the doctrine and the practice of other states comprising our Western Civilization”); *id.* at 774 (noting unfettered executive power over enemy aliens “is in keeping with the practices of the most enlightened of nations”); *id.* at 775 n.6 (quoting Blackstone for proposition that “[a]t common law ‘alien enemies have no rights, no privileges, unless by the king’s special favour, during the time of war’”); *id.* at 775 n.7 (addressing limited judicial scrutiny of executive detention or expulsion of enemy aliens as “follow[ing] the practice of the English courts”); *id.* at 776 (citing Kent and Story for proposition that enemy aliens “have no power to sue in the public courts of the enemy nation”); *id.* (noting U.S. law regarding nonresident enemy aliens emerged in 1813 based on an examination by New York’s highest court of “the foremost authorities of the Continent and of England,” which concluded “that alien enemies resident in the country of the enemy could not maintain an action in its courts during the period of hostilities”); *id.* at 779 (“Except in England, whose law appears to be in harmony with the views we have expressed, and other English-speaking peoples in whose practice nothing has been cited to the contrary, the writ of *habeas corpus* is generally unknown.”). But see International Covenant on Civil and Political Rights, art. 9(4), adopted Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 3, 1976) [hereinafter ICCPR] (“Anyone who is deprived of his liberty by arrest or detention 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.”).

torial rationale of the *Insular Cases* and *Eisentrager* to deny constitutional protection to aliens outside the United States.

In other words, modern doctrines regarding the Constitution's application to citizens abroad had been brought in step with international law understandings of a state's extraterritorial authority over its nationals, even if the two doctrines were not reconciled explicitly. Doctrines regarding constitutional protection for aliens abroad, however, had remained tied to a territorial conception of jurisdiction that was anachronistic under international law.

III. THREE APPROACHES TO EMBEDDED INTERNATIONAL LAW

The significant historical role of international law in forging U.S. understandings of the Constitution's application abroad raises the question of what role modern international conceptions of jurisdiction can, or should, continue to play in those understandings. The question goes to the appropriate relationship between international law and constitutional interpretation, and is by no means limited to the extraterritoriality context.⁸¹ The question potentially arises whenever international law at one time played a significant role in informing constitutional meaning, including contexts ranging from the proper interpretation of the Takings⁸² and Full Faith and Credit Clauses⁸³ to the constitutional rights of Native Americans and immigrants in the United States.⁸⁴

So how should a modern court approach a constitutional provision whose construction is informed by embedded international law understandings? As a practical matter, Supreme Court case law reveals three approaches to embedded international norms, with sharply contrasting results for the ongoing influence of international law. I describe these as *evolutionary*, *entrenchment*, and *substitution* approaches. In this order, they reflect a decreasing ongoing role for international law in constitutional analysis.

Under the *evolutionary* approach, the role of international law in informing a particular constitutional provision remains strong, overt, and

81. See *supra* note 62.

82. See, e.g., *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532–33 (1848) (power of eminent domain derived from law of nations); see also *Juragua Iron Co. v. United States*, 212 U.S. 297, 298 (1909) (duty to pay just compensation for wartime damage to property informed by international law); *United States v. Pac. R.R.*, 120 U.S. 227, 234–39 (1887) (same).

83. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (noting “expectation that [the Full Faith and Credit Clause] would be interpreted against . . . principles developed in international conflicts law”); *Haddock v. Haddock*, 201 U.S. 562, 581–82 (1906) (applying “principles of international law” to application of Full Faith and Credit Clause to divorce decree), overruled in part by *Williams v. State of North Carolina*, 317 U.S. 287 (1942); *Huntington v. Attrill*, 146 U.S. 657, 666 (1892) (addressing “the fundamental maxim of international law . . . [that] ‘[t]he courts of no country execute the penal laws of another’”).

84. See *supra* note 62 and *infra* note 86 and accompanying text.

evolving over time. Courts continue to look to contemporary international rules, as well as to modern foreign law and practice, in determining constitutional meaning. This approach is visible in Supreme Court decisions determining the scope of the treaty power and admiralty jurisdiction, the relationship between the international laws of war and the commander-in-chief power, and the meaning of “cruel and unusual” punishment under the Eighth Amendment.⁸⁵ Cases following this approach recognize that both international and constitutional meaning evolve over time, and to the extent that courts have looked abroad, they have looked to the then-contemporary international rules. In other words, constitutional meaning may evolve in this context as the relevant international law does. This does not mean that the constitutional provision is inextricably tied to the international norm. The relationship between international law and constitutional meaning continues to be mediated by the U.S. courts, with sensitivity to unique U.S. constitutional characteristics and domestic concerns.

The *entrenchment* approach essentially freezes the international norm at the point it was first considered in constitutional doctrine. International law informs constitutional analysis at some point, but the constitutional principle does not evolve with later changes in international law. This largely has been the case with regard to the government’s constitutional power to exclude aliens and to regulate Native American affairs.⁸⁶ In each of these contexts, nineteenth-century courts looked to international law and embraced the rule they perceived at a particular time (in the case of immigration law, in the late nineteenth century) to uphold a specific approach to the government’s constitutional power. With regard to aliens seeking entry, courts looked to international law to embrace a theory of nearly absolute governmental power to admit or exclude. Despite ongoing objections of litigants and advocates that the international principle was incorrectly interpreted at the time and that it is now no longer accepted, courts generally have been unwilling to revisit this ques-

85. See generally Cleveland, *International Constitution*, supra note 1. On the meaning of the Eighth Amendment, see, for example, *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (emphasizing international consensus against capital punishment for juveniles when determining the evolving meaning of Eighth Amendment); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (taking into account that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime” in finding practice barred by Eighth Amendment).

86. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279–80 (1955) (recognizing international law doctrines regarding discovery and conquest inform government authority to regulate for Native American tribes); *United States v. Kagama*, 118 U.S. 375, 378–85 (1886) (same); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 608–09 (1889) (power to exclude aliens derives from international law); Cleveland, *International Constitution*, supra note 1, at 39–44 (discussing role of international law doctrines in Supreme Court’s recognition of government’s power to exclude aliens and regulate Indian tribes).

tion.⁸⁷ Both the constitutional interpretation and the role of international law have remained fixed, or entrenched, in their original form.

In the third, *substitution* approach, international law principles have been abandoned or modified unrecognizably in favor of other, generally domestic constitutional considerations. In cases of perfect substitution, a principle that originated in international law no longer retains any doctrinal or interpretive force. The international origins of the principle are not simply forgotten; the principle itself is completely lost. A striking example of substitution is visible in the evolution of the Contract Clause. Early interpretations of the Contract Clause were rich with references to universal principles of public law and the practices of other nations.⁸⁸ This approach, however, disappeared quickly during the early nineteenth century, as domestic considerations in the construction of that clause took over.

Personal jurisdiction doctrine, on the other hand, could be considered an example of either evolution or partial substitution. Some domestic considerations have emerged to moderate the role of territorial jurisdiction, such as the reasonableness of exercising jurisdiction over a claim. The substitution is imperfect, however, because the principle of territorial jurisdiction retains force in the purposeful avilment prong of personal jurisdiction analysis, as well as in the concept of tag jurisdiction. Moreover, personal jurisdiction could also be considered evolutionary, since U.S. domestic principles regarding personal jurisdiction have evolved mostly (though not entirely) consistently with modern international law.

Unfortunately, though unsurprisingly, there appears to be no clear pattern or explanation in the case law for when an evolutionary approach or entrenchment or substitution prevails. At best, the evolutionary approach appears to be most pervasive when the constitutional provision at issue implicates foreign relations (such as in the treaty, Commander-in-Chief, or admiralty contexts) or where the provision otherwise invites consideration of evolving common values at home and abroad (such as the Cruel and Unusual Punishment Clause). Resort to the evolutionary approach also turns substantially on the mode of constitutional interpretation employed by a court. A constitutional provision that has been construed by the courts as potentially evolving over time, such as constitutional due process, would be more susceptible to an evolutionary

87. Cf. *Galvan v. Press*, 347 U.S. 522, 530–31 (1954) (Frankfurter, J.) (“[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens But the slate is not clean.”). But see *Beharry v. Reno*, 183 F. Supp. 2d 584, 598 (E.D.N.Y. 2002) (“Since [C]ongress’s power over aliens rests at least in part on international law, it should come as no shock that it may be limited by changing international law norms.”), rev’d, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

88. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 258 (1827) (noting right to contract derives from law of nations).

relationship to international law. As Henry Monaghan has observed, an originalist interpretive approach could also be amenable to an evolutionary relationship to international law, to the extent that the Founders of the Constitution anticipated that a provision would have an evolutionary meaning.⁸⁹

At a minimum, however, where international law has played a role in informing constitutional doctrine, principles of comity and harmony in international relations, without more, suggest that a subsequent change in international rules creates a duty for courts to reconsider the constitutional doctrine in light of the changed international landscape. They need not necessarily follow the new international rule, but they should at least consider the initial reasons for looking to international law and the reason for the transformation of the international rule.

In the case of extraterritoriality, a foreign relations nexus supports adopting an evolutionary approach, since extraterritorial conduct often involves conduct in another state's territory, and conflicts considerations ran strong in early constitutional approaches based on strict territoriality.⁹⁰ Because courts generally do not overtly acknowledge the role of international law in the entrenchment and substitution contexts, the decisions offer few insights into the rationales for these approaches.

Prior to *Boumediene*, the U.S. approach to extraterritorial application of the Constitution fell into two of these categories. Constitutional protections for U.S. nationals abroad had evolved in concert with international rules regarding the lawful exercise of extraterritorial power, thus reflecting a (perhaps latent) evolutionary approach. According to the U.S. government, however, protections for noncitizens subject to U.S. authority overseas, however, reflected an entrenchment approach: The doctrines remained tied to the antiquated conceptions of territorial jurisdiction that had first informed them.

This tension between an entrenchment approach to the constitutional rights of aliens abroad, and an evolutionary approach to the rights of citizens, generated a number of anomalies for the United States. From the perspective of internal constitutional coherence, it created doctrinal anomalies between the treatment of citizens and aliens in U.S. custody beyond our borders. From the perspective of basic respect for the rule of law, it created the possibility of extraterritorial constitutional "black holes" for the treatment of aliens abroad. And from the perspective of comity and international relations, it created conflicts between the United States's constitutional obligations and international understandings of the government's international state responsibility, as the next Part indicates.

89. Henry Paul Monaghan, *Doing Originalism*, 104 *Colum. L. Rev.* 32, 37–38 (2004) ("Even a strict form of originalism, properly understood, must acknowledge that the original understanding of some clauses could be fairly read to have included a background assumption of further judicial development.").

90. See, e.g., *In re Ross*, 140 U.S. 453, 464–65 (1891).

IV. CONTEMPORARY INTERNATIONAL LAW: JURISDICTION AS CONTROL

Modern international rules regarding jurisdiction, as applied by international and regional human rights bodies and the International Court of Justice, stood in striking contrast to the United States's pre-*Boumediene* approach to the rights of aliens abroad. The major international bodies to address the relationship between jurisdiction human rights obligations, and extraterritorial conduct—the Inter-American Commission on Human Rights, the U.N. human rights treaty bodies, the International Court of Justice, and the European Court of Human Rights—all have recognized that a state's extraterritorial exercise of effective control over either a person or a territory places that conduct within a state's "jurisdiction," giving rise to legal responsibility for human rights violations. Although the European Court of Human Rights has taken the most cautious approach to this principle, its jurisprudence also recognizes significantly broader extraterritorial jurisdiction over places and persons than did that of the United States. Moreover, none of these institutions has drawn the bright line distinction between responsibility over citizens and aliens that persisted in U.S. law. To the contrary, these tribunals all adopt a pragmatic, totality of the circumstances test for determining when a state exercises sufficient control to exercise jurisdiction, and thus to be obligated to respect fundamental rights. They recognize that in a modern world of instant global communications, global trade and travel, and international cooperation in military and law enforcement efforts, categorical restrictions based on territory or alienage are unworkable.

A. *The Inter-American Commission on Human Rights*

The Inter-American Commission on Human Rights is charged with overseeing state compliance with two human rights instruments in the Americas—the American Declaration of the Rights and Duties of Man⁹¹ and the American Convention on Human Rights.⁹² In construing state obligations under these instruments, the Commission has adopted an expansive approach to recognizing human rights obligations for extraterritorial conduct such as kidnappings and aerial shootings. In so doing, the

91. Organization of American States, American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/II.71, doc. 6 rev. 1 (1988). The Declaration is nonbinding but has been understood by the Inter-American human rights institutions as a statement of the international legal obligations of O.A.S. member states which are not parties to the American Convention. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Inter-Am. Ct. H.R., Advisory Opinion OC-10/89, (ser. A) No. 10 ¶¶ 43-47 (1989). The United States has signed the American Declaration and the American Convention, but has not ratified the American Convention.

92. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

Commission has largely abandoned any geographic considerations in determining jurisdiction, and has focused instead on the exercise of “authority and control” over individuals, rather than over territory.

