

Rule of Law and Democracy Section

Rule of Law, Equality and Non-Discrimination Branch

Research and Right to Development Division

Office of the High Commissioner for Human Rights

**AMNESTY
INTERNATIONAL**



1 April 2014

AI Index: ACT 30/003/2014

Dear Nathalie Prouvez,

Subject: General Assembly Resolution 68/167

We write with regard to your letter dated 26 February 2014 requesting information on a number of questions related to the impact of surveillance on the right to development.

Amnesty International is grateful for this opportunity and would like to make the following submissions regarding the extraterritorial scope of the International Covenant on Civil and Political Rights (the ICCPR) and specifically of the right to privacy contained therein. We trust that this will be of use in considering Issue Five identified by your office.

Extraterritoriality

There are a number of situations in which a state's conduct will interfere with rights across borders, and can be said to have an extraterritorial element. It is Amnesty International's interpretation of the ICCPR that where the conduct complained of either occurs within the territory or jurisdiction of a state or has the effect of interfering with the enjoyment of the right within that state, even if the persons affected reside elsewhere, that state is responsible for any violation of the ICCPR. The responsibility of the state in such situations should not be considered "extraterritorial" application of the ICCPR as it arises because the interference occurs within the territorial jurisdiction of the state.ⁱ Thus, a situation which is often erroneously referred to as "extraterritorial" surveillance is where the surveillance occurs within the territorial jurisdiction of the state but has extraterritorial effects. Where a state conducts surveillance of communications passing through its territory the interference (and therefore any potential violation) physically occurs within the territory of the state and territorial international human rights obligations apply.

“Extraterritorial” application of the ICCPR therefore refers to interferences or violations of protected rights that both occur outside the territory of a state and affect enjoyment of the right outside of the territory of that state.

Article 2 (1) ICCPR

It is our primary submission that Article 2 (1) of the ICCPR should be interpreted to the effect that all states parties are responsible for violations of the right to privacy, regardless of where the interference occurs and regardless of the nationality of the victim. Although the United States and a small minority of other states have argued that Article 2 (1) can be interpreted to the effect that “and” should be read conjunctively and that therefore a state only has responsibilities to respect and ensure rights where the individual is both within its territory and subject to its jurisdiction; the Human Rights Committee and the International Court of Justice have held that “and” was intended to be disjunctive and therefore the state has responsibilities to respect and ensure rights to all persons within its territory or subject to its jurisdiction. The Committee has therefore interpreted article 2 (1) to the effect that the state’s jurisdiction extends to *“anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”*

To the extent that it is considered a requirement that the state must have “power or effective control”, we submit that the correct interpretation is that the state must have power or effective control over the essence of the right in question. With respect to surveillance it is power or effective control over the individual’s communications that will constitute the state’s power or effective control over the right to privacy.

The existing international and regional case law on extraterritoriality

The Human Rights Committee has held a longstanding position affirming states’ obligations to apply ICCPR rights outside their own territories, and clarifying that Article 2(1) of the Covenant is to be read disjunctively. The view of the Committee in this regard is best summarized in *López Burgos v. Uruguay*:

“...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.”ⁱⁱ

In its General Comment 31, the Committee reaffirmed this position, stating that states must ensure Covenant rights to *“anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”ⁱⁱⁱ* In at least thirteen other instances the Committee has upheld the extraterritorial application of the ICCPR.^{iv}

Similarly, the International Court of Justice has upheld the duty of states to apply the ICCPR when exercising their jurisdiction outside their own territories. In its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Territories*, the ICJ followed the jurisprudence and reasoning of the HRC in confirming the Israeli government's obligation to fulfil its Covenant obligations in the Occupied Territories, rejecting Israel's claim that it did not exercise effective control in those areas.^v

Though it is considering the application of a different legal instrument, the European Court of Human Rights (ECtHR) has also ruled positively on the question of whether state parties to the European Convention on Human Rights and Fundamental Freedoms must respect and ensure rights under that Convention extraterritorially. The ECtHR has held that in certain circumstances states can be held responsible for extraterritorial violations of the Convention.^{vi} One of the instances applied by the ECtHR is where the state has "effective control" over a particular territory or individual, and in such cases they have held that the European Convention applies.^{vii} Thus, where the acts occur wholly within the territory of another state, this may still engage international human rights obligations of the first state if it can be shown that the person was within the power or effective control of the state.^{viii} Another exception appears to be where the violation was caused on the territory of the state but experienced outside its territory.^{ix} In our view this also applies where a person's communications are within the power or effective control of the state.

