

HUMAN RIGHTS ABROAD: When Do Human Rights Treaty Obligations Apply Extraterritorially?

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The second half of the twentieth century saw an explosion of human rights law. Before World War II, there were almost no significant multilateral human rights agreements.¹ In the years following the war, sixteen multilateral agreements were concluded through the United Nations alone.² These twentieth-century agreements were distinctive from most international law that came before them in that they placed the international community between a sovereign state and its own citizens. No longer could states act within their own borders with absolute impunity. Yet even before the ink was dry on these post-war agreements, a question emerged that remains a subject of intense debate today: What limits, if any, do human rights agreements place on the behavior of states *outside* their own territory?

In this Article, we begin to answer that question. We do so by examining developments in the extraterritorial application of human rights treaties in foreign jurisdictions and international tribunals across the globe. Building upon earlier scholarship,³ we review the recent developments in the jurisprudence of the Supreme Court and Federal Court of Appeal of Canada, the Supreme Court of the United Kingdom, the European Court of Human Rights, the Inter-American Commission on Human Rights, the

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1. Convention to Suppress the Slave Trade and Slavery, League of Nations, Sept. 25, 1926, 60 L.N.T.S. 253, available at <http://www.unhcr.org/refworld/docid/3ae6b36fb.html>.

2. Chapter IV: Human Rights, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Mar. 29, 2011).

3. See generally Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Jacco Bomhoff, *The Reach of Rights: "The Foreign" and "The Private" in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements*, 71 LAW & CONTEMP. PROBS. 39 (2008); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2009).

International Court of Justice, the Committee Against Torture, and the Human Rights Committee of the International Covenant on Civil and Political Rights. Our goal in this cross-national examination is to discover whether these courts have developed a coherent standard or approach from which the United States might learn.

What we find is a remarkable degree of coherence and consistency. All but one of the jurisdictions we examine here has articulated a test for the extraterritorial application of human rights treaties that turns on the government's "effective control" over the territory, person, or situation in question. Moreover, most foreign and international bodies have remained remarkably consistent in their approach to this question over the past few years, despite the pressures placed on them by the "War on Terror." Indeed, to the extent there has been any shift, the U.K. courts have moved closer to the global norm by applying a more expansive extraterritorial application of human rights obligations abroad.

The decisions of these foreign and international courts are relevant to the United States in two key respects. First, the United States is a party to the International Covenant on Civil and Political Rights and the Convention Against Torture.⁴ Hence, the interpretations of the Human Rights Committee (tasked with interpreting and enforcing the Covenant) and the Committee Against Torture (tasked with interpreting and enforcing the Convention Against Torture) have direct implications for U.S. practice.

Second, U.S. courts may consider the example of these foreign and international jurisdictions and tribunals in developing their own jurisprudence on the question of applying human rights law extraterritorially. U.S. courts have not yet articulated a clear and consistent standard for when to apply human rights treaties extraterritorially and thus stand to learn a great deal from foreign and international courts that have done so. In making this claim, we are guided by Justice Sandra Day O'Connor's work both on and off the bench. She has long been a leading advocate of looking to foreign and international standards not as binding precedent, but as a source of information that may help guide judicial decision-making in the United States. At a 2003 conference in Atlanta, for example, Justice O'Connor noted that "conclusions reached by other

4. International Covenant on Civil and Political Rights, *Status of Ratifications, Reservations and Declarations*, U.N. Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 5, 2011) (ratified by the United States in 1992); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Status of Ratifications, Reservations and Declarations*, U.N. Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=&mtdsg_no=IV-9&chapter=4&lang=en (last visited Feb. 5, 2011) (ratified by the United States in 1994).

countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts.”⁵

While a member of the Supreme Court, Justice O’Connor made clear that it is particularly appropriate to look to the views of other countries in matters of treaty interpretation. As she wrote in her majority opinion in *Air France v. Saks*: “In determining precisely [how to interpret the Warsaw Convention], we ‘find the opinions of our sister signatories to be entitled to considerable weight.’”⁶ Justice O’Connor then considered the positions of French, Swiss, German, and British law on the subject in coming to her own conclusion. In *Olympic Airways v. Husain*, a later case that rested on interpretation of the Warsaw Convention, Justice O’Connor joined Justice Antonin Scalia in a dissenting opinion in which they criticized the majority for its failure to address how the courts of U.S. treaty partners had addressed similar interpretive questions under the Convention.⁷ Justice O’Connor was eventually joined by most of her brethren in her view that it is appropriate to look to treaty partners’ understanding of a treaty in deciding how to interpret that treaty.⁸

5. Justice Sandra Day O’Connor, Remarks at the Southern Center for International Studies 1–2 (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf.

6. *Air France v. Saks*, 470 U.S. 392, 404 (1985) (citing *Benjamin v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)).

7. *Olympic Airways v. Husain*, 540 U.S. 644, 657–58 (2004) (Scalia, J., dissenting).