The American Declaration of the Rights and Duties of Man does not expressly address the subject of jurisdiction. Article 1 of the American Convention on Human Rights, however, obligates states parties to respect the protections of the Convention for all persons “subject to their jurisdiction.”⁹³ The text is similar to that of the European Convention on Human Rights in that it explicitly refers only to jurisdiction, not to territory.

In the admissibility decision in the 1999 case of *Saldaño v. Argentina*, the Commission construed Article 1(1) of the Convention as establishing extraterritorial state responsibility:

The Commission does not believe . . . that the term “jurisdiction” in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory.⁹⁴

The Commission accordingly articulated an “understanding of jurisdiction—and therefore responsibility for compliance with international obligations—as a notion linked to *authority and effective control*, and not merely to territorial boundaries.”⁹⁵ The Commission noted that the jurisdictional provision of the American Convention had been modeled upon the European Convention, and explicitly followed the jurisprudence of the European Court of Human Rights in *Cyprus v. Turkey*, *Loizidou v. Turkey*, and related cases.⁹⁶

In an early inquiry applying the American Declaration, the Commission found admissible a petition by Panamanian nationals alleging human rights violations arising from the U.S. military intervention in Panama in 1989.⁹⁷ No question of extraterritorial jurisdiction was raised by the parties, and the Commission found the claims admissible, with no analysis, on the grounds that “[w]here it is asserted that a use of military

93. *Id.* art. 1.

94. *Saldaño v. Argentina*, Petition, Inter-Am. C.H.R., Report No. 38/99, OEA/Ser.L./V/II.102, doc. 6 rev. ¶ 17 (1999). The petition was brought against Argentina for harms arising from the prosecution and sentencing of an Argentine national in, and by, the United States. It was deemed inadmissible for lack of any evidence of exercise of “authority and control” by Argentina. *Id.* ¶ 21.

95. *Id.* ¶ 19 (emphasis added).

96. *Id.* ¶¶ 17–18. The European cases are discussed *infra* notes 150–156.

97. U.S. Military Intervention in Panama, Case 10,573, reprinted in 1 Inter-Am. Y.B. on Hum. Rts. 476 (1993).

force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of noncombatants are implicated."⁹⁸

In the 1999 case of *Coard v. United States*, the Commission explicitly invoked its "authority and control" standard for claims under the Declaration in a petition brought by persons alleging that they were arbitrarily detained by the United States during the 1983 invasion of Grenada.⁹⁹ The Commission stated as follows:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination—"without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of *any person subject to its jurisdiction*. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its *authority and control*.¹⁰⁰

The same year, the Commission elaborated on this standard to uphold jurisdiction over a complaint against Cuba for deliberately shooting down two civilian aircraft operated by Brothers to the Rescue in interna-

98. *Id.* ¶ 6, 1 Inter-Am. Y.B. on Hum. Rts. at 512. For earlier proceedings addressing the Commission's treatment of extraterritorial conduct under the Declaration, see *Disabled Peoples' Int'l v. United States*, Application No. 9213, Inter-Am. C.H.R., OEA/Ser.L./V/II.71, doc. 9 rev. 1, at 184 (1987) (holding admissible petition concerning U.S. military action in Grenada); Gen. Secretariat of the Org. of Am. States, Inter-Am. Comm'n on Human Rights, Second Report on the Human Rights Situation in Suriname, OAS/Ser.L./V/II.66, doc. 21 rev. 1, at 44-45 (1985) (addressing allegations that Government of Suriname had threatened Surinamese citizens in Holland and Suriname); Gen. Secretariat of the Org. of Am. States, Inter-Am. Comm'n on Human Rights, Report on the Situation of Human Rights in Chile, OAS/Ser.L./V/II.66, doc. 17 ¶¶ 80-91 (1985) (discussing murders committed outside of Chile).

99. *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).

100. *Id.* (emphasis added) (citation omitted). The Commission found on the merits that although the detentions appeared to have a valid security justification, the United States had failed to afford the detainees an opportunity to test the legality of their detention "with the least possible delay," in violation of the Declaration. *Id.* ¶ 60.

tional airspace.¹⁰¹ Once again invoking the jurisprudence of the European Court of Human Rights,¹⁰² the Commission held that Cuba was responsible for the extraterritorial aerial shooting.¹⁰³ The Commission found conclusive evidence that the agents of the Cuban State had “placed the civilian pilots of the ‘Brothers to the Rescue’ organization under their authority,” and “that the victims died as a consequence of direct actions taken by agents of the Cuban State in *international airspace*.”¹⁰⁴

In 2002, the Commission again recognized extraterritorial jurisdiction under the Declaration in ordering precautionary measures against the United States on behalf of the Guantánamo detainees. The Commission found that the detainees, as persons under the “authority and control” of a state in a situation of armed conflict, were entitled to the protection of both international human rights law and international humanitarian law.¹⁰⁵

In short, the Inter-American Commission has understood state jurisdiction within the meaning of the Convention and Declaration to link the exercise of state control to state responsibility for resulting human rights violations. The Commission’s focus has been decidedly nonterritorial. In each case, the Commission’s concern was with the state’s control over a specific person or situation—not with the state’s control over the territory in which the event occurred.

B. *U.N. Treaty Bodies*

Unlike the American and European Conventions, the jurisdictional clauses of the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture explicitly address territoriality. Nevertheless, like the Inter-American Commission, the U.N. treaty bodies responsible for overseeing state compliance with these treaties have interpreted jurisdiction in terms of a state’s exercise of control over either persons or places.

1. *The Human Rights Committee*. — Under Article 2(1) of the ICCPR, 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 present Covenant.”¹⁰⁶ This phrasing—“within its territory and subject to its jurisdiction”—poses some analytic complexity. The phrase could be read in the conjunctive, to establish that a person would have to be both “within” a state’s territory and subject to its jurisdiction for any

101. *Alejandro v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶¶ 23, 25 (1999).

102. *Id.* ¶ 24.

103. *Id.* ¶ 45.

104. *Id.* ¶ 25.

105. Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc 5 rev. 1 ¶ 80 (2002–2003).

106. ICCPR, *supra* note 80, art. 2.

Covenant protections to apply. This was the position of the George W. Bush Administration.¹⁰⁷ The entire phrase could be understood so that the limiting clause—“within its territory and subject to its jurisdiction”—modifies only the obligation “to ensure” Covenant rights, but not the obligation “to respect” those rights.¹⁰⁸ The Human Rights Committee, on the other hand, has construed this jurisdictional provision in the disjunctive—so that the obligations to respect and ensure apply both “to all persons who may be within their territory and to all persons subject to their jurisdiction.”¹⁰⁹ The First Optional Protocol to the ICCPR supports this latter interpretation by recognizing the Committee’s authority to receive communications from “individuals subject to [a State Party’s] jurisdiction.”¹¹⁰ It appears that, at least in early years, the United States agreed with this approach.¹¹¹ In General Comment Number 31, adopted in 2004, the Committee articulated a “power or effective control” standard for determining when persons are “subject to” a state’s jurisdiction:

107. See U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: United States of America, ¶ 130, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) (“[T]he obligations assumed by the United States under the Covenant apply only within the territory of the United States.”).

108. Manfred Nowak, U.N. Covenant on Civil and Political Rights CCPR Commentary 43 (2d rev. 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*’ . . .”).

109. U.N. Human Rights 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]. As Thomas Buergenthal has explained:

[T]he 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.

Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations, *in* The International Bill of Rights 72, 74 (Louis Henkin ed., 1981) (citation omitted); see also Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9) (“[T]he drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”). For recent debate over the extraterritorial reach of the ICCPR, see 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; see also 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.

110. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, opened for signature Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

111. See U.N. Human Rights Comm., Summary Record of the Hundred and Ninety-Fourth Meeting, May 16, 1950, ¶ 32, U.N. Doc. E/CN.4/SR.194 (May 25, 1950) (United States delegation explaining that military “troops, although maintained abroad, remained under the jurisdiction of the State”).

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. . . . 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 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.¹¹²

The Committee has not subsequently elaborated extensively on the meaning of “effective control.” In earlier opinions, however, the Committee had made clear that Convention obligations applied in extra-territorial situations, including situations of armed conflict. In reviewing states’ periodic reports under the ICCPR, the Committee noted with approval Belgium’s recognition of the applicability of the Covenant to the actions of Belgian soldiers in Somalia as part of the United Nations Operation in Somalia.¹¹³ The Committee also condemned an Iranian religious authority’s issuance of a *fatwa* calling for the murder of Salman Rushdie, a foreign national residing abroad.¹¹⁴ Most recently, the Committee has rejected the United States’s position that Covenant obligations do not extend to U.S. treatment of persons outside U.S. territory, including in Guantánamo and elsewhere.¹¹⁵

In 1981, in addressing an individual communication involving Uruguay’s kidnapping of a Uruguayan citizen in Argentina and his later imprisonment and torture in Uruguay, the Committee observed in *López Burgos v. Uruguay* that the fact that the initial kidnapping took place outside of Uruguayan territory did not deprive the Committee of jurisdic-

112. General Comment No. 31, *supra* note 109, ¶ 10 (emphasis added).

113. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: Belgium, ¶ 14, U.N. Doc. CCPR/C/79/Add.99 (Nov. 19, 1998) (noting “concern[]” for Belgian soldiers’ behavior in Somalia, but acknowledging “that the State Party has recognized the applicability of the Covenant in this respect”).

114. U.N. Human Rights 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); see also U.N. Human Rights 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) (concluding state’s denial of passport to citizen residing abroad was exercise of state’s jurisdiction for purposes of Covenant).

115. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, 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”).

tion under either the Optional Protocol or the Covenant, since the acts "were perpetrated by Uruguayan agents acting on foreign soil."¹¹⁶ Like the Inter-American Commission, the Human Rights Committee found that the critical relationship was between the state and the individual, not the state and a particular territory. The Committee reasoned that "individuals subject to [a State Party's] jurisdiction" under the Optional Protocol referred "not to the *place* where the violation occurred, but rather to the *relationship between the individual and the State* in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."¹¹⁷ Turning to the Covenant itself, the Committee maintained that Article 2(1) did not imply that a state "cannot be held accountable" for acts committed by its agents on foreign soil, "whether with the acquiescence of the Government of that State or in opposition to it."¹¹⁸ It concluded 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."¹¹⁹

The Committee also has tentatively acknowledged the complexities that may arise if all Covenant obligations apply in an extraterritorial context—a question that the European Court of Human Rights has considered more extensively. In *López Burgos*, Committee Member Christian Tomuschat wrote separately to note the potential overbreadth of a position that Covenant obligations always apply extraterritorially. Tomuschat recognized that there are 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 citizens remain subject to the jurisdiction of their state of nationality. Likewise, states occupying a foreign territory may not be able to afford all persons in that territory the protections of the Covenant, because under international humanitarian law the occupying state has a competing duty to respect the existing domestic laws of the occupied territory. He noted that these considerations may have animated the choice of the jurisdictional formula in Article 2 of the ICCPR. "Never was it envisaged, however," he observed, "to grant States parties unfettered discretionary power to carry out wilful and deliberate

116. U.N. Human Rights 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, ¶ 12.1, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981) [hereinafter Human Rights Comm., *López Burgos*]; accord U.N. Human Rights 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) [hereinafter Human Rights Comm., *Casariago*] (concluding Uruguay's extraterritorial arrest of Uruguayan national in Brazil and her later detention in Uruguay gave rise to Covenant violations).

117. Human Rights Comm., *López Burgos*, supra note 116, ¶ 12.2 (emphasis added).

118. Id. ¶ 12.3.

119. Id.

attacks against the freedom and personal integrity of their citizens living abroad.”¹²⁰

Building on this reasoning, the Committee has condemned Israel for failing to “fully apply” the Covenant in its occupied territories.¹²¹ The Committee saw this duty as arising from Israel’s long-standing presence in the territories, its exercise of “effective jurisdiction” there through its security forces, and its “ambiguous attitude” toward the future independence of the territories.¹²²

In short, the Committee has adopted a retail approach to the extra-territorial reach of ICCPR obligations. Jurisdiction arises, not based on the location where the harm occurs, but from the relationship between the state and the individual with regard to a particular Covenant obligation. Where the state exercises “effective control” over an individual in a manner that implicates a particular Covenant right, jurisdiction arises for purposes of that right only. Even certain forms of temporary military occupation of a territory, however, would not necessarily give rise to application of full Covenant obligations. Thus, in a temporarily occupied territory, a state would owe a duty not to torture or arbitrarily detain a foreign national in its custody, but would not be obligated to rewrite wholesale the laws of that territory to comply with the requirements of the Covenant.

Notably, the alien status of a victim does not warrant denial of the Covenant’s protections in any of the extraterritorial cases addressed by the Committee. The Committee has made clear that the Covenant’s application to any “individual” means exactly that.¹²³ With rare exceptions, protections of the Covenant apply to all persons in a state’s jurisdiction, not simply to citizens, or to aliens from a friendly state. The other tribunals addressed in this section similarly treat alienage as irrelevant to the question of extraterritoriality.