Likewise, the Inter-American Commission on Human Rights has ruled on a number of cases which involved the issue of extraterritorial application of the American Convention on Human Rights. The IACHR has consistently ruled that a state's obligations under the relevant Convention apply outside its national territory. In *Saldaño v. Argentina*, the IACHR expanded the concept of jurisdiction, stating that, "this term is not, as submitted by the respondent Government, equivalent or limited to the national territory of the High Contracting party concerned."^x In the case of *Alejandro Jr. and Others v. Cuba*, the Commission ruled that the Cuban military's act of shooting down a civilian aircraft constituted effective military control and hence Convention obligations were in effect.^{xi} In that circumstance, Cuba did not have physical custody over the four pilots of those planes, but those pilots 'died as a consequence of direct actions taken by agents of the Cuban State' and therefore were under Cuba's power and authority'.^{xii}

Effective control

Regarding the requirement that jurisdiction is dependent on effective control,^{xiii} it is Amnesty International's view that the effective control required to engage responsibility is control over the communications rather than physical control over the individual. Thus the right to liberty depends to

a large extent on custody or power over the individual.^{xiv} However, in other rights, such as the right to life,^{xv} the right to property^{xvi}, non-discrimination,^{xvii} freedom of movement,^{xviii} and the right to fair trial there can be no requirement that the individual be in the custody of the violating state (and thus physically within the effective control of the state).^{xix} Therefore it is evident that an individual's right may be interfered with (and potentially violated) even where the state has no effective control over her physical being but does have effective control over the essence of the right – whether, for example, power over his life (the ability to arbitrarily kill him); the power to expropriate her property, or to conduct an unfair trial against him.^{xx}

The Human Rights Committee,^{xxi} the Inter-American Commission on Human Rights,^{xxii} African Commission on Human Rights,^{xxiii} Committee on the Elimination of Racial Discrimination,^{xxiv} and the Committee on the Elimination of Discrimination against Women,^{xxv} have all applied their respective human rights instruments to situations in which a State did not have control over territory or physical custody over persons, but rather over the situations leading to rights violations.^{xxvi} For example, in regard to German companies, the Human Rights Committee called on Germany to 'strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad'.^{xxvii}

The International Court of Justice has applied human rights treaties to the extraterritorial conduct of a State even outside of circumstances in which it has control over territory or physical custody over persons. The ICJ's judgement in *Armed Activities in Congo* held Uganda responsible for violations of several treaties including the ICCPR and the African Charter on Human and Peoples' Rights in the DRC even outside of the area in which Uganda had effective control.^{xxviii} Similarly, in its Provisional Measures in *Georgia v Russia*, the ICJ stated that CERD applies, 'like other provisions of *instruments of that nature*, to the actions of a State party when it *acts beyond its territory*'.^{xxix}

Applying this principle to the right to privacy, it is the effective control over an individual's communications that allows the state to interfere with and potentially violate the rights to privacy. It is such power therefore that engages the obligation to respect the right to privacy. We consider that mass surveillance of communications by a state constitutes a context that is within the control (or at least the power or authority) of that state. Where the state's domestic law enables its government to intercept or surveil individuals' communications wherever that occurs, such action must fall within the authority of the state.

This analysis also appears to accord with the position taken by the Human Rights Committee in its very recent observations regarding the United States.^{xxx} In March 2014 the Human Rights Committee recommended that the United States "take all necessary measures to ensure that its surveillance

activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are under direct surveillance.”^{xxxi} In making this recommendation the Human Rights Committee affirmed the view that the obligations of states pursuant to the ICCPR apply to surveillance activity outside their own territory.

Conclusion

It is Amnesty International’s submission that Article 2 (1) of the ICCPR implies extraterritorial obligations to respect and ensure protected rights and that both the obligations to ensure and respect are to be exercised extraterritorially subject to the “power or effective control over the essence of the right,” and therefore, in the context of surveillance of an individual’s communications, this refers to effective control or power over those communications. This leads to the conclusion that extraterritorial surveillance engages the surveilling state’s obligations to respect the rights to privacy guaranteed in the ICCPR.

Yours sincerely,

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ⁱ See for example *Munaf v Romania* (2009) UN Doc CCPR/C/96/D/1539/2006 (HRC), where the Human Rights Committee held that, “a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.”

ⁱⁱ *López Burgos v. Uruguay*, UN Doc. A/36/40, 6 June 1979, para. 12.3.