8. Justice Scalia remarked in a debate with Justice Breyer:

I do not use foreign law in the interpretation of the United States Constitution. Now, I will use it in the interpretation of a treaty. In fact, in a recent case I dissented from the Court, including most of my brethren who like to use foreign law, because this treaty had been interpreted a certain way by every foreign court of a country that was a signatory, and that way was reasonable, although not necessarily the interpretation I would have taken as an original matter. But I thought that the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies -- that is to say if it’s within ball park, if it’s a reasonable interpretation, though not necessarily the very best.

Antonin Scalia, Justice, and Stephen Breyer, Justice, U.S. Assoc. of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), available at <http://www.freerepublic.com/focus/news/1352357/posts>. For a recent case where this view garnered the support of Justices Kennedy, Roberts, Alito, Scalia, Ginsburg, and Sotomayor, see *Abbott v. Abbott*, 130 S. Ct. 1983, 1993–94 (2010) (“This Court’s conclusion that *ne exeat* rights are rights of custody is further informed by the views of other contracting states. In interpreting any treaty, ‘[t]he opinions of our sister signatories . . . are entitled to considerable weight.’ The principle applies with special force here . . .”) (citations omitted).

This Article takes up Justice O'Connor's invitation to look for clear agreement in the international community on the meaning and scope of shared treaty obligations. Specifically, we examine whether foreign and international bodies have applied human rights treaties to actions of the government of a ratifying state when it acts outside its own territory. Do the courts of our key treaty partners conclude that their governments are bound to observe the limits imposed in human rights treaties when acting outside their territory? Have the international tribunals and treaty bodies tasked with interpreting the treaties applied human rights obligations in similar circumstances? We aim to answer these questions and thereby offer a guide to U.S. policymakers and courts struggling with when and how to apply U.S. human rights commitments to U.S. government actions abroad.

This is not simply a hypothetical topic of mere academic interest. The United States is currently involved in multiple military actions abroad—the most significant of which are in Iraq and Afghanistan. In the context of its ongoing presence, the United States is holding prisoners within these countries, as well as in Guantánamo Bay, Cuba.⁹ Whether these prisoners should receive the protections of the international treaties ratified by the United States—most notably the International Covenant on Civil and Political Rights and the Convention Against Torture—is a very real and pressing issue that has the potential to affect detention facilities in these countries, as well as, perhaps, detention facilities in other territories. Learning how other countries have confronted similar questions—sometimes even precisely the same questions—provides insight that might influence U.S. courts' and policymakers' understanding of our shared treaty obligations.¹⁰

9. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Second Periodic Report of States Parties due in 1999, United States of America*, ¶ 50, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005).

10. The consistent approach of foreign and international courts to the extraterritorial application of rights guaranteed in human rights treaties might even be looked to by some courts to inform ongoing debates over the extraterritorial application of rights guaranteed in the U.S. Constitution. The use of foreign and international precedent in this context is more controversial. In recent years, the Supreme Court has faced difficult questions about the extraterritorial application of rights guaranteed by the U.S. Constitution, as opposed to human rights treaties. In 2008, the Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), extended access to the right of habeas to detainees at Guantánamo Bay—strictly outside the limits of the territorial United States—by applying a new, functional approach to extraterritorial application of constitutional rights. A recent case in the D.C. Circuit, *Al Maqaleh v. Gates*, 605 F.3d 84 (2010), asked whether this holding should extend to the Bagram Air Base in Afghanistan. The extraterritorial applicability of other Bill of Rights protections, including those under the Fourth and Fifth Amendments, have also recently been tested based on U.S. government actions in Kenya (*In re Terrorist Bombings of U.S. Embassies in East Africa*). *Terrorist Bombings of U.S. Embassies in East Afr. v. Odeh*, 552 F.3d 177 (2d Cir. 2008) (on Fifth Amendment issues);

U.S. courts have yet to directly confront whether U.S. commitments under the Covenant or the Convention Against Torture apply to U.S. government actions abroad. The executive branch, however, has at times suggested that the United States' commitments under these human rights agreements do not apply when the United States acts overseas.¹¹ This position has been the target of consistent criticism from abroad for over a decade, not least by the Human Rights Committee and Committee Against Torture. In 1996, for example, the Human Rights Committee wrote: "The Committee does not share the view expressed by the Government [of the United States] that the Covenant lacks extraterritorial reach under all circumstances." It explained: "[s]uch a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that state's territory."¹² The Committee

Terrorist Bombings of U.S. Embassies in East Afr. v. Odeh, 552 F.3d 177 (2d Cir. 2008) (on Fourth Amendment issues).