Finally, the Committee’s approach is not without supporters. While states may not agree entirely with the Committee’s interpretation of the Covenant’s geographic scope, a number of States Parties have formally

120. *Id.* at app. (opinion by Christian Tomuschat).

121. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: Israel, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

122. *Id.* The Committee reaffirmed its position in 2003. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of Human Rights Comm.: Israel, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) [hereinafter U.N. Human Rights Comm., Israel 2003].

123. See U.N. Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 2 (1986), *in* 1 Human Rights Instruments: Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008) (“[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”); General Comment No. 31, *supra* note 109, ¶ 10 (“[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness . . .”).

acknowledged to the Committee that they accept some extraterritorial reach for the Covenant, including with respect to military activities in Iraq and Afghanistan.¹²⁴

2. *The Committee Against Torture.* — The Convention Against Torture¹²⁵ does not have a single jurisdictional provision, but addresses jurisdiction in a range of contexts. Article 2(1) of the Convention obligates states to “take effective legislative, administrative, judicial or other measures” to prevent torture—in other words, to exercise prescriptive, adjudicative and enforcement jurisdiction—“in any territory under its jurisdiction.”¹²⁶ The separate duty to prosecute acts of torture extends beyond territorial jurisdiction to other bases for jurisdiction under international law. Article 5(1) of the Convention obligates or allows a state to criminally punish acts of torture that occur “in any territory under its jurisdiction” or on board the state’s ship or aircraft, or if the offender or the victim is a national of the state, or if the offender is “in any territory under its jurisdiction,” regardless of where the act occurred (in other words, universal jurisdiction).¹²⁷

The Torture Convention thus appears to define jurisdiction in classical international law terms. It establishes a duty to prevent torture in any territory under a state’s jurisdiction, and establishes a duty to punish acts of torture if the act occurred or the offender is present in territory subject to the state’s jurisdiction, or in other classic contexts of extraterrito-

124. See, e.g., U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments by the Government of Germany to the Concluding Observations of the Human Rights Committee, at 3, U.N. Doc. CCPR/CO/80/DEU/Add.1 (Apr. 11, 2005) (“Whenever 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.”); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: The United Kingdom of Great Britain and Northern Ireland, ¶ 24, U.N. Doc. CCPR/C/GBR/CO/6/Add.1 (Nov. 3, 2009) (“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.”); U.N. Human Rights 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, ¶ 16, U.N. Doc. CCPR/C/AUS/Q/5/Add.1 (Feb. 5, 2009) (“Australia 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”); see also Comité des droits de l’homme, Examen des rapports présentés par les états parties en vertu de l’article 40 pacte: cinquième rapport périodique: Belgique, at 17, U.N. Doc. CCPR/C/BEL/5 (July 17, 2009) (noting that when Belgian forces are deployed abroad, particularly while participating in peacekeeping missions, the State will ensure individuals under its jurisdiction will be granted rights recognized by the Covenant). I am grateful to Gerald Neuman for bringing these developments to my attention.

125. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

126. *Id.* art. 2.

127. *Id.* art. 5.

rial jurisdiction (flag jurisdiction, nationality, and passive personality). It further obligates a state, “in any territory under its jurisdiction,” to prevent acts of “cruel, inhuman or degrading treatment or punishment.”¹²⁸ The critical extraterritoriality question for the Committee Against Torture accordingly has been to determine the meaning of “territory under its jurisdiction.” Although this phrase facially links jurisdiction and territory, it is interesting to note that even here jurisdiction is not clearly limited to a state’s own sovereign territory, but extends to “any territory under [the state’s] jurisdiction.” Guantánamo, for example, is subject to the United States’s “complete jurisdiction and control,”¹²⁹ although the United States disclaims formal sovereignty there.

In the most comprehensive statement of extraterritorial jurisdiction of any of the international or regional tribunals, the Committee has interpreted this concept as encompassing all territories, and all persons, over which a state exercises any form of “effective control,” whether “directly or indirectly, in whole or in part, *de jure* or *de facto*.” In General Comment No. 2, which was adopted in November 2007, the Committee stated as follows:

Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also “in any territory under its jurisdiction.” The Committee has recognized that “any territory” includes *all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control*, in accordance with international law. The reference to “any territory” . . . refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control.¹³⁰

The Committee observed that its interpretation of territory subject to a state’s jurisdiction was consistent with the obligation under Article 5(1)(b) of the Convention to exercise jurisdiction over the state’s own nationals, wherever they may act.¹³¹ The Committee further noted that “territory” “also include[s] situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over *persons* in detention.”¹³² Furthermore,

128. *Id.* arts. 11–13, 16.

129. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. 418 (“[D]uring the period of the occupation of the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . .”).

130. U.N. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 16, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (emphasis added).

131. *Id.*

132. *Id.* (emphasis added).

the concept of “any territory under its jurisdiction,” . . . includes any territory or *facilities* and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party. The Committee emphasizes that the State’s obligation to prevent torture also *applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.*¹³³

In sum, the Committee construes a state’s jurisdiction under the Convention as extending to all territories or facilities under its de facto effective control, to all nationals and agents of the state, and to all persons in the state’s de facto detention. The analysis, while broad, is consistent with international law’s recognition of extraterritorial jurisdiction over a state’s nationals as well as those persons over whom a state exercises complete or effective control.

The Committee had previously applied this standard in reviewing state reports, notably those of the United Kingdom¹³⁴ and the United States.¹³⁵ The Committee pointedly disagreed with the United Kingdom’s position that persons under de facto British authority in Afghanistan and Iraq were not under U.K. jurisdiction, noting that jurisdiction “includes all areas under the de facto effective control of the State party’s authorities.”¹³⁶ The Committee similarly called upon the United States to ensure the protections of the Convention to “all persons under the effective control of its authorities, . . . wherever located in the world.”¹³⁷

The United States, however, has objected to the Committee’s interpretation of the extraterritorial scope of the Convention. In its observations on General Comment No. 2, the United States indicated that while it did not generally object to the General Comment as a pronouncement of policy for improving implementation of the convention, it did not agree that, as a legal matter, “‘de facto control’ equates with ‘territory

133. *Id.* ¶ 7 (emphasis added).

134. See U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, ¶ 4, U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004) [hereinafter *Conclusions & Recommendations: United Kingdom*] (“[T]he Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party’s authorities.” (emphasis omitted)).

135. U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 15, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) [hereinafter *Conclusions & Recommendations: United States*] (reiterating that State party’s jurisdiction “includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised” and rejecting view “that those provisions are geographically limited to its own de jure territory”).

136. *Conclusions & Recommendations: United Kingdom*, supra note 134, ¶ 4(b) (emphasis omitted).

137. *Conclusions & Recommendations: United States*, supra note 135, ¶ 15.

under its jurisdiction.”¹³⁸ The United States also pointed to Article 5 of the Convention’s application to offenses committed “on board a ship or aircraft registered in that State” as evidence that “[i]f the drafters had intended for Article 2 to extend beyond the territory under a State Party’s jurisdiction, they would have reflected that intent in the words of the Convention.”¹³⁹

The Committee Against Torture is responsible for overseeing state compliance with only two related types of human rights violations: torture, and cruel, inhuman, or degrading treatment. Unlike, for example, the right to education, the obligation not to commit torture or to allow its commission by a state’s agents does not generally require control of a territory in order for a state to give it effect. Instead, the state must exercise control over its agents. The Committee Against Torture therefore has not confronted the difficulty posed by other human rights conventions (and by constitutions) of determining when a state’s relationship with a person or territory is sufficient to give rise to a broad menu of human rights obligations. The Committee nevertheless has addressed state responsibility functionally, by focusing on circumstances when a state is able to carry out the obligations of the Convention as a practical matter, without regard to any formal distinctions regarding the location of the conduct or the identity of the perpetrator or victim.¹⁴⁰

C. *The International Court of Justice*

Building upon its recognition that either “physical control” of a territory or complete or “effective control” over operatives or conduct abroad¹⁴¹ gives rise to international legal obligations, the International Court of Justice has embraced an effective control approach to jurisdiction under human rights treaties. In its 2004 *Wall* Advisory Opinion, the court found that Israel’s exercise of jurisdiction over the Occupied

138. Observations by the United States of America on Committee Against Torture General Comment No. 2: Implementation of Article 2 by States Parties (Nov. 3, 2008) ¶¶ 2, 28 (on file with the *Columbia Law Review*).

139. *Id.* ¶ 29.

140. Other treaty bodies have adopted an analogous approach. See, e.g., U.N. Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, ¶ 8, U.N. Doc. E/C.12/1/Add.27 (Dec. 4, 1998) (“The Committee is of the view that the State’s obligations under the Covenant apply to all territories and populations under its effective control.”); U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, ¶ 32, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007) (“The Committee reiterates its concern at the position of the State party . . . that the Convention does not apply in the Occupied Palestinian Territories . . .”); U.N. Comm. on the Rights of the Child, Concluding Observations: Israel, ¶ 2, U.N. Doc. CRC/C/15/Add.195 (Oct. 9, 2002) (noting “the responsibility of the State party for the implementation of the Convention in the occupied Palestinian territories”).

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

Palestinian Territories triggered Israel's obligations under the ICCPR, the International Covenant on Social, Economic and Cultural Rights, and the Convention on the Rights of the Child. The ICJ observed that although a state's jurisdiction is "primarily territorial, it may sometimes be exercised outside the national territory."¹⁴² The court noted with approval the Human Rights Committee's "constant practice" of recognizing that extra-territorial acts may fall within a state's jurisdiction, citing the Committee's early cases involving extraterritorial kidnappings by Uruguay and its decisions relating to Israel's responsibility in the Occupied Territories.¹⁴³ In 2005, the court reaffirmed this principle in recognizing that Uganda's occupation in the northeastern part of Congo gave rise to obligations under international human rights and international 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."¹⁴⁴

D. *The European Court of Human Rights and Al-Skeini*

This brings us back to the *Al-Skeini* case and the jurisprudence of the European Court of Human Rights. Although *Al-Skeini* was a decision of the U.K. domestic courts, the judges' interpretation of the extraterritorial scope of obligations under the European Convention was governed by the jurisprudence of the European Court.¹⁴⁵ That court, in turn, has given extensive consideration to extraterritorial obligations under the treaty. The European Court also to date has adopted a somewhat more restrictive view of the extraterritorial reach of a state's human rights obligations under the European Convention than the other international tribunals addressed above. This caution is attributable in part to the regional character of the European Convention, as well as to other textual provisions in the Convention.¹⁴⁶

142. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9).

143. *Id.* at 179–80.

144. Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), (I.C.J. Judgment of Dec. 19, 2005) at 70, available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (on file with the *Columbia Law Review*) (citing *Legal Consequences of Wall*, 2004 I.C.J. at 178–81).

145. An application for review before the European Court of Human Rights was pending at the time of publication. See *Al-Skeini v. United Kingdom*, App. No. 55721/07, Statement of Facts (Eur. Ct. H.R. Dec. 17, 2008), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (follow "HUDOC" hyperlink; follow "Communicated Cases Collection" hyperlink on left sidebar; input "al-skeini" in "Text" field; press search; follow "55721/07 Statement of Facts" hyperlink) (on file with the *Columbia Law Review*).

146. Article 56 of the Convention, for example, allows state parties to declare the applicability of the Convention "to . . . territories for whose international relations it is responsible," and provides that the Convention shall be applied in such territories "with

1. *The European Court of Human Rights.* — As noted in the Introduction, the European Convention provides that States Parties must afford the protections of the Convention “to everyone within their jurisdiction.”¹⁴⁷ Territory is not mentioned. Unlike the U.N. Human Rights Committee and the U.N. Committee Against Torture, which have moved away from the textual references to territory in their respective conventions, the European Court of Human Rights (ECHR) has leaned toward imputing a territorial meaning into jurisdiction where no textual reference exists. In construing the concept of “jurisdiction” in light of public international law and the purposes and understandings surrounding the Convention, the court has held that the Convention is to be applied “notably in the legal space . . . of the Contracting States.”¹⁴⁸ But the court also has recognized “exceptional” circumstances, where a state’s “effective control” of a territory beyond its borders, or the state’s exercise of control over persons abroad through its agents, can trigger jurisdiction under the Convention.¹⁴⁹ And in *Al-Skeini*, the Law Lords and the U.K. government concluded that this extraterritorial jurisdiction reached the torture and murder of an Iraqi national in a British military prison in Iraq.

Leading early decisions of the European Court on extraterritorial jurisdiction involved Turkey’s occupation of parts of northern Cyprus and the acts of the Turkish Republic of Northern Cyprus (TRNC), the local authority established there. In its preliminary objections judgment in *Loizidou v. Turkey*,¹⁵⁰ the court held that “the concept of ‘jurisdiction’ under [Article 1] is not restricted to the national territory of the High Contracting Parties,” and establishes state responsibility for acts of a state’s authorities, “whether performed within or outside national boundaries, which produce effects outside their own territory.”¹⁵¹ Furthermore, state responsibility may arise under the Convention

when as a consequence of military action—*whether lawful or unlawful*—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.¹⁵²

Note that the court here is not referring to jurisdiction in the classical prescriptive sense to determine when a state may lawfully act abroad. Instead, the court is addressing jurisdiction as control—the *de facto* exer-

due regard, however, to local requirements.” Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6, arts. 56(1) and (3).