ⁱⁱⁱ Human Rights Committee General Comment 31, UN Doc. CCPR/C/74/CRP.4/Rev.629 (March 2004), para. 10.

^{iv} See; *Ng v. Canada*, 5 November 1993, UN Doc. A/49/40, Vol. II, 189; *Kindler v. Canada*, HRC 31 July 1993, UN Doc. A/48/50, 138; *López Burgos v. Uruguay*, HRC 6 June 1979, UN Doc A/36/40, para. 12.1; *Celiberti de Casariego v. Uruguay*, UN Doc. CCPR/ C/13/D/52/1979, paras. 12.1-12.3; Concluding Observations on Cyprus, UN Doc. CCPR/C/79/Add.88;

Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93, para. 10 and UN Doc. CCPR/CO/78/ISR, para. 11; Concluding Observations on Belgium, Doc. CCPR/C/79/Add.99 para. 14; Concluding Observations on Croatia, UN Doc. CCPR/C/79/Add.15 para. 10; Concluding Observations on Moldova, UN Doc. CCPR/CO/75/MDA, para. 4; Concluding Observations on Bosnia-Herzegovina, UN Doc. CCPR/C/79/Add.14, paras. 4-5; Concluding Observations on Croatia, UN Doc. CCPR/C/79/Add.15, para. 6; Concluding Observations on Serbia-Montenegro, UN Doc. CCPR/C/79/Add.16, paras. 4-7; Concluding Observation on Lebanon, UN Doc. CCPR/C/78, para. 12.

^v International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List, No.131 paras. 109-111. Armed Activities in the territory of the Congo (Democratic Republic of Congo v Uganda) [2005] ICJ Rep 168, para. 220.

^{vi} See *Catan v Moldova and Russia Applications nos. 43370/04, 8252/05 and 18454/06*, quoting *Al-Skeini and Others v the United Kingdom* Application no. 55721/07 and noting that, “the Court has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.”

^{vii} *Droz & Janousek v. France and Spain*, ECtHR, Case No. 21/1991/273/344, Judgement of 27 May 1992, para. 91; *Loizidou v. Turkey* (Preliminary Objections), ECtHR, Judgement of 23 March 1995, Series A vol. 310, para. 62; *Ilascu and others v. Moldova and Russia*, Application no 48787/99, ECtHR, Judgement of July 2004, para. 311; *Issa & others v. Turkey*, (Application no 31821/96; admissibility decision), ECtHR, 30 May 2000, 55; *Ócalan v. Turkey* (Application No. 46221/99) ECtHR, Judgement of 12 May 2005, paras. 91, 190.

^{viii} See *Al-Skeini and Others v the United Kingdom*, Application no. 55721/07, “It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.” See also *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

^{ix} Thus in *Andreou v Turkey*, Application no. 45653/99, the ECtHR held that, “even though the applicant had sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as ‘within [the] jurisdiction’ of Turkey within the meaning of Article 1 of the Convention.”

^x *Victor Saldaño v. Argentina*, Petition, IACHR Report No. 38/99, 11 March 1999, para. 18.

^{xi} *Armando Alejandro Jr. and Others v. Cuba (‘Brothers to the Rescue’)*, IACHR Report No. 86/99, Case No. 11589, 29 September 1999

^{xii} *Armando Alejandro Jr.*, para. 25.

^{xiii} An alternative approach to extraterritorial jurisdiction is to consider that the reference to territory and jurisdiction in Article 2 (1) refers to the obligation to ensure, but not to the obligation to respect rights in the convention. The consequence would be that the negative obligation to respect convention rights is not subject to the effective control requirement while positive obligations are. This argument arises from a textual interpretation of article 2 (1) advocated by academics such as Milanovic, *Extraterritorial Application, Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy (OUP 2011)*, p.209 onwards. However, it should be noted that a State that is engaging in conduct that interferes with a person’s rights extraterritorially normally has effective control over its conduct that leads to such interferences and therefore jurisdiction applies. Amnesty International notes that regardless which test is applied extraterritorial surveillance engages state responsibility under the ICCPR.