11. See Letter from the Permanent Representative of the U.S. to the U.N. and Other Int'l Orgs. in Geneva, to the Office of the High Comm'r for Human Rights (Jan. 31, 2006), *reprinted as Annex II* to the U.N. High Comm'n on Human Rights, Report of the Chairman of the Working Group on Arbitrary Detention et al. on the Situation of Detainees at Guantánamo Bay, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) ("The United States has made clear its position that . . . the International Covenant on Civil and Political Rights, by its express terms, applies only to 'individuals within its territory and subject to its jurisdiction.'"); John B. Bellinger, III, U.S. Dep't of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), *available at* <http://www.state.gov/g/drl/rls/68557.htm> ("As a general matter, countries negotiating the Convention [Against Torture] were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes . . ."); U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third Periodic Reports of States Parties, United States of America*, ¶ 3, U.N. Doc. CCPR/C/USA/3, Annex I (Nov. 28, 2005) ("[T]he United States respectfully reiterates its firmly held legal view on the territorial scope of application of the Covenant."). By contrast, the United States in its report to the Committee Against Torture supports the extraterritorial application of the treaty, stating that "prohibition on torture and conspiracy to torture extends, inter alia, to U.S. employees and U.S. contractors of the United States anywhere in the world outside of the United States, provided that the conduct falls within the enumerated elements of the statute." U.N. Comm. Against Torture: *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Second Periodic Report of States Parties due in 1999, United States of America*, ¶¶ 12, 75–76, 86, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005).

12. See Rep. of the Human Rights Comm., Jan. 31–Mar. 11, 1994, ¶ 284, U.N. Doc. A/50/40; GAOR 50th Sess., Supp. No. 40 (1995) (criticizing the U.S. position that the ICCPR does not extend beyond U.S. borders). The U.S. executive branch did not back down in its Second and Third Periodic Reports filed with the Committee in 2005, in which the United States reiterated its stance that the Covenant does not apply extra-territorially. U.N. Human Rights Comm., *Third Periodic Reports of States Parties Due in 2003: United States of America*, ¶ 110, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) [hereinafter *Third Periodic Reports*] ("The preparatory work of the Covenant establishes that the reference to 'within its territory' was

Against Torture has also been critical of the U.S. executive branch's position on extraterritorial effect. In 2006, for instance, the Committee Against Torture voiced concern that detainees under the control of U.S. forces outside of the United States had not received the protection of the Convention: "despite the occurrence of cases of extraterritorial torture of detainees, no prosecutions have been initiated under the [U.S.'s] extraterritorial criminal torture statute."¹³

Though these questions have not yet reached the U.S. courts, they likely will. To the extent, moreover, that the executive branch's traditional approach to this issue is increasingly out of step with that of international bodies and our treaty partners, the executive branch may wish to reassess its approach. To inform these debates and discussions, this Article provides an overview of the positions taken by international and selected foreign courts on the question of whether the human rights treaties apply abroad. We focus, in particular, on the most recent developments, which have yet to be summarized or addressed elsewhere and which provide a particularly helpful guide in this rapidly-developing area of law.¹⁴ Focusing on the last several years of jurisprudence also permits us to see how these bodies have addressed the demands of war and threats of terrorism against those of human rights.

included within Article 2(1) of the Covenant to make clear that states would not be obligated to ensure the rights recognized therein outside their territories . . . "); see also Matthew Waxman, Head of U.S. Delegation, U.S. Delegation Response to Oral Questions from the Members of the Committee (July 18, 2006), available at <http://www.usmission.ch/Press2006/0718iccprResponse.html>. The executive branch argued that its treatment of persons in detention sites abroad is governed by the "law of war," not by the Covenant. *Third Periodic Reports, supra*, ¶¶ 129–30 (noting that "the legal status of such persons is governed by the law of war"). In a 2006 report, the Committee again criticized this overly "restrictive interpretation" and claimed that it conflicted with the views of other international authorities. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United States of America*, 87th Sess, July 10–28, 2006, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (stating that the United States holds this view "despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice."). The executive branch nonetheless once again reiterated its position in 2008 that the Covenant has only territorial scope. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, ¶ 2, U.N. Doc. CCPR/C/USA/CO/3/REV.1/ADD.1, (Feb. 2, 2008).

13. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture*, 36th Sess, May 1–19, 2006, ¶ 13, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

14. Sarah Cleveland, among others, describes the earlier jurisprudence not discussed in depth here. See generally Cleveland, *supra* note 3.

This Article proceeds in three parts. Part I summarizes the jurisprudence of foreign courts, specifically the Supreme Court and Federal Court of Appeal of Canada and the U.K. Supreme Court. Part II examines the approach taken by international courts, specifically the European Court of Human Rights, the Inter-American Court on Human Rights, and the International Court of Justice. Part III provides an overview of the positions of U.N.-linked human rights bodies, specifically the Committee Against Torture and the Human Rights Committee.

We conclude by noting that the U.S. executive branch's consistent position against any extraterritorial application of these human rights protections makes the United States an outlier in the international context. Nearly every other foreign and international body examined here concludes that countries that exert "effective control" over a territory, person, or situation must observe basic human rights obligations. It is our hope that by placing U.S. practice within an international context, we can open up a conversation about how the United States might—in this area as in so many others—once again be a leader in the development and enforcement of human rights protections in the world.