147. *Id.* art. 1.

148. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 359.

149. See *infra* notes 163–168.

150. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (Judgment on Preliminary Objections).

151. *Id.* at 23–24.

152. *Id.* at 24 (emphasis added).

cise of authority, “whether lawful or unlawful,” which gives rise to legal responsibility for harms committed.

In its merits judgment, the court reaffirmed this articulation of state responsibility, finding that it was unnecessary to determine whether Turkey “exercise[d] detailed control” over the TRNC.¹⁵³ Turkey’s large military presence in northern Cyprus made it “obvious” that the Turkish military exercised “effective control” over the region. Such control established Turkey’s “responsibility for the policies and actions” of the TRNC.¹⁵⁴ The court therefore concluded that “[t]hose affected by such policies or actions therefore come within the ‘jurisdiction’ of Turkey for purposes of Article 1 of the Convention.”¹⁵⁵ The court again applied this analysis to find Turkey liable for human rights violations in *Cyprus v. Turkey*.¹⁵⁶ In the Cyprus cases, therefore, the European Court at least suggested that “jurisdiction” would encompass the effective control of a territory, the “detailed control” over particular extraterritorial acts, or the extraterritorial acts of a state’s agents, presumably including acts that affected only a specific person or persons, rather than a territory.

The ECHR appeared to retreat from this reading of jurisdiction in *Banković v. Belgium*.¹⁵⁷ *Banković* involved NATO’s 1999 aerial bombing of a Serbian-controlled radio and television station in Belgrade.¹⁵⁸ The applicants alleged that all seventeen NATO states participating in the NATO campaign were jointly liable, regardless of whether they had actually participated in the bombing or exercised any control over it.¹⁵⁹ This politically charged case was decided in December 2001, while the United Kingdom was heavily involved in the U.S. war in Afghanistan. The question for the court was whether the air strike constituted “control” so that the conduct fell within the “jurisdiction” of the participating NATO states for purposes of the Convention.¹⁶⁰

In construing the concept of “jurisdiction” under Article 1, the court observed that it must consider “any relevant rules of international law . . . [and] determine State responsibility in conformity with the governing principles of international law,”¹⁶¹ while also considering the travaux and the Convention’s special status as a human rights treaty. The court then proceeded to equate jurisdiction under the Convention with classical conceptions of jurisdiction under international law.¹⁶²

153. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2235 (Judgment on Merits).

154. *Id.*

155. *Id.*

156. See *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 25 (citing *Loizidou* and finding that Turkey’s Article I jurisdiction extended over northern Cyprus because of its effective control there).

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

158. *Id.* at 340.

159. *Id.* at 345.

160. *Id.* at 350.

161. *Id.* at 351.

162. *Id.* at 351–53.

As to the “ordinary meaning” of the relevant terms in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extraterritorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states.¹⁶³

The court continued:

Accordingly, for example, a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence. In addition, a State may not actually exercise jurisdiction on the territory of another without the latter’s consent, invitation or acquiescence unless the former is an occupying State, in which case it can be found to exercise jurisdiction in that territory, at least in certain respects.¹⁶⁴

The court concluded that the Convention “must be considered to reflect this ordinary and essentially territorial notion of jurisdiction,” while recognizing other “exceptional” bases of jurisdiction based on the particular circumstances of each case.¹⁶⁵ The court found that the travaux and state practice under the Convention confirmed this reading.¹⁶⁶

Turning to the scope of any extraterritorial exceptions, the court looked to prior jurisprudence of the court and the European Commission, particularly the decisions regarding Turkey in Cyprus.¹⁶⁷ The court found that these decisions elaborated a rule that a state exercises jurisdiction when it, “through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupa-

163. *Id.* at 351–52 (citing F.A. Mann, *The Doctrine of Jurisdiction in International Law*, in 1 *Recueil des Cours* (1964); F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, in *Recueil des Cours* (1984); *Jurisdiction of States*, in 3 *Encyclopedia of Public International Law* 55–59 (Rudolph Bernhardt ed., 1997); *Extraterritorial Effects of Administrative, Judicial and Legislative Acts*, in 2 *Encyclopedia of Public International Law* 337–43 (Rudolph Bernhardt ed., 1995); Oppenheim’s *International Law*, supra note 26, § 137; Pierre-Marie Dupuy, *Droit International Public* 61 (4th ed. 1998); Ian Brownlie, *Principles of Public International Law* 287, 301, 312–14 (5th ed. 1998)).

164. *Id.* at 352 (citations omitted) (citing 3 *Encyclopedia of Public International Law*, supra note 163; 2 *Encyclopedia of Public International Law*, supra note 163; 1 Oppenheim’s *International Law*, supra note 25, § 137; Dupuy, supra note 163, at 64–65; Brownlie, supra note 163, at 313; Antonio Cassese, *International Law* 89 (1st ed. 2001); Venice Comm’n, Council of Europe, Report on the Preferential Treatment of National Minorities by Their Kin-States 16, CDL-INF (2001) 19 (Oct. 22, 2001)).

165. *Id.*

166. *Id.* at 352–53.

167. *Id.* at 355.

tion or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.”¹⁶⁸ Jurisdiction also arose in “cases involving the activities of [a state’s] diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.” In such cases both treaties and customary international law “recognised the extraterritorial exercise of jurisdiction by the relevant State.”¹⁶⁹ The court thus shifted its interpretation of jurisdiction under the Convention from focusing on de facto control in the earlier cases, to a test that was designed to determine the international legality of extraterritorial conduct under prescriptive jurisdiction.

Addressing whether “effective control” had been exercised by the NATO member states in this case, the court rejected the applicants’ suggestion that the “effective control” test should be tailored to require compliance with Convention obligations to the extent of the extraterritorial control that was exercised. The applicants’ proposed reading comported with the retail approach of the Inter-American Commission and the U.N. Human Rights Committee. Both of these bodies have recognized that a state’s “control” over a particular person or situation is sufficient for a finding of jurisdiction over the violations that arise from that relationship. (The Inter-American Commission’s decision in *Brothers to the Rescue*¹⁷⁰ is the most directly analogous case to *Banković*.) The European Court rejected this approach, however, as “tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State.”¹⁷¹ (This is, of course, precisely how the Committee Against Torture has elucidated obligations under the Torture Convention.) Faced with the application of a wide-ranging set of treaty obligations, however, the European Court read this as a suggestion that the Convention obligations be “divided and tailored” according to the particular circumstances of the exercise of jurisdiction, and was unwilling to accept this suggestion.¹⁷² The court objected that the approach would collapse any distinction between jurisdiction and the presence of a violation of any particular Convention right. Had the drafters of the Convention intended such a result, the court reasoned, they could have provided that the Convention applies in all circumstances, as do the four Geneva Conventions.¹⁷³

The court declined to follow the approach of the Human Rights Committee on this question, which it seemed to feel had overreached in

168. *Id.*

169. *Id.* at 356.

170. *Alejandro v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L./V/II.106, doc. 3 rev. (1999).

171. *Banković*, 2001-XII Eur. Ct. H.R. at 356.

172. *Id.*

173. *Id.*

its efforts to read a territorial restriction out of the ICCPR, in the face of contrary evidence in the negotiating history.¹⁷⁴ It found the Inter-American Commission's decision in *Coard v. United States* unpersuasive, since the American Declaration contains no explicit jurisdictional provision. The court noted that the American Convention contained jurisdictional language similar to the ECHR, but observed that no case construing that language had been brought to its attention—ironic, given that the Inter-American Commission itself had relied on the jurisprudence of the ECHR in finding that the American Convention applied extraterritorially.¹⁷⁵ *Banković's* ultimate conclusion regarding the tailoring of rights to the scope of control is unclear, however, since the court ultimately endorsed the view that the Convention would apply to the extraterritorial arrest and detention of an individual,¹⁷⁶ where it would seem that its same concern about a duty to apply the whole Convention would pertain.

Finally, the court denied that finding the Convention inapplicable would create a “vacuum in the system of human rights protection.”¹⁷⁷ The court concluded that the “vacuum” concept, which had been articulated in the Turkish cases, was limited to territories, such as Cyprus, that were already subject to the Convention (e.g., within the Convention's “legal space (espace juridique)”) and thus already entitled to the Convention's protection.¹⁷⁸ Serbia, on the other hand, fell outside of the Convention's legal space. The court concluded that an intentional aerial bombing did not create any “jurisdictional link” between the victims and the responsible states.¹⁷⁹

Banković appeared to mark a retreat from the court's earlier suggestions about the Convention's extraterritorial scope.¹⁸⁰ By relying on classical grounds for prescriptive jurisdiction, the court appeared to confuse the bases for finding that a state acted lawfully abroad, and the grounds for finding that a state should be held legally responsible for extraterritorial conduct, regardless of whether it was lawful or not. Nev-

174. See *id.* at 357–58 (discussing Article 2, § 2 of the ICCPR and noting that “as early as 1950 the drafters had definitively and specifically confined its territorial scope” and rejecting argument “that exceptional recognition by the United Nations Human Rights Committee of certain instances of extraterritorial jurisdiction . . . displaces . . . the territorial jurisdiction expressly conferred by that Article . . . or explains the precise meaning of ‘jurisdiction’ in Article I of its Optional Protocol”).

175. *Id.* at 357.

176. See *id.* at 346 (noting respondent States argued “arrest and detention of the applicants outside the territory of the respondent State in . . . [other cases] constituted . . . a classic exercise of such legal authority or jurisdiction over those persons”).

177. *Id.* at 358 (quoting *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 25).

178. *Id.* at 358–59.

179. *Id.* at 359.

180. See, e.g., *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 136 (1975) (holding phrase “within their jurisdiction” in the Convention “is not . . . limited to the national territory of the High Contracting Party concerned” and “Parties are bound to secure the said rights and freedoms exercised within their territory or abroad”).

ertheless, *Banković* still preserved an extraterritorial scope for obligations under the Convention broader than the United States government had recognized for aliens abroad prior to *Boumediene*. The *Banković* court reaffirmed that “effective control” of a territory through military occupation could give rise to obligations under the Convention for the acts of both the state’s officials and the subordinate local administration. And the court recognized extraterritorial jurisdiction over the acts of a state’s consulates and embassies, and on ships and aircraft. The government respondents in the case conceded that, under traditional rules of public international law, jurisdiction could arise from “the assertion or exercise of legal authority, actual or purported,” over persons brought within the state’s control, and that the arrest and detention of persons by a state’s military authorities on foreign soil was a “classic exercise of such legal authority.”¹⁸¹ *Banković*, therefore, did not seem to affect the court’s prior holdings recognizing jurisdiction, inter alia, over cases involving a state’s extraterritorial arrest and detention of an individual.

Subsequent decisions have reaffirmed and perhaps broadened this approach to extraterritoriality. In *Öcalan v. Turkey*, the European Court found that Turkey’s arrest and forced extradition of a Turkish national from within Kenya had triggered rights under the Convention.¹⁸² The court found that the applicant was within Turkish jurisdiction immediately upon being taken into the custody of Turkish officials, “even though . . . Turkey exercised its authority outside its territory.”¹⁸³ It ambiguously distinguished *Banković* on the grounds that “the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.”¹⁸⁴

Issa v. Turkey, which was decided by a Chamber of the ECHR while *Al-Sheini* was pending in the lower U.K. courts, applied the “effective control” standard to reaffirm that acts in a foreign state that are committed by agents under a State’s “authority and control” may trigger the application of the ECHR, even outside the legal space of the Council of Europe:

[A] state may also be held accountable for violation of the Convention rights and freedoms of 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.¹⁸⁵

Issa involved kidnappings and deaths allegedly resulting from a six-week invasion of northern Iraq by 35,000 Turkish forces. Returning once again to a conception of jurisdiction as control, rather than as lawful authority to regulate, the court recognized that, for jurisdiction to exist, a

181. *Banković*, 2001-XII Eur. Ct. H.R. at 346.

182. *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 131.

183. *Id.* at 164.

184. *Id.*

185. *Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 567, 588 (2004).

State need not exercise “detailed control over the policies and actions of the authorities in the area” situated, but need only be in “overall control of the area.”¹⁸⁶ The court invoked the jurisprudence of the Human Rights Committee to hold that the Convention should not be “interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”¹⁸⁷ The applicants in *Issa* ultimately did not prevail because they could not demonstrate sufficiently that Turkish forces were actually operating in their area.¹⁸⁸ But the clear implication from *Issa* was that the extraterritorial conduct of a state’s military personnel could trigger Convention obligations in situations under the effective control of those personnel, even if they did not have effective control over the territory. Most recently, in *Medvedyev v. France*,¹⁸⁹ a Chamber of the European Court found that the seizure of a drug trafficking vessel on the high seas without legal justification violated Article 5 of the European Convention.