^{xiv} Manfred Nowak, Letter to the Editor from Manfred Nowak: What does extraterritorial application of human rights treaties mean in practice?, 11 March 2014, available at <http://justsecurity.org/2014/03/11/letter-editor-manfred-nowak-extraterritorial-application-human-rights-treaties-practice/>

^{xv} See for example the European Court of Human Rights in *Issa v. Turkey* Application no. 31821/96 (concerning the killing of Iraqi shepherds by Turkish military forces in Iraq) Or *Pad and others v Turkey* (2007) Application 60167/00 paras. 53-55. In *Pad*, some Iranian nationals had been killed by fire from Turkish helicopters, and Turkey was found to have jurisdiction. Whether the events had occurred on the Iranian or Turkish side of the border remained in dispute, but the Court decided that it was not necessary to determine the exact location, as Turkey had already admitted that its forces had caused the killings by firing upon the victims from helicopters. This decision contradicts the Court’s decision in *Banković*, where it found that jurisdiction did not apply in similar circumstances, *Banković and others v Belgium and others* (2001) Application 52207/99.

^{xvi} For example in *Bosphorous Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* Application No 45036/98 the European Court of Human Rights held that the seizure in Ireland of an airplane belonging to the applicant, who did not reside within Ireland, meant that the state had jurisdiction over the applicant and was therefore accountable for potential violations.

^{xvii} *Gueye et al. v. France* Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989) (in which the Human Rights Committee found a violation of ICCPR article 26 (nondiscrimination) when France had enacted legislation that provided for the same service in the French military a lower pension to retired Senegalese soldiers living in Senegal than it provided to Frenchmen living in France (or even living in Senegal). The act of legislating occurred in France but its discriminatory effect was felt by beneficiaries of French pensions.)

^{xviii} *Sophie Vidal Martins v. Uruguay* (57/1979), Communication No. R.13/57, U.N. Doc. Supp. No. 40 (A/37/40) at 157 (1982) (in which the Human Rights Committee in 1982 found a violation of article 12 (freedom of movement) when Uruguay had refused to issue a passport to its citizen residing in Mexico, “thereby preventing her from leaving any country.”)

^{xix} See Novak, per note xiv above and Martin Scheinin, ‘Letter to the Editor from Former Member of the Human Rights Committee, Martin Scheinin’, 10 March 2014, available at <http://justsecurity.org/2014/03/10/letter-editor-martin-scheinin/>

^{xx} See also *Montero v Uruguay* (1983) Communication 106/1981, UN Doc CCPR/C/OP/2 (HRC) [5]; HRC, ‘Concluding Observations: Iran’ (1993) UN Doc CCPR/C/79/Add.25 [9]; *Mbenge v Zaire* (1983) Communication 16/1977, UN Doc CCPR/C/OP/2 (HRC) [21]; HRC, ‘Concluding Observations: Croatia’ (1992) UN Doc CCPR/C/79/Add.15 [7]; HRC, ‘Concluding Observations: Yugoslavia’ (1992) UN Doc CCPR/C/79/Add.16 [5, 8];

^{xxi} See note xx.

^{xxii} (*‘Brothers to the Rescue’*), note xi above. *Saldaño v Argentina* (which held 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.’)

^{xxiii} *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia* (2003-2004) Communication 157/96, 17th Annual Activity Report (African Comm HR) para. 75. ^{xxiii} In that case, the Commission examined whether States imposing the sanctions on Burundi were compliant with the African Charter, even though they had no territorial control or presence in Burundi.

^{xxiv} CERD Committee, ‘Concluding Observations: United States of America’ (2008) UN Doc CERD/C/USA/CO/6 para. 30.

^{xxv} CEDAW Committee, ‘General Recommendation 28 on the Core Obligations of States Parties under Article 2’ (2010) UN Doc CEDAW/C/GC/28: ‘States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory’.

^{xxvi} Similar findings by the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child are not listed here as those extraterritorial obligations are partially founded on obligations of international cooperation and assistance contained in the relevant treaties.

^{xxvii} HRC, ‘Concluding Observations: Germany’ (2012) UN Doc CCPR/C/DEU/CO/6 para. 16.

^{xxviii} *Armed Activities in the territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 168, para. 220.

^{xxix} *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures, Order of 15 October 2008 [2008] ICJ Rep 353, para 109. The Court, ‘reminding the Parties of their duty to comply with their obligations under’ CERD, ordered them, ‘within South Ossetia and Abkhazia and adjacent areas in Georgia’ to refrain from any act of racial discrimination, to ‘abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations,’ and to ‘do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions’, para. 149.

^{xxx} Human Rights Committee, Concluding observations on the fourth report of the United States of America, UN Doc. CCPR/C/USA/CO/4, para. 22, available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en

^{xxxi} As above, para. 22 (a)