I. RECENT DEVELOPMENTS IN FOREIGN COURTS

Canada and the United Kingdom share many of the United States' obligations under international human rights treaties. Moreover, they have been engaged in significant military operations abroad, most recently the ongoing war in Afghanistan.¹⁵ As a result, the courts of Canada and the United Kingdom have encountered cases similar in many respects to those likely to arise in the United States. We therefore begin our examination of foreign and international court practice by providing an overview of the jurisprudence of the Canadian Supreme Court, the Canadian Federal Court of Appeal, and the United Kingdom Supreme Court on the extraterritorial application of human rights law. We find that Canadian courts have concluded that Canadian authorities are bound by international law when

15. There were approximately 9500 UK troops in Afghanistan in February 2011. See *Defence Factsheet Operations in Afghanistan*, MOD.COM, available at <http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBritishForces.htm> (last visited Apr. 13, 2011). Canada had a significant troop presence in Afghanistan throughout the war, though it has announced plans to withdraw troops in 2011. See *Canada Afghan Mission Ends 2011*, BBCNEWS.COM, available at <http://news.bbc.co.uk/2/hi/americas/7610165.stm> (last updated Sept. 11, 2008). In addition, at the peak of its involvement in combat operations in Iraq, the United Kingdom had 46,000 troops on the ground. *Defence Factsheet Operations in Iraq*, MOD.COM, available at <http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInIraqFactsandFigures.htm> (last visited Apr. 13, 2011).

acting abroad. Yet, the courts have not yet directly confronted the question of whether and when human rights *treaty* obligations apply beyond the country's borders (though they have once appeared to implicitly accept that they are). The U.K. Supreme Court, by contrast, has directly confronted the issue, holding that human rights obligations codified by international human rights treaties apply outside of the United Kingdom's territory whenever the government exercises "effective control" extraterritorially.¹⁶

A. *Canadian Supreme Court and Federal Court of Appeal*

The Supreme Court and Federal Court of Appeal of Canada have heard two important cases in the last couple of years addressing the extent to which Canada's human rights obligations under both domestic and international law apply beyond Canada's borders. These cases elaborate upon the Supreme Court's 2007 decision in *R. v. Hape*.¹⁷ In that case, the Canadian Supreme Court held that, as a matter of deference to the sovereignty of other states, the Canadian Charter does not apply outside of Canada unless the foreign state in question consents to the application of Canadian law.¹⁸ The Court cautioned, however, that the "deference ends where clear violations of international law and fundamental human rights begin."¹⁹ Thus, *Hape* suggested that while the Canadian Charter only applies abroad if foreign consent is given, Canadian authorities are bound by international law when acting abroad, and violations of such law could trigger Charter remedies.

Over the last two years, Canadian courts have applied the *Hape* framework in two high-profile cases. First, in *Amnesty International Canada v. Canada*, the Federal Court of Appeal held the Charter inapplicable to Canadian detention of non-citizens in Afghanistan, but noted that detainees *were* protected by international humanitarian law.²⁰ Second, in *Canada (Prime Minister) v. Khadr*, the Canadian Supreme Court confirmed that violations of international human rights obligations could trigger the application of the Charter, thereby allowing a plaintiff to claim remedies under the Charter against the Canadian government.²¹

16. This examination aims to provide a review of the jurisprudence most likely to be directly relevant to the United States' own experience. We invite and encourage additional research into the jurisprudence of foreign courts on these same questions in other jurisdictions.

17. *R. v. Hape*, [2007] 2 S.C.R. 292 (Can.).

18. *Id.* ¶ 69.

19. *Id.* ¶ 52.

20. *Amnesty Int'l Canada v. Canada*, [2009] 4 F.C.R. 149 (Can.).

21. *Khadr v. Canada (Prime Minister)*, [2010] 1 S.C.R. 44, ¶ 14 (Can.).

1. Amnesty International Canada v. Canada (2009)

In 2009, Canadian courts considered the extraterritorial application of human rights obligations in *Amnesty International Canada v. Canada*.²² *Amnesty International* presented the question whether the Canadian Charter applies in Afghanistan to the detention of non-Canadians by Canadian forces or to their transfer by Canada to Afghan authorities.²³ Both the government and the courts took *Hape*'s consent-based approach to the extraterritorial application of the Canadian Charter as a starting point.²⁴ At trial, the Canadian government took the position that, under *Hape*, Afghanistan's consent was necessary to trigger the applicability of the Canadian Charter vis-à-vis detained foreign nationals in Afghanistan.²⁵ It took pains to point out, however, that the Charter's inapplicability would not create a legal vacuum, because detainees were still protected by international humanitarian law.²⁶ Indeed, in making this argument, the government appears to have conceded that international human rights obligations *do apply* in Afghanistan as the *lex generalis*: "Canada's operations in Afghanistan . . . are governed by international law, most importantly the *lex specialis* of IHL applicable in times of armed conflict, whereas international human rights law is *lex generalis*."²⁷ Because these two bodies of law apply, the government explained, it was neither necessary nor appropriate for the court to apply the Charter.