2. *Al-Skeini*. — The claims in *Al-Skeini* involved six civilians killed by British forces in southern Iraq. Four of them had been killed either at British checkpoints, by British forces searching a private home, or on the streets by British patrols.¹⁹⁰ The British military had concluded that in each case, an adequate threat was posed to justify the use of lethal force. The sixth case involved the death of Mr. Mousa in a British detention facility, described in the Introduction. The questions posed by the case included whether, after *Banković*, the “effective control” test applied outside of the territory of the members of Council of Europe. (The ECHR’s post-*Banković* decisions appear to counsel that it does.) The U.K. courts at all three levels found that the first five deaths did not occur within U.K. “jurisdiction” under the Convention, but that the case of Mr. Mousa did.

The British government disputed jurisdiction over Mr. Mousa’s case in the lowest administrative court. That court nevertheless found jurisdic-

186. *Id.*

187. *Id.* (citing Human Rights Comm., *López Burgos*, supra note 116; Human Rights Comm., *Casariago*, supra note 116).

188. *Id.* at 590.

189. App. No. 3394/03, ¶ 50 (Eur. Ct. H.R. July 10, 2008) (referred to Grand Chamber Dec. 1, 2008), at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (follow “HUDOC” hyperlink; input “3394/03” in “Application Number” field; press search; follow “Case of Medvedev” hyperlink) (on file with the *Columbia Law Review*) (noting ship and its crew were under control of French military forces from time of capture, “so that even though they were outside French territory, they were within the jurisdiction of France for the purposes of Article 1 of the Convention”).

190. *R (Al-Skeini and others) v. Sec’y of State for Def.*, [2007] UKHL 26, [2008] 1 A.C. 153 (appeal taken from Eng.) (U.K.). Another decedent had been killed in her home by a stray bullet. The British military disputed that the bullet had come from a British weapon. *Id.* ¶ 6, 1 A.C. at 177.

tion.¹⁹¹ The court read *Banković* as significantly narrowing the scope of extraterritorial jurisdiction under the Convention, and rejected the broader language from the later decision in *Issa* as inconsistent with *Banković*. Following *Banković*'s lead, the court relied upon traditional international principles of prescriptive jurisdiction, rather than jurisdiction as control, to define the scope of the Convention. The court nevertheless concluded that Mr. Mousa's death in a British military prison was sufficiently analogous to the narrow exceptions recognized in *Banković* for the extraterritorial actions of embassy and consulate personnel and actions on airplanes and ships for jurisdiction to be present. The court appeared to restrict its holding to the facts of the case:

[I]t is not at all straining the examples of extraterritorial jurisdiction . . . to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and . . . a prison.¹⁹²

The court could "see no reason in international law considerations, nor in principle, why in such circumstances the United Kingdom should not be answerable" under the Convention.¹⁹³ On appeal, the government accepted this narrow understanding of agency jurisdiction, but argued that no remedy was available in the U.K. courts because the Human Rights Act had not implemented domestically any extraterritorial obligations under the Convention.

The Law Lords affirmed both the dismissal of the first five cases and the recognition of jurisdiction over the case of Mr. Mousa.¹⁹⁴ In addressing the presumption against territorial application of the Human Rights Act, Lord Rodger observed that a state ordinarily could not assert its authority over the subjects of another sovereign in a foreign state, for reasons both of comity and practicality.¹⁹⁵ The assertion of legal obligations over the state's own agents abroad, however, was a different matter, since "[i]nternational law does not prevent a state from exercising jurisdiction over its nationals travelling or residing abroad," if the legislation "does not offend against the sovereignty of other states."¹⁹⁶ Consistent with classical prescriptive jurisdiction, he observed that making remedies available under the Convention for the acts of U.K. authorities in another state's territory would not offend the sovereignty of the other state and thus did not offend any aspect of international law.¹⁹⁷ This approach

191. *R (Al-Skeini and others) v. Sec'y of State for Def.*, [2004] EWHC (Admin) 2911, (2005) 2 W.L.R. 1401 (Eng.).

192. *Id.* ¶ 287, 2 W.L.R. at 1483.

193. *Id.*

194. *Al-Skeini*, [2008] 1 A.C. at 154 (syllabus).

195. *Id.* ¶¶ 45–46, 1 A.C. at 192–93 (Rodger, Lord).

196. *Id.* ¶ 46, 1 A.C. at 193 (Rodger, Lord) (citing Oppenheim's *International Law*, supra note 26, § 138).

197. *Id.* ¶ 54, 1 A.C. at 195.

would not result in “confer[ring] rights on people all over the world with little or no real conne[ct]ion with the United Kingdom,” since Convention rights would only arise for persons “within [U.K.] jurisdiction.”¹⁹⁸

With respect to the scope of extraterritorial jurisdiction under the Convention, Lord Rodger maintained that the critical question was “the link between the victim and the contracting state.”¹⁹⁹ He concluded that under either *Banković* or *Issa*, British forces exercised insufficient control in Basra to trigger jurisdiction in the first five cases. Lord Carswell agreed with Rodger’s analysis on this point, but emphasized how “stringent” the test was for extraterritorial jurisdiction.²⁰⁰ Because such jurisdiction was “pro tanto a diminution or invasion” of the sovereignty of another state, extraterritorial jurisdiction “should be closely confined.”²⁰¹ Once one went beyond the categories of embassies, consulates, and a military prison that was occupied and controlled by U.K. agents in Iraq, he would require “a high degree of control by the agents of the state” before recognizing jurisdiction in another state’s territory.²⁰²

* * *

The preceding examination of the approaches of international and regional human rights tribunals to extraterritorial conduct reveals substantial consensus regarding basic principles. Whether one employs the “authority and control” test of the Inter-American system, the “power or effective control” standard of the Human Rights Committee and the International Court of Justice, the “de facto and de jure effective control” of the Committee Against Torture—all of which apply to control over either persons or territories, the “effective control” test of the International Court of Justice, or the more territorially-constrained conception of “control” of the ECHR, *control*, rather than geography, is the touchstone for the recognition of rights protections abroad.

Concededly, the interpretation of regional and international human rights treaties may be imperfect evidence of what international law allows or requires regarding the application of domestic legal constraints on the exercise of state power abroad. Interpreting “jurisdiction” in human rights treaties requires consideration of both jurisdictional concepts under international law and the text and purpose of the specific human rights treaty, and may require consideration of the treaty’s negotiating history and subsequent state practice. In other words, any particular treaty framework may impose its own endogenous constraints on the meaning of jurisdiction. For example, the European Convention was created based on the assumption of common values shared by a particular

198. Id. ¶ 55, 1 A.C. at 195 (internal quotation marks omitted).

199. Id. ¶ 64, 1 A.C. at 197.

200. Id. ¶ 97, 1 A.C. at 206 (Carswell, Lord).

201. Id.

202. Id.

regional community, and has textual provisions (such as Article 56) that appear to support a territorially restrictive view of jurisdiction. *Banković* and *Al-Skeini* accordingly may reflect a more limited scope of extraterritorial jurisdiction based on control than customary international law would acknowledge.

But each of the tribunals addressed above to a significant extent was also construing “jurisdiction” as a concept of international law, whether from the perspective of control and state responsibility, or prescriptive jurisdiction. Their approaches confirm that contemporary international law does not prohibit a state from regulating the conduct of its agents abroad, through constitutional limitations or otherwise, if it ever did. Certainly nothing in modern international law principles of jurisdiction, prescriptive or otherwise, justified the formalistic territorial limitations imposed on the extraterritorial application of constitutional rights that the U.S. government sought to reaffirm in *Boumediene*.

V. *BOUMEDIENE* AND *MUNAF*: RESURRECTING THE EVOLUTIONARY APPROACH

The decisions in *Boumediene* and *Munaf* upholding the application of constitutional and statutory habeas corpus abroad retreated from two entrenched nineteenth-century principles—territorial sovereignty and citizenship—that had plagued U.S. extraterritoriality doctrine. *Boumediene* addressed the question of whether the Suspension Clause protected habeas corpus jurisdiction for aliens being detained as enemy combatants in Guantánamo Bay, a territory outside the formal sovereign territory of the United States, but subject to the United States’s “complete jurisdiction and control.” *Munaf* addressed whether statutory habeas jurisdiction applied to a U.S. citizen held by multinational forces in Iraq, but who remained under the United States’s effective control. Together, the decisions substantially reoriented the U.S. extraterritoriality doctrine toward a functional, control-based test. At the same time, they potentially opened U.S. doctrine toward an evolutionary relationship to international law.

Justice Kennedy’s majority opinion in *Boumediene* rejected the U.S. government’s argument that the Constitution’s geographic scope vis-à-vis aliens is limited to the formal sovereign territory—that the Constitution “stops where de jure sovereignty ends.”²⁰³ Justice Kennedy portrayed the Court’s prior extraterritoriality decisions, including *In re Ross*, the *Insular Cases*, *Johnson v. Eisentrager*, *Reid v. Covert*, and his own prior concurring opinion in *United States v. Verdugo-Urquidez*, as establishing a “functional approach” to the Constitution’s application abroad.²⁰⁴

The “common thread” uniting these cases, according to Kennedy, was “the idea that questions of extraterritoriality turn on objective factors

203. *Boumediene v. Bush*, 128 S. Ct. 2229, 2253 (2008).

204. *Id.* at 2258.

and practical concerns, not formalism.”²⁰⁵ Kennedy read the cases as allowing the Court “to inquire into the objective degree of control the Nation asserts over foreign territory.”²⁰⁶ He cited the leading *Insular* decision, *Downes v. Bidwell*, for the proposition that the application of a constitutional provision abroad depends on “the situation of the territory and its relations to the United States.”²⁰⁷ The *Insular Cases* thus held that only “fundamental” constitutional provisions applied to the unincorporated territories acquired during the Spanish-American War because the Supreme Court recognized the need to adapt the Constitution to circumstances where the United States only planned to govern temporarily, where U.S. legal procedures were alien to a population previously governed under a civil law system, and where completely displacing the existing legal system could risk “uncertainty and instability.”²⁰⁸ The *Insular Cases* thus “not[ed] the inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere.’”²⁰⁹

Likewise, Justice Kennedy continued, at least for concurring Justices Harlan and Frankfurter in *Reid v. Covert*, the determinative issue in upholding the extraterritorial application of grand and petit jury protections for U.S. citizens was not citizenship, but “practical considerations, related . . . to the place of their confinement and trial.”²¹⁰ Kennedy quoted Justice Harlan for the proposition that “the particular local setting, the practical necessities, and the possible alternatives are relevant to . . . whether jury trial *should be deemed*” necessary²¹¹ and, in particular, whether judicial enforcement of the provision would be “impracticable and anomalous.”²¹² The critical difference between the applications of petit and grand jury rights in *Reid* and their denial in *In re Ross* therefore was the “practical considerations” in *Reid* “that made jury trial a more feasible option.”²¹³

Similarly, the central issue justifying the denial of habeas review to the enemy aliens in *Eisenstrager* was not citizenship or extraterritoriality, but the joint Allied control over the Landsberg prison. Sovereignty, as

205. *Id.*

206. *Id.* at 2252.

207. *Id.* at 2254 (internal quotation marks omitted) (quoting *Downes v. Bidwell*, 182 U.S. 244, 293 (1901) (White, J., concurring)).

208. *Id.*

209. *Id.* at 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)); see also *id.* at 2254–55 (“[T]he real issue in the *Insular Cases* was . . . which [constitutional] provisions were applicable [to the government] . . . in dealing with new conditions and requirements.” (internal quotation marks omitted) (quoting *Balzac*, 258 U.S. at 312)).

210. *Id.* at 2256.

211. *Id.* (internal quotation marks omitted) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result)).

212. *Id.* at 2255–56 (internal quotation marks omitted) (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result)).

213. *Id.* at 2257; see also *id.* at 2256 (noting *Reid* concurring justices preserved the holding in *In re Ross*, which they understood as holding “under some circumstances Americans abroad have no right to indictment and trial by jury”).

used in *Eisenstrager*, was “a multifaceted concept,”²¹⁴ which referred to something akin to the international law idea of jurisdiction as control. Sovereignty accordingly referred to “the objective degree of control the United States asserted” over the facility,²¹⁵ or “plenary control, or practical sovereignty,” rather than “*de jure* sovereignty.”²¹⁶ Justice Kennedy quoted the international law conception of sovereignty as “a state’s lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there.”²¹⁷ Furthermore, Kennedy suggested that the relevant problem of “control” in postwar Germany extended beyond the multilateral control of the prison itself. The United States’s temporary occupation in Germany covered 57,000 square miles of territory and eighteen million people. The United States was responsible for supervising “massive reconstruction and aid efforts,” and faced potential security threats from the defeated enemy.²¹⁸ Kennedy observed that “[t]he Court’s holding in *Eisenstrager* was thus consistent with the *Insular Cases*, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely.”²¹⁹ This was not an indefinite occupation of the type that the Human Rights Committee and the ICJ have found subjects Israel to full legal accountability in the Occupied Territories. It was temporary, like the United States’s temporary occupation of Cuba after the Spanish-American War in *Neely*, but with potential security threats more like those facing the British forces in *Al-Skeini*. By contrast, Guantánamo Bay is “no transient possession”;²²⁰ the United States exercises *de facto* sovereignty over Guantánamo Bay by virtue of its complete jurisdiction and control there.