The Court agreed, apparently accepting the government's concession that international human rights treaties do apply to Canadian detention activities in Afghanistan in the process.²⁸ The Federal Court of Appeal held that the Charter did not apply to non-citizen detainees in Afghanistan, even if the detainees could prove a likelihood of torture upon their transfer.²⁹ The Court interpreted the Supreme Court jurisprudence to hold that "deference and comity end where clear violations of international law and fundamental human rights begin"³⁰ But it noted that "[t]his does not mean that the Charter then applies as a consequence of these violations."³¹ Rather, the

22. *Amnesty Int'l Canada v. Canada*, [2009] 4 F.C.R. 149 (Can.).

23. *Id.* ¶ 3.

24. *Id.* ¶ 25.

25. Government's Factum ¶ 4, *Amnesty Int'l Canada v. Canada*, [2008] 4 F.C.R. 546 (Can.).

26. *Id.* ¶ 85–88.

27. *Id.* ¶ 46; *see also id.* ¶¶ 81–83 (discussing the relationship between international humanitarian law and international human rights law in more detail).

28. *Amnesty Int'l*, [2009] 4 F.C.R. ¶ 25.

29. *Id.* ¶ 3.

30. *Id.* ¶ 20.

31. *Id.*

court noted that the key question was whether the Canadian forces exercised “effective control” over Afghan territory and over Afghan people.³² It concluded that Canada did not exercise effective control over the detention facilities, because the facilities were shared by Canada and several international and security and assistance force countries participating in security and infrastructure activities in Afghanistan.³³ At the same time, the Court appeared to endorse the “consent-based test” established in *Hape*, and applied by the trial court below, under which it found that the Afghan government had not consented to the general application of Canadian law, and therefore the Charter could not apply.³⁴

Although it concluded that the Canadian Charter did not apply, the Court explained that this decision did not leave a legal vacuum “considering that the applicable law is international humanitarian law.”³⁵ Following this proposition, the Court cited the trial court’s conclusion that before transferring a detainee into Afghan custody, Canadian forces must be satisfied that there are no substantial grounds to believe that the detainee would be subjected to “torture or other forms of mistreatment at the hands of Afghan authorities.”³⁶ The Court thus ruled for the government, and the claimants’ petition for leave to appeal to the Supreme Court of Canada has been denied, but it left the unmistakable impression that it regarded international humanitarian law applicable to Canadian troop actions in Afghanistan.³⁷

2. *Canada (Prime Minister) v. Khadr* (2010)

Canadian citizen Omar Khadr has been detained by the United States at Guantánamo Bay since he was a teenager.³⁸ Years into his confinement, he sued the Canadian government for violations of domestic and international law. In 2008, the Canadian Supreme Court held in his favor, deciding that Khadr was entitled to the Charter’s protection in Guantánamo and ordering the Canadian government to turn over certain documents to him. The Charter applied to Khadr, the Court explained, because Canadian agents had participated in his detention and interrogation, which the U.S. Supreme

32. *Id.* ¶ 25.

33. *Id.*

34. *Id.* ¶ 34.

35. *Id.* ¶ 36.

36. *Id.* (quoting *Amnesty Int’l Canada v. Canada*, [2008] 4 F.C.R. 546, ¶ 64.).

37. Office of the Comm’r for Fed. Judicial Affairs Canada, 2 Appeals Noted (2009), available at <http://reports.fja.gc.ca/eng/an/2009/v2p3/v2p3.html> (refusing leave to appeal on May 21, 2009).

38. *Khadr v. Canada (Prime Minister)*, [2010] 1 S.C.R. 44, ¶ 3 (Can.).

Court had previously determined violated Common Article III of the Geneva Conventions.³⁹

After the 2008 victory, Khadr pressed the courts to order the Canadian government to request his repatriation to Canada, arguing that this was the only way to remedy the violations of the Canadian Charter and international law.⁴⁰ The government responded that the alleged Charter violations were not properly attributable to the Canadian government, and that it was therefore under no international legal obligation to seek Khadr's return.⁴¹ The government also maintained that international human rights treaties like the Convention Against Torture and the Convention on the Rights of the Child did not apply abroad absent host state consent, citing *Hape*.⁴² Only explained in a single paragraph, this argument would seem to effectively limit the international human rights violation exception recognized in *Hape* to violations of international humanitarian law.

When the challenge returned to the Canadian Supreme Court, it affirmed that Khadr's detention and interrogation violated his rights under the Charter. The Court reaffirmed the holding in *Hape* that violations of "fundamental human rights norms" under international law by Canadian authorities abroad trigger the extraterritorial application of the Charter even without the host state's consent.⁴³ In establishing the breach, Khadr had not only demonstrated a breach of the Charter, but had also shown that the deprivation was not in accordance with principles of fundamental justice.⁴⁴ Such principles, the Court held, "are to be found in the basic tenets of our legal system. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound."⁴⁵ The conduct of Canada did not conform to these principles, the Court explained, because "Canada's participation in the illegal process in place at Guantánamo Bay clearly violated Canada's binding international obligations."⁴⁶

Despite finding for Khadr on these fundamental questions of law, the Court refused to order the government to seek Khadr's repatriation. The Court reasoned:

39. Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125, ¶¶ 23–25 (Can.).

40. Respondent's Factum ¶¶ 1–2, *Khadr*, [2008] 2 S.C.R. 125 (Can.).

41. Appellants' Factum ¶¶ 45–47, *Khadr*, [2008] 2 S.C.R. 125 (Can.).

42. *Id.* ¶ 55. This represented an apparent retreat from the position the government articulated and the court accepted in *Amnesty International*.

43. *Khadr*, 1 S.C.R. ¶ 14.

44. *Id.* ¶ 24.

45. *Id.* ¶ 23 (internal quotation marks and citation omitted).

46. *Id.* ¶ 24.

Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond.⁴⁷

In short, the Court declined to clarify precisely how far Canada's international human rights treaty obligations applied abroad and left it to the Canadian government to fashion an appropriate remedy.

In sum, in recent years, Canadian courts still have not yet squarely addressed when exactly international human rights *treaty* obligations apply beyond the country's territorial borders. In *Amnesty International*, the government and the appeals court appeared to accept that international human rights treaties apply in Afghanistan as *lex generalis* that is displaced by the *lex specialis* of international humanitarian law in armed conflict. In *Khadr*, the Supreme Court affirmed that violations of international human rights obligations under international law are an exception to the general rule that the Charter does not apply abroad absent host state consent, but it did not specify whether treaty obligations would themselves be enforceable extraterritorially.

B. U.K. Supreme Court

In recent years, the United Kingdom has adapted its approach to the extraterritorial application of human rights treaties in response to jurisprudence of the European Court of Human Rights. Although the government was initially reluctant to acknowledge any extraterritorial effect of human rights law outside the United Kingdom's jurisdiction, the United Kingdom now holds that its international human rights obligations apply outside of the United Kingdom's territory so long as the government exercises "effective control" over that territory. This evolution in the United Kingdom's position is illustrated by the three recent cases described below: *Al-Skeini v. United Kingdom*, *Al-Jedda v. United Kingdom*, and *Smith, R. v. Secretary of State for Defense*.

1. *Al-Skeini v. United Kingdom* (2007) [House of Lords]

In *Al-Skeini v. United Kingdom*, a case now before the European Court of Human Rights (as discussed in more depth below), the House of Lords (presently known as the Supreme Court of the United Kingdom) considered

47. *Id.* ¶ 2.

the alleged mistreatment of claimants by British troops in U.K.-occupied Basra.⁴⁸ Specifically, the House of Lords addressed the extraterritorial reach of the Human Rights Act of 1998, which incorporates portions of the European Convention on Human Rights into the domestic U.K. legal system, providing a basis for individuals to bring suit to enforce Convention rights in U.K. domestic courts.⁴⁹ The Secretary of State for Defense argued that five of the six claimants, whose relatives were allegedly killed by patrolling British troops, were outside the United Kingdom's jurisdiction as defined in Article 1 of the Convention—and hence the conduct was not covered by the Convention at all.⁵⁰ While the Secretary agreed that the Convention applied to the sixth claimant, who died in a British detention facility in Afghanistan (and hence was undoubtedly within the U.K.'s jurisdiction under the Convention), he argued that the Human Rights Act did not apply to conduct outside the territory of the United Kingdom. Because the Act provided the sole basis for enforcing Convention claims in domestic court, this left all the claimants without any remedy in British courts.⁵¹

The House of Lords disagreed with the Secretary's interpretation of the U.K.'s legal obligations. It held that the Human Rights Act applies to *all* extraterritorial actions of British public authorities when a victim is within the "jurisdiction" of the United Kingdom for purposes of Article 1 of the European Convention on Human Rights.⁵² The House of Lords agreed with the Secretary that the first five claimants—who had been killed by patrolling troops—were not under U.K. "jurisdiction" for purposes of Article 1 of the Convention, could not claim Convention rights, and therefore could not bring a claim for a violation of Convention rights under the Act.⁵³ The Secretary had conceded, however, that the sixth claimant—who had died while in custody of U.K. troops—fell within U.K. jurisdiction under Article 1 of the Convention. This extraterritorial jurisdiction was founded on "certain limited exceptions, recognised in the jurisprudence of the European Court of Human Rights"⁵⁴—in particular, that jurisdiction under Article 1 extends to instances where a Convention member

48. See *Al-Skeini v. Sec'y of State for Def.*, [2007] UKHL 26 (H.L.) (appeal taken from Eng.).

49. *Id.* at [2]. The Court reiterated that the Act and Convention were not identical but that there were "significant differences between them." *Id.* at [10] (quoting *In re McKerr*, [2004] UKHL 12 (H.L.) [25]).

50. *Id.* at [34].

51. *Id.* at [56].

52. *Id.* at [59], [96], [150].

53. *Id.* at [81], [90], [97], [132].

54. *Id.* at [3].