Kennedy also found that functional concerns involving control had always informed the right to habeas corpus. In England, habeas corpus jurisdiction historically might not have run to certain territories due to such “prudential concerns” as whether a court’s jurisdiction would “conflict with the judgments of another court of competent jurisdiction” or whether courts, as a practical matter, might be unable to enforce their judgments due to the great distance.²²¹ Similarly, habeas might not extend where a court would be disobeyed; where another nation’s court

214. *Id.* at 2257.

215. *Id.* at 2258.

216. *Id.* at 2252.

217. *Id.* (internal quotation marks omitted) (quoting Restatement (Third) of Foreign Relations Law of the United States § 206 cmt. b (1986)).

218. *Id.* at 2261.

219. *Id.* at 2260–61.

220. *Id.* at 2261.

221. *Id.* at 2250 (“[P]rudential concerns . . . such as comity and the orderly administration of criminal justice affect the appropriate exercise of habeas jurisdiction.” (internal quotation marks omitted) (quoting *Munaf v. Geren*, 128 S. Ct. 2207, 2220 (2008))).

had jurisdiction; where another nation's laws applied;²²² or where, as in *Eisentrager*, there were difficulties involved in producing the petitioners.²²³ Accordingly, for purposes of extraterritorial application of habeas corpus, the majority found the following considerations relevant: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."²²⁴ The majority stressed the practical reality that the Guantánamo Bay detainees had spent six years under U.S. control with no meaningful legal oversight in a territory where U.S. law has been the only law for over a century.²²⁵

Although some commentators have attempted to read *Boumediene* as limiting extraterritorial application of the Constitution to Guantánamo or to territories over which the U.S. exercises complete jurisdiction or de facto sovereignty, the opinion cannot be cabined in this manner. Nothing in the three-factor test for habeas corpus indicates that de facto control is required. The decision in *Reid*, which Kennedy found fully consistent with his analysis, upheld criminal procedural protections on U.S. military bases abroad and did not turn on the type of complete control over territory that the United States exercises at Guantánamo. Likewise, the presence or absence of "complete" territorial control or de facto sovereignty were not the relevant reasons for denying criminal procedural protections in U.S. consular courts abroad in *In re Ross*, or on sovereign U.S. territory in the *Insular Cases*. Indeed, an argument that would have made constitutional habeas corpus applicable outside the United States *only* at Guantánamo, as a territory uniquely subject to U.S. de facto sovereignty, was presented to the Court in an amicus brief joined by this author, but was not embraced by the Court.²²⁶

Boumediene requires a more modulated analysis of control, and looks to the full range of practical implications for application of a particular constitutional right that arises from whatever degree of control the United States exercises in a particular context. The decision does not provide much guidance regarding how a "practical control" test should be applied for constitutional rights other than habeas corpus, but some rough guidelines are offered. The decision portrays control as spanning a spectrum, at least for the purposes of the application of the Suspension Clause. De jure²²⁷ and de facto sovereignty lie at one end of the spec-

222. *Id.* at 2251.

223. *Id.* at 2257.

224. *Id.* at 2259.

225. *Id.* at 2275.

226. Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners at 1-2, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195 & 06-1196).

227. *Boumediene*, 128 S. Ct. at 2258 (de jure sovereignty "affects, at least to some extent, the political branches' control over that territory").

trum (although even *de jure* sovereignty by one state may not include *de facto* control—a situation starkly illustrated by the respective roles of Cuba and the United States over Guantánamo Bay).²²⁸ Control that is “absolute” and “indefinite” also weighs in favor of constitutional protection, as does a situation where the United States intends a long-term occupation or intends to displace all local legal institutions.²²⁹ On the other hand, in a situation where control is multilateral, where the United States is “answerable to its Allies for all activities occurring there,”²³⁰ where the location is in an active theater of war,²³¹ or where security is uncertain, adequate control may not be present. Additional factors to be considered may include the potential for compromising a military mission,²³² the function of U.S. authority in a location, the size of the territory and population under U.S. authority, the compatibility of U.S. legal standards with local law, the potential for friction with a host government, and the potential for conflicting jurisdiction.

Boumediene's rejection of formal territorial restrictions and citizenship requirements, and its focus on practical control for determining when constitutional rights limit governmental conduct abroad, largely comport with modern international law's focus on effective control. The Court did not explicitly rely on the effective control decisions of human rights tribunals, although these authorities were presented to the Court by the U.N. High Commissioner for Human Rights as *amicus*.²³³ Nevertheless, the decision broke with the nineteenth-century concept of jurisdiction, largely brought U.S. doctrine in line with the international view that effective control establishes a state's legal accountability for harms committed abroad, and opened the door for future development of extraterritoriality doctrine in a direction consistent with international law.

Boumediene thus may be considered a reassertion of an evolutionary approach to international law in the Court's jurisprudence regarding extraterritoriality. Of course, it is possible that the Court simply stumbled upon a formula for determining extraterritoriality that appeared to parallel international rules, but that the Court did so for its own, purely domestic reasons. Perhaps more likely, the Court, which had the international law decisions before it, preferred not to explicitly link the test it articulated to international doctrine. The fact that the Court did not cite international law, however, does not preclude the doctrine from being informed by international law or from evolving with international law in the future. As both Judith Resnik and Rosalind Dixon have observed,

228. See *id.* at 2252 (“Indeed, it is not altogether uncommon for a territory to be under the *de jure* sovereignty of one nation, while under the plenary control, or practical sovereignty, of another.”).

229. *Id.* at 2260.

230. *Id.* (citing *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948)).

231. *Id.* at 2262.

232. *Id.* at 2261.

233. Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners at 5–16, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195 & 06-1196).

courts often engage in “silent dialogues” or “co-evolution” in the transnational migration and development of legal principles.²³⁴ As Harold Koh contends, such dialogues may result in the development of “different labels” or “parallel rules” for the same underlying principles.²³⁵ The critical point for now is that a doctrine that had been entrenched in a rigid nineteenth-century conception of territorial jurisdiction, at least with respect to extraterritorial constitutional protection for aliens, has been liberated from that stricture in a manner consistent with modern jurisprudence regarding the extraterritorial rights of citizens under the U.S. Constitution and the extraterritorial obligations of states under international law.

Concededly, the *Boumediene* decision does not reach as broadly as those of the human rights bodies, in that it focuses on control over *territories* (occupied Cuba in *Neely*, occupied Germany in *Eisentrager*, the *Insular* territories), *facilities* (Landsberg Prison in *Eisentrager*, the military bases in *Reid*), and *proceedings* (the consular tribunal in *In re Ross*, the military trials in *Reid*). The decision does not specifically address control that is exercised over *people* (such as in the context of international kidnappings, or extraterritorial abuse of detainees). In this sense, it does not reach as broadly as the decisions under international and regional human rights instruments.

The companion decision in *Munaf v. Geren*, however, did address the question of extraterritorial control over an individual, albeit in the context of application of the federal habeas statute.²³⁶ The Court’s pragmatic approach based on de facto control again mirrors an international law analysis. *Munaf* addressed whether the federal habeas statute established federal court jurisdiction over two U.S. citizens, Mr. Munaf and Mr. Omar, who were detained by U.S. forces acting as part of the Multinational Force—Iraq (MNF-I), in Iraq.²³⁷ The case thus posed the

234. Rosalind Dixon, A Democratic Theory of Constitutional Comparison, 56 Am. J. Comp. L. 947, 960–63 (2008) (“[I]n an increasingly globalized world, constitutional democracies which start with sufficient commonality in a particular constitutional area are very likely to experience a co-evolution in constitutional values.”); Judith Resnik, Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry, 115 Yale L.J. 1564, 1612–26 (2006) (identifying “implicit dialogues” as “silent absorption” of international norms by domestic courts without explicit reference to an international source).

235. See Harold Hongju Koh, Foreword: On American Exceptionalism, 55 Stan. L. Rev. 1479, 1483–84 (2003) (discussing United States’s use of “different labels” for same underlying principles as found in international law); Harold Hongju Koh, International Law as Part of Our Law, 98 Am J. Int’l L. 43, 45 (2004) (discussing development of “parallel rules” between U.S. and foreign jurisprudence in which “the Court has noted when American legal rules seem to parallel those of other nations”).

236. *Munaf v. Geren*, 128 S. Ct. 2207, 2218 (2008) (addressing “question whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign’s territory to that sovereign’s government for criminal prosecution”).

237. *Id.* at 2213.

question whether the detainees could be considered “in custody under . . . the authority of the United States” for purposes of the federal habeas statute.²³⁸

As described by the Court, the MNF-I was an international coalition of twenty-six nations, including the United States, operating in Iraq under the unified command of the United States military, at the request of the Iraqi government, and pursuant to U.N. Security Council resolutions.²³⁹ Pursuant to an agreement with the Iraqi government, MNF-I forces were authorized to detain individuals believed to pose a threat to Iraqi security, and to continue to detain such persons during Iraqi criminal proceedings. MNF-I detention operations were overseen by an American military unit, under the command of the U.S. military. At the time of the decision, MNF-I forces were holding approximately 24,000 detainees at Camp Cropper and elsewhere.²⁴⁰

Omar and Munaf were detained as security internees pursuant to the decision of MNF-I tribunals composed of three American military officers, consistent with Article 5 of the (Third) Geneva Convention. Omar’s decision was then sustained by a Combined Review and Release Board, comprised of six representatives of the Iraqi government and three MNF-I officers. His habeas petition sought to challenge his transfer to Iraqi custody for trial before the Iraqi courts.²⁴¹ Munaf was prosecuted before an Iraqi court while in U.S. custody, and was awaiting further proceedings when his habeas petition was filed.²⁴²

The U.S. government maintained that because the United States was acting as an agent for a multinational force, the Court should follow the decision in *Hirota v. MacArthur*²⁴³ to hold that habeas jurisdiction was not available.²⁴⁴ *Hirota* involved high level Japanese military personnel who were convicted by the International Military Tribunal for the Far East, a tribunal established and overseen by General MacArthur for the Allies. In a three-paragraph opinion, the Supreme Court found that habeas review was not appropriate, since the military tribunal was “not a tribunal of the United States” and General MacArthur was acting “as the agent of the Allied Powers.”²⁴⁵

In rejecting the government’s claim that the multinational coalition should defeat a finding of control, the *Munaf* Court again privileged functionalism over formalism. Writing for a unanimous Court, Chief Justice Roberts examined the actual nature of U.S. control over the MNF-

238. 28 U.S.C. § 2241(c)(1), (3) (2006).

239. *Munaf*, 128 S. Ct. at 2213.

240. *Id.* at 2213–14.

241. *Id.* at 2214.

242. *Id.* at 2215.

243. 338 U.S. 197 (1948).

244. See *Munaf*, 128 S. Ct. at 2217 (“The Government argues that the multinational character of the MNF-I, like the multinational character of the tribunal at issue in *Hirota*, means that it too is not a United States entity subject to habeas.”).

245. *Hirota*, 338 U.S. at 198.

I, and especially noted the government's concession that Omar and Munaf were "in the immediate 'physical custody' of American soldiers who answer[ed] only to an American chain of command,"²⁴⁶ and whose actions were controlled, "[a]s a practical matter," by "'the President and the Pentagon.'"²⁴⁷ Because the United States had authority to release the detainees without the consent of other countries, the Court found that they were "in custody" of the United States within the meaning of the habeas statute.²⁴⁸ The Court concluded that "actual custody" sufficed for purposes of habeas jurisdiction, "even if that custody could be viewed as 'under . . . color of' another authority, such as the MNF-I," at least for American citizens.²⁴⁹ Whatever may have been the reality of U.S. authority over General MacArthur, the *Hirota* Court had relied on the Solicitor General's representation that MacArthur "did not serve 'under the Joint Chiefs of Staff.'"²⁵⁰ *Hirota* was thus distinguishable.²⁵¹

The pragmatic factual inquiry into the nature of extraterritorial U.S. control over the individuals in *Munaf* bears striking similarity to the British courts' analysis of U.K. control over the British detention facility in Iraq,²⁵² as well as the analysis of the various international tribunals in situations where a state exercises extraterritorial power over a specific individual.²⁵³ Although the Court did not couch its inquiry in terms of effective control, its analysis sought to determine whether the United States's control over the detainees was effective as a practical matter, despite U.S. participation in the multilateral operation.

Moreover, both *Munaf* and *Hirota* share striking parallels with recent decisions of international bodies holding that states do not incur legal responsibility for harms committed by their troops when their troops are participating in multilateral peacekeeping or other operations under multilateral control or U.N. command. The general principle in such contexts, as stated by the International Law Commission, is that the "conduct of an organ of a state . . . that is placed at the disposal of [an]

246. *Munaf*, 128 S. Ct. at 2216 (quoting Brief for the Respondents at 21, *Munaf*, 128 S. Ct. 2207 (No. 06-1666)).