“exercised effective control of an area outside its national territory.”⁵⁵ The sixth claimant, who had been seized and detained and taken to a British military base in Basra, where he was brutally beaten by British troops—was clearly within the effective control of the British troops. The House of Lords thus concluded that the sixth claimant’s claim fell within the territorial scope of the Convention and hence of the Human Rights Act, and it allowed the claim to proceed.⁵⁶

2. *Al-Jedda v. United Kingdom* (2007) [House of Lords]

In *Al-Jedda v. United Kingdom*, which is also now pending before the European Court of Human Rights (again, discussed in more depth below), a dual British and Iraqi citizen challenged his detention without trial by British troops in Iraq.⁵⁷ The appellant claimed a violation of his right to liberty under Article 5.1 of the European Convention on Human Rights. The Secretary of State for Defence argued first that the appellant’s detention was attributable not to the United Kingdom, but to the United Nations because British troops in Iraq were acting under the authority of the U.N. Security Council.⁵⁸ Alternatively, the Secretary contended that U.N. Security Council Resolution 1546, which grants preventative detention authority to the multinational force in Iraq, and Article 103 of the U.N. Charter, which provides that U.N. Charter obligations supersede conflicting international agreements, prevailed over the appellant’s rights under Article 5.1 of the European Convention on Human Rights.⁵⁹

The House of Lords held that the detention without trial of individuals in Iraq by British troops was attributable to the United Kingdom, not the United Nations.⁶⁰ Thus, the House of Lords reaffirmed the extraterritorial application of the European Convention and the Human Rights Act to instances of British detention of foreigners abroad.⁶¹ It also reiterated its holding in *Al-Skeini* that the Human Rights Act will “usually apply to acts of United Kingdom public authorities outside the United Kingdom where

55. *Id.* at [30] (quoting *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 346 (2001), available at 41 I.L.M. 517, 528).

56. *Id.* at [84], [92], [99], [151].

57. R (on the application of *Al-Jedda*) v. Sec’y of State for Def., [2007] UKHL 58, [2008] 1 A.C. 332 (H.L.) (appeal taken from Eng.).

58. The British government had not raised this argument in the lower courts, raising it on appeal following a relevant admissibility decision by the European Court of Human Rights. See *Behrami v. France*, App. No. 71412/01 (2007); *Saramati v. France*, App. No. 78166/01 (2007).

59. *Al-Jedda*, [2007] UKHL 58, [30].

60. *Id.* at [22]–[23], [124], [149].

61. *Id.* at [123].

the victim is within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention.”⁶² However, it ultimately found that the detention in the case did not violate Article 5.1 of the European Convention on Human Rights, because the British authorities were exercising power lawfully delegated to them by the U.N. Security Council.⁶³

While the *Al-Skeini* and *Al-Jedda* cases have been pending at the European Court of Human Rights,⁶⁴ the British government has accepted and adapted to the rulings of the House of Lords. The British government now recognizes the extraterritorial application of the European Convention on Human Rights and the Human Rights Act to territory abroad under effective British control, and has adjusted its legal positions in subsequent cases accordingly. For example, in later cases involving Iraqi nationals, the British government has argued before British lower courts that the factual circumstances shifted the responsibility for the applicants to the Iraqi government or U.S. forces, rather than challenging the extraterritorial application of the European Convention on Human Rights.⁶⁵

3. *Smith, R. v. Secretary of State for Defence* (2010)

The British government’s position in a more recent case before the newly-renamed Supreme Court of the United Kingdom illustrates the current approach to the extraterritorial application of U.K. human rights obligations. In *Smith, R v. Secretary of State for Defence*, the Court considered a complaint from the mother of a British soldier who died of heatstroke in Iraq.⁶⁶ The plaintiff demanded a full investigation into the possibility of state failure to protect human life under Article 2 of the European Convention on Human Rights.⁶⁷ Although the soldier died on a British military base, the Supreme Court considered the hypothetical situation of a soldier who dies off base, acting in an advisory role because of the great practical relevance of the hypothetical situation.⁶⁸

62. *Id.* at [48].

63. *Id.* at [30]–[39], [105], [136], [151].

64. For a discussion in greater detail about the European Court of Human Rights, see *infra* Part II.A.

65. See *R (on the application of Al-Saadoon) v. Sec’y of State for Defence*, [2008] EWHC (Admin) 3098, [3] (Eng.); *R (on the application of Hassan) v. Sec’y of State for Defence* [2009] EWHC (Admin) 309, [13]–[24] (Eng.).

66. *R (on the application of Smith) v. Sec’y of State for Def.*, [2010] UKSC 29, [2011] A.C. 1 (appeal taken from Eng.).

67. *Id.* at [2].

68. *Id.* at [93].