247. *Id.* (quoting Transcript of Oral Argument at 15, *Munaf*, 128 S. Ct. 2207 (No. 06-1666)).

248. *Id.* at 2217.

249. *Id.* (quoting 28 U.S.C. § 2241(c)(1) (2006)).

250. *Id.* at 2217-18 (quoting Transcript of Oral Argument at 42, 50, 51, *Hirota*, 338 U.S. 197 (No. 239)).

251. *Munaf* also submitted a petition to the Human Rights Committee against Romania, alleging that Romania shared responsibility for his mistreatment by transferring him to U.S. military custody in Iraq. The Committee dismissed the petition on the grounds that the harms alleged by *Munaf* in U.S. custody were not "the necessary and foreseeable consequence" of his transfer and that Romania thus did not "exercise jurisdiction over the author in a way that exposed him to a real risk of becoming a victim of any violations under the Covenant." U.N. Human Rights Comm., Views, Communication No. 1539/2006, ¶¶ 7.5, 14.6, U.N. Doc. CCPR/C/96/D/1539/2006 (Aug. 21, 2009).

252. See *supra* Part IV.D.2 (discussing *Al-Skeini* case).

253. See *supra* Part IV.C (discussing International Court of Justice).

international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct.”²⁵⁴ Where the state retains some control over its national contingent, the decisive question in establishing legal responsibility for particular conduct is whether an “organization exercises effective control over th[e] conduct” in question.²⁵⁵

In *Behrami and Saramati*,²⁵⁶ the ECHR applied this principle to hold that France was not responsible for the conduct of its troops as part of a U.N. peacekeeping operation in Kosovo. The Behramis contended that France was responsible for the death and injury of two children after French forces failed to clear an undetonated cluster bomb.²⁵⁷ Mr. Saramati complained that he had been unlawfully detained for six months at the hands of French officers.²⁵⁸ The ECHR concluded that because the peacekeeping organs were either subsidiary organs of the U.N. or exercising powers lawfully delegated by the Security Council, their actions were attributable to the U.N., not to France.²⁵⁹

On the other hand, in *Al-Jedda v. UK Secretary of State for Defence*,²⁶⁰ a majority of the U.K. Law Lords rejected the United Kingdom’s attempt to attribute the conduct of U.K. forces in Iraq to the United Nations. The factual circumstances closely paralleled those in *Munaf*—the case involved a challenge under the European Convention to the allegedly arbitrary detention of a British national who was being held as a security detainee in British-policed Basra. As Lord Bingham of Cornhill reasoned, there had been no suggestion that the U.N. controlled or was responsible for the abuses by U.S. troops at Abu Ghraib or the abuses by U.K. forces at issue in *Al-Skeini*, and this situation was no different:

The UN did not dispatch the coalition forces to Iraq. The [Coalition Provisional Authority] was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate. . . . [T]he UN gave the multi-national force express authority to take steps to promote security and stability in Iraq, but . . . the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control

254. Int’l Law Comm’n, Responsibility of International Organizations, art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004) (emphasis added).

255. *Id.*

256. *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).

257. *Id.* ¶¶ 5–6, 46 I.L.M. at 748.

258. *Id.* ¶¶ 8–13, 46 I.L.M. at 748–49.

259. *Id.* ¶¶ 151–52, 46 I.L.M. at 773.

260. [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.) (U.K.).

of the UN, or that UK forces were under such command and control when they detained the appellant.²⁶¹

Like *Boumediene*, the *Munaf* Court did not acknowledge the *Al-Jedda* decision, although the case had been brought to the Court's attention in amicus briefs.²⁶² Both *Munaf* and *Al-Jedda* applied an effective control test and reached the same conclusions regarding the respective control exercised by U.S. and British forces in Iraq.²⁶³

VI. EMBEDDING EFFECTIVE CONTROL

The appropriate scope of a state's extraterritorial obligations is legally unresolved at this time, both as a matter of international law and of U.S. constitutional law. The full implications of the *Boumediene* decision and the ultimate parameters of an effective control test—including its application to persons versus territories, and under what circumstances—remain subjects for future development. Nevertheless, *Boumediene* and *Munaf* appear to leave the door somewhat open to considering effective control in the international sense in determining the functional applicability of constitutional provisions to conduct abroad. But how would an approach to extraterritorial application of the Constitution that considered effective control operate in practice? In his dissent in *Boumediene*, Justice Scalia criticized the majority's functional test for determining the Constitution's application to conduct abroad as "inherently subjective."²⁶⁴ Other commentators, both before the decision and since, have expressed doubt regarding the malleability of a test that turns on whether application of the Constitution would be "impracticable and anomalous" in a particular context.²⁶⁵ Deciding whether states adequately control

261. *Id.* ¶ 23, 1 A.C. at 348–49. (Bingham, Lord). The Law Lords in *Al-Jedda* ultimately proceeded, however, to hold that U.N. Security Council Resolution 1546, authorizing "internment . . . necessary for imperative reasons of security," displaced the ECHR art. 5(1) prohibition on arbitrary detention. *Id.* ¶ 39, 1 A.C. at 355.

262. Brief of Former U.S. Diplomats and Nat'l Security Specialists as Amici Curiae in Support of Respondents at 18 n.24, 23–24, *Munaf v. Geren*, 129 S. Ct. 19 (2008) (Nos. 07-394 & 06-1666).

263. For additional recent cases exploring state responsibility in cooperation with multilateral institutions, see *Galic v. The Netherlands*, App. No. 22617/07, ¶ 46 (Eur. Ct. H.R. June 9, 2009), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (follow "HUDOC" hyperlink; check the "Decisions" box on left sidebar; input "22617/07" in "Application Number" field; press search; follow "Galic v. The Netherlands" hyperlink) (on file with the *Columbia Law Review*) (finding Netherlands was not responsible for acts or omissions of International Criminal Tribunal for former Yugoslavia, in light of tribunal's status as subsidiary organ of U.N.); *Blagojevic v. The Netherlands*, App. No. 49032/07, ¶ 46 (Eur. Ct. H.R. June 9, 2009), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (follow "HUDOC" hyperlink; check the "Decisions" box on left sidebar; input "49032/07" in "Application Number" field; press search; follow "Blagojevic v. The Netherlands" hyperlink) (on file with the *Columbia Law Review*) (same).

264. *Boumediene v. Bush*, 128 S. Ct. 2229, 2303 (2008) (Scalia, J., dissenting).

265. Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 *Colum. L. Rev.* 973, 976 (2009) (arguing Court's functional approach

complex events occurring abroad is not easy, particularly where their acts are intermixed with those of other states. A pragmatic test that requires looking at the totality of the circumstances no doubt is unsatisfying to those who crave bright-line rules. But the effective control decisions of other national courts²⁶⁶ and international tribunals demonstrate both that courts are capable of applying such a standard, and that workable principles are available. An effective control standard does not mean that every action abroad gives rise to human rights or constitutional law obligations.²⁶⁷ While complete answers are premature, this Part accordingly suggests some preliminary considerations for application of an effective control test in constitutional extraterritorial analysis.

Like other courts adopting the effective control approach, the Supreme Court's decisions in *Boumediene* and *Munaf* distinguished the situations before the Court from World War II prisons under multilateral control or tribunals that were not subject to ultimate U.S. authority. As detailed previously, other international, regional, and national tribunals also have applied the effective control test to find that states lack legal responsibility when they do not, as a practical matter, control the events around them, whether as a result of participating in peacekeeping operations not under their own command, or due to highly unstable security situations, such as those U.K. forces faced in trying to police the streets of Basra in occupied Iraq.

Boumediene's functional approach to the application of habeas corpus to Guantánamo Bay does not preclude the possibility that in some cases, application of the Constitution in overseas contexts would be unworkable, overbroad, and would wreak havoc with U.S. governmental obligations abroad. As Justice Jackson put it provocatively in *Eisenstrager*:

Such a construction [that the Constitution applies to aliens abroad] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could

enables "courts to make decisions respecting the applicability . . . of constitutional provisions abroad based entirely on policy concerns"); see also Neuman, *Strangers to the Constitution*, supra note 52, at 113–17 (characterizing impracticable and anomalous test as form of "global due process"). But see Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 259, 273 (2009) (identifying "impracticable and anomalous test" as "best fit . . . [with] the Court's modern case law" and noting that although test "suffers from [a] lack of certainty," alternatives may not be superior); Gerald L. Neuman, *Understanding Global Due Process*, 23 Geo. Immigr. L.J. 365, 370 (2009) (discussing, pre-*Boumediene*, implications of "impracticable and anomalous" approach for constitutional rights of aliens abroad).

266. See Chimène I. Keitner, *Rights Beyond Borders* (Oct. 2, 2009), available at <http://ssrn.com/abstract=1480886> (unpublished manuscript, on file with the *Columbia Law Review*) (examining approach to extraterritorial application of domestic rights under various national legal systems).

267. Nor, in U.S. law, does it mean that a remedy is invariably available. See *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (noting that "special factors" would preclude *Bivens* action for claims of torture brought by alien detainees on Guantánamo), cert. denied, 78 U.S.L.W. 3360 (U.S. Dec. 14, 2009) (No. 09-227).

require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against “unreasonable” searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.²⁶⁸

Justice Jackson’s concern addressed the extent to which all applicable constitutional provisions should apply to a foreign territory that is under U.S. occupation, and the absence of limiting principles. The European Court of Human Rights stated this concern less inflammatorily in *Banković*.²⁶⁹ The court felt it could not plausibly find “control” arising from the air strikes if the implication was that *all* Convention rights would have to be respected as a result. The Convention reflected an assumption that states *in the region* shared common understandings of appropriate rights and values; it was not intended to be a Convention for the world.²⁷⁰ Moreover, an occupying power is obligated to respect, to the extent possible, the local laws in the place of occupation. Both of these considerations weighed against finding that the NATO countries exercised jurisdiction in the former Yugoslavia.

Translated to the U.S. context, a number of these concerns are pertinent. While the application of the constitutional prohibition against cruel and unusual punishment or conduct that shocks the conscience to a detainee in U.S. custody abroad is entirely reasonable,²⁷¹ is it plausible to apply the Fourth Amendment warrant requirement²⁷² or the Fifth Amendment prohibition on takings without just compensation? Is it appropriate to obligate the United States to respect constitutional protections for freedom of speech and religion, or equal protection for the rights of women, when occupying a country such as Iraq or Afghanistan with radically different cultural and religious traditions?

At least three different considerations are at work here. The first objection has to do with proportionality between the extent of control exercised and the scope of legal obligations incurred. Does (or should) a state’s exercise of control over a person for certain limited purposes (e.g., detention and interrogation) nevertheless give rise to the full range of

268. *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1949); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990) (noting “significant and deleterious consequences” that would follow from recognizing extraterritorial application of Fourth Amendment).

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

270. *Id.* at 356–57.

271. Cf. Exec. Order No. 13,491 § 3(a), 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009) (requiring humane treatment “whenever . . . individuals [detained in any armed conflict] 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”).

272. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157, 159 (2d Cir. 2008) (holding Fourth Amendment reasonableness requirement, but not warrant requirement, applies to search of citizen’s property abroad).

constitutional or treaty obligations? In *Banković*, the European Court suggested yes in adopting a wholesale approach to Convention obligations and was therefore reluctant to find jurisdiction. The more workable approach, and the majority international rule, however, has been a retail approach, which recognizes jurisdiction, and therefore state obligations, only in relation to the nature and scope of the control that is exercised. In other words, it is the particular relationship between the territory or person and the agents of the state that determines what rights are implicated.²⁷³ Where state agents kidnap an individual abroad, only the rights implicated by that conduct would be at issue. Assuming reasonable margins for the exercise of discretion, proportionality, and human error, as are allowed under international humanitarian law, this concern is frequently overstated. At the other extreme, where an occupation of a territory is not temporary, but indefinite, and where the state exercises complete control over the region, as Israel does in the Occupied Territories, recognizing applicability of the full range of a state's human rights obligations is appropriate.²⁷⁴ The U.S. Supreme Court has drawn similar distinctions between territorial arrangements that are temporary (*Cuba in Neely*) and permanent (*Guantánamo in Boumediene*). The Supreme Court also has long followed a retail approach to the application of the Constitution abroad. At least since the *Insular Cases*, the relevant question has been whether a particular constitutional provision is applicable to a particular context abroad,²⁷⁵ and this approach was reaffirmed in *Boumediene*.

273. See Adam Roberts, *What Is a Military Occupation?*, 1984 *Brit. Y.B. Int'l L.* 249, 304–05 (“[W]ithin the law on occupations there is some allowance for the application of different combinations of rules in different circumstances.”).

274. See *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 *I.C.J.* 136, 197–98 (July 9); U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm.: Israel*, ¶ 11, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998); see also U.N. Human Rights Comm., *Israel* 2003, *supra* note 122, ¶ 11.

275. See *Downes v. Bidwell*, 182 U.S. 244, 292 (1901) (White, J., concurring) (noting relevant question “is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable”). Similarly, in his dissent in *Johnson v. Eisentrager*, Justice Black noted:

If our country decides to occupy conquered territory either temporarily or permanently, it assumes the problem of deciding how the subjugated people will be ruled, what laws will govern, who will promulgate them, and what governmental agency of ours will see that they are properly administered. This responsibility immediately raises questions concerning the extent to which our domestic laws, constitutional and statutory, are transplanted abroad. Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries. But that does not mean that the Constitution is wholly inapplicable in foreign territories that we occupy and govern.

339 U.S. 763, 796–97 (1950) (citing *Downes*, 182 U.S. at 270–71).

Another aspect of international law may also assist with determining the legal obligations that should be applicable in any particular circumstance. Under international human rights law, a state is commonly understood to incur three tiers of legal obligations—the obligations to respect, protect, and ensure rights.²⁷⁶ The primary obligation, to respect, obligates a state not to violate rights through its own conduct or the conduct of its agents. This obligation generally encompasses what liberal political theory describes as negative rights—the obligation that the state must do no harm. The second tier, to protect, obligates the state to shield individuals from harms committed by third parties, and includes some obligations that would fall outside of state obligations under the U.S. Constitution under the state action doctrine. The third tier, to ensure or fulfill rights, requires the state to secure the enjoyment of rights that people are unable to secure themselves. Under U.S. constitutional law, this would include obligations to ensure a republican form of government or to establish fair court systems. The second and third tiers of rights encompass what liberal theory portrays as positive rights or obligations.

Part of the concern of the European Court of Human Rights in *Banković* regarding the wholesale application of Convention rights reflected the scope of obligations embraced by these three tiers. The court was concerned that an obligation not to arbitrarily deprive persons of life in a NATO military campaign in Serbia (a primary obligation to respect) should not also carry with it obligations, inter alia, to establish schools (a tertiary obligation to ensure). Conceptualizing rights in terms of primary, secondary, and tertiary obligations offers one established way to think about tailoring a state's legal obligations to the actual extent of authority exercised.

The second concern raised by Justice Jackson's quotation—that certain legal protections are utterly inappropriate for situations of armed conflict abroad—is to some extent a red herring. International humanitarian law establishes special international rules for states in wartime. Additionally, constitutional provisions such as the Takings Clause have been held by the Supreme Court, in light of international law, not to apply to the unavoidable destruction of property in a wartime context.²⁷⁷ The appropriateness of applying certain rights in situations of armed conflict has been confronted on the international plane in parsing the relationship between international humanitarian law and human rights law. Similar analyses can be pursued in the constitutional context.

The third objection is more compelling. It seems reasonable to assume that there are certain contexts where application of particular con-

276. 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 three tiers of obligations in context of economic, social, and cultural rights).

277. See cases cited supra note 82.

stitutional requirements to the behavior of government agents abroad would either be unworkable for pragmatic reasons, or would be otherwise inappropriate, such as where the Constitution requires an approach unknown to the law of the territory being occupied. This was at least one of the Court's considerations in the *Insular Cases*, in holding that Anglo-American jury procedures were inappropriate for territories with civil law traditions.

Both treaty and constitutional doctrines do exist, however, to address such concerns. Where a treaty is being applied, flexible interpretation through a margin of appreciation²⁷⁸ or construction of a treaty's limitations provisions may be adequate to address the problem. In more extreme circumstances, the appropriate resolution may be to allow derogation from a particular treaty obligation. Narrowly employed, these tools would build in flexibility in responding to particular circumstances, while preserving a nation's fundamental, nonderogable obligations, including the duty to protect life and to prevent and penalize acts of torture and cruel, inhuman, or degrading treatment or punishment.

In the context of U.S. constitutional law, *Boumediene's* functional, pragmatic control test injects flexibility into the extraterritorial application of the Constitution. The test also draws upon existing doctrine examining whether application of specific rights abroad would be "impracticable and anomalous" in light of particular situations or cultural contexts. Thus, in *Reid v. Covert*, Justice Harlan found that it was not "impracticable and anomalous" to recognize constitutional grand and petit jury protections for U.S. civilians tried by the U.S. military overseas.²⁷⁹ In *Verdugo*, Justice Kennedy reasoned in concurrence that applying the Fourth Amendment's warrant requirement to the search of an alien's property in Mexico was "impracticable and anomalous," since no U.S. court was available at the time to issue search warrants in another country, and because residents in other countries may have different expectations of privacy.²⁸⁰ There were flaws in Justice Kennedy's reasoning, since he suggested that the Fourth Amendment should apply to the search of a U.S. citizen's property abroad, even though the "impracticability" of obtaining a warrant would have been the same. Kennedy also failed to consider whether the "reasonableness" requirement of the Fourth Amendment should apply to an extraterritorial search, irrespective of the warrant requirement.

278. See R. St. J. Macdonald, *The Margin of Appreciation*, in *The European System for the Protection of Human Rights* 83 (R. St. J. MacDonal et al. eds., 1993) (noting doctrine of margin of appreciation in European Court of Human Rights case law seeks to "develop a reasonably comprehensive set of review principles appropriate for application across the entire [European] Convention, while at the same time recognizing the diversity of political, economic, cultural and social situations in" European States).

279. 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result).

280. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

These infirmities notwithstanding, if rigorously applied, the “impracticable and anomalous” approach suggests that some flexibility might remain where it actually was unworkable to apply constitutional protections in a particular context. But as with treaty limitations and derogations, constitutional protections for fundamental protection of life and bodily security should always be “practicable” to apply to persons in U.S. custody.

Likewise, the Supreme Court developed a doctrine regarding “fundamental” rights in incorporating constitutional rights against the states through the Fourteenth Amendment,²⁸¹ as well as in the *Insular Cases* for determining what constitutional rights should be respected in unincorporated U.S. territories. These related doctrines require consideration of the extent to which a particular constitutional provision, or a particular aspect of constitutional doctrine (such as the requirement of twelve-member juries, unanimous verdicts, or search warrants) is fundamental to the constitutional system, or instead is a culturally contingent procedural requirement. In answering this question, the Court at times has looked to what practices are considered fundamental not only under Anglo-American law but also in the laws of civilized nations.²⁸² Moreover, in determining what constitutional doctrines should apply to overseas territories, lower courts have interpreted the fundamental rights doctrine as an inquiry into whether rights are “fundamental in the international sense.”²⁸³ In answering this question, they have looked explicitly to international law and foreign practice to determine the appropriateness of applying any particular provision extraterritorially.

Consistent with international law approaches to this question, both the “fundamental” rights and “impracticable and anomalous” doctrines suggest that certain constitutional requirements might not apply, or might not apply in the same way, in an occupied territory where respect for local cultural and religious traditions was appropriate. In applying the Equal Protection Clause to overseas U.S. territories, for example, the

281. See *Adamson v. California*, 332 U.S. 46, 53 (1947) (“The due process clause of the Fourteenth Amendment . . . does not draw all the rights of the federal Bill of Rights under its protection.”), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964); *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (noting right to trial by jury is “not of the very essence of a scheme of ordered liberty,” and “[t]o abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (internal quotation marks omitted)), overruled by *Benton v. Maryland*, 395 U.S. 784 (1969); *Burnett*, supra note 265, at 1026–31 (noting relevance of Fourteenth Amendment incorporation analysis to fundamental rights approach to extraterritorial application of the Constitution).

282. *Palko*, 302 U.S. at 326 n.3 (“Double jeopardy . . . is not everywhere forbidden.”); *Twining v. New Jersey*, 211 U.S. 78, 110–11 (1908) (observing that jurisdiction and notice were the “two fundamental conditions [of due process], which seem to be universally prescribed in all systems of law established by civilized countries”).

283. See *Wabool v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992) (finding statute immune to equal protection attack because the particular aspect of equality at issue was not “fundamental in the international sense”).

federal courts have upheld legal preferences for the local population that would not be allowed in the mainland United States. The modern courts have done so out of a desire to accommodate cultural differences and self-determination among territorial inhabitants.²⁸⁴ Some type of margin of appreciation therefore could be applied in such cases.²⁸⁵

Much remains to be fleshed out regarding the potential impact of an evolutionary relationship between extraterritoriality and the modern jurisdictional conception of effective control. But under *Boumediene's* functional approach, and consistent with an evolutionary approach to international principles of jurisdiction, international law and practice should be relevant to identifying what constitutional protections must be respected abroad. To some extent, this is a choice of law question, and where the question involves whether the U.S. Constitution obligates the government to take some form of action that could conflict with the law of another jurisdiction, established limitations on the exercise of international jurisdiction, including the principle of reasonableness,²⁸⁶ could provide guidance regarding when application of domestic law is appropriate. Where the question is whether constitutional limitations should constrain the government where it has already chosen to act abroad, the decisions of international and regional courts and tribunals, and the approaches of other national legal systems to questions of extraterritoriality, could provide guidance on whether or not application of a particular constitutional protection must be respected.

CONCLUSION

Global legal obligations are becoming increasingly complex, with overlapping legal authority frequently exercised by international, regional, national, subnational, and nonstate actors. The multifaceted character of legal authority is posing many complex challenges for global governance, of which determining the obligations that flow from extraterritorial state conduct is only a small part. The world has long since abandoned a regime in which rigid territorial rules could meaningfully define and separate the legal obligations of states, and *Boumediene* an-

284. See, e.g., *Wabot*, 958 F.2d at 1460–61 (upholding race-based restriction on land sales intended to protect traditional culture); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139–40 (D. N. Mar. I. 1999) (holding “one person, one vote” standard is not “the basis of all free government” and therefore “need not be applied in and to an unincorporated territory such as the Commonwealth” of the Northern Mariana Islands), *aff'd*, *Torres v. Sablan*, 528 U.S. 1110 (2000); *Banks v. Am. Samoa Gov't*, 4 Am. Samoa 2d 113, 125 (1987) (upholding race-based employment preferences for American Samoans where application of equal protection principles “would tend to be destructive of the traditional culture”); cf. Gerald L. Neuman, *Anomalous Zones*, 48 *Stan. L. Rev.* 1197, 1197, 1202–03 (1996) (discussing significance of local preferences in determining whether government should “suspend fundamental norms within a territorially limited enclave”).

285. See *supra* note 278 and accompanying text.

286. Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) (identifying reasonableness limitations on exercise of jurisdiction).

nounced that the effort to preserve this approach with respect to the extraterritorial rights of aliens had proven unsustainable. By reopening a space for considering modern international principles of jurisdiction, *Boumediene* dragged U.S. approaches to extraterritoriality out of the 1800s and simultaneously ended a long-festering form of American exceptionalism. Much work remains to be done in elaborating both the *Boumediene* effective control tests and applying them to particular constitutional provisions and contexts. The challenges facing U.S. extraterritoriality doctrine, as well as international law principles of effective control, will be particularly complex in situations where a state does not act alone, but acts in concert with one or more other states, or as part of a multilateral effort, as the developing international case law suggests.

These challenges will become more acute as transnational interaction increases with growing collaboration on international trade, law enforcement, and security efforts. In the security context alone, the past few years have seen U.N. obligations to place individuals on terrorism watch lists conflict with national or regional obligations to respect basic due process rights,²⁸⁷ the establishment of secret U.S. prisons and refueling of U.S. rendition planes on foreign soil, and the secret transfer of terrorism suspects to other countries for purposes of interrogation and torture.²⁸⁸ In these and other circumstances, effective control may, as a practical matter, be possessed by multiple actors, and workable international and constitutional doctrines for establishing accountability will need to be flexible and sensitive to practical realities.

As challenging as the road ahead may be, *Boumediene* and *Munaf* offer an important first step toward reconciling U.S. constitutional doctrine with this multifaceted global reality. By moving from entrenchment toward an evolutionary approach and opening U.S. constitutional principles of legal accountability to modern international standards, *Boumediene* also eliminates a number of doctrinal anomalies in U.S. law. It reduces the differential treatment of citizens and aliens when they are subject to U.S. authority abroad. It erodes the possibility of extraterritorial constitutional lacunae. The Court's evolutionary approach also has the potential to align U.S. domestic law with the expectations and legal obligations of our major allies, with U.S. legal duties under international law, and with the modern realities of the global exercise of U.S. power.

287. Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 ECJ EUR-Lex LEXIS 1954, at *140, *146 (Sept. 3, 2008) (holding members of European Community have obligation to ensure actions taken to fulfill U.N. Security Council resolution do not violate European Community rights and finding that Security Council listing process does not provide for adequate judicial review or property right protections); see also *Yearbook of European Law 2009* (Piet Eeckhout & Takis Tridimas, eds., forthcoming May 2010) (Symposium on *Kadi* Judgment).

288. E.g., *Arar v. Ashcroft*, 532 F.3d 157, 175–76 (2d Cir. 2008) (alleging secret rendition to Syria for torture), *aff'd* on other grounds on *reh'g en banc*, 585 F.3d 559 (2d Cir. 2009).