The Secretary of State for Defence argued that the extraterritorial application of the Convention was limited to territory under the United Kingdom's effective control.⁶⁹ Thus, the Secretary of State for Defence allowed that a military death on a British army base *would* be within British jurisdiction and would trigger an Article 2 inquest, but contended that a death off base would be outside the jurisdiction of the United Kingdom.⁷⁰ In contrast, the respondent argued for a personal definition of jurisdiction, which would apply to all British members of the armed forces regardless of location.⁷¹

In a six to three decision, the Supreme Court ruled that the Human Rights Act and the European Convention do not apply to British troops at all times when they serve abroad.⁷² Reversing the Court of Appeal, the Supreme Court held that British soldiers abroad are only under U.K. jurisdiction, and thus "effective control," when physically present at a British military base or hospital.⁷³ Therefore, there is no automatic right to an Article 2 investigation when a soldier dies on the battlefield. However, because Private Smith died on base, the Court found that the coroner should have found that there was a possible failure of the system to protect soldiers in extreme temperatures, triggering an inquest.⁷⁴ In so ruling, the Supreme Court demonstrated some discomfort with addressing the jurisdictional issues, noting that "[t]he proper tribunal to resolve [the scope of the European Convention on Human Rights and principles that apply to contracting States] is the Strasbourg Court itself, and it will have the opportunity to do so when it considers *Al-Skeini*."⁷⁵

II. RECENT DEVELOPMENTS IN INTERNATIONAL COURTS

We turn now to the international courts and tribunals that have had occasion in recent years to consider whether human rights treaty obligations apply to ratifying states when they act outside their own territorial borders. We consider, in particular, the jurisprudence of the European Court of Human Rights, the Inter-American Commission on Human Rights, and the International Court of Justice. All three courts have considered the question with respect to the treaties under their jurisdiction. The European Court has

69. *Id.* at [32].

70. *Id.*

71. *Id.* at [33].

72. *Id.* at [60].

73. *Id.* at [92].

74. *Id.* at [87], [106].

75. *Id.* at [60].

consistently held that obligations under human rights treaties are active wherever governments have “effective control” over *territories* outside of their borders. The Inter-American Commission has a similar but slightly different approach; it holds that human rights treaties apply wherever governments have “authority and control” over *individuals* or their specific situations. Finally, the International Court of Justice has not developed a clear test for determining the reach of human rights treaties, but it has concluded that it is unquestionably the case that such treaties are *not* limited to a country’s territorial borders.

A. *European Court of Human Rights*

A review of recent European Court of Human Rights opinions shows that it continues to recognize jurisdiction over cases “involving a state’s extraterritorial arrest and detention of an individual.”⁷⁶ The Court first recognized the importance of a state’s “effective control” in extraterritoriality analysis in 1995 in *Loizidou v. Turkey*. In that case, the Court held that Turkey’s occupation of parts of northern Cyprus gave the Court jurisdiction over its conduct there.⁷⁷ In 2001 in *Banković v. Belgium*, the Court reaffirmed the “effective control” standard, while making clear that it was meant to apply to military occupations, conduct on a state’s flag vessels or in its consulates and embassies, situations of arrest and detention, and analogous cases.⁷⁸

In the recent cases of *Al-Saadoon v. The United Kingdom*,⁷⁹ and *Medvedyev v. France*,⁸⁰ the Court faithfully applied the *Banković* approach, finding jurisdiction and holding the United Kingdom and France liable for violations of the European Convention on Human Rights committed in British-occupied Iraq⁸¹ and on a ship seized by the French military,⁸²

76. Cleveland, *supra* note 3, at 266.

77. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (Judgment on Preliminary Objections), available at <http://www.strasbourgconsortium.org/common/ajax/document.download.php?docID=2111&docExt=html>.

78. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 346 (2001). It should be noted that even the narrowed version of the effective control test articulated in *Banković* extends extraterritorial obligations much farther than the United States currently recognizes. See Cleveland, *supra* note 3, at 265–66.

79. *Al-Saadoon v. U.K.*, Decision on Admissibility, App. No. 61498/08 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click check-box for “decisions,” search “case title” for “Al-Saadoon” and follow hyperlink).

80. *Medvedyev v. France*, Judgment, App. No. 3394/03 (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “case title” for “Medvedyev” and follow hyperlink).

81. *Al-Saadoon*, Decision on Admissibility, App. No. 61498/08.

respectively. In two cases currently pending before the European Court,⁸³ again involving the extraterritorial application of human rights law in British-occupied Iraq, the European Court is expected to apply the same framework. Finally, the Court has applied *Banković* in recent cases brought against Greece, Malta, and the International Criminal Tribunal for the Former Yugoslavia, holding that regardless of whether an alleged victim is inside or outside a given state's borders, that state has jurisdiction over that victim only if it has "effective control" over him or her.⁸⁴ In these cases, the Court has made clear that governments have jurisdiction over individuals when and only when they bear responsibility for their arrest, prosecution, or detention.

1. *Al-Saadoon v. United Kingdom* (2010)

The applicants in *Al-Saadoon* are two Iraqi men, accused of being involved in the murder of British soldiers, who were detained by the United Kingdom and transferred into Iraqi custody.⁸⁵ Iraqi authorities charged the applicants with war crimes, and the applicants have argued that these charges carry a substantial risk that they would ultimately be sentenced to death.⁸⁶ On the merits, a chamber of the European Court eventually found that the United Kingdom had violated several articles of the European Convention by transferring the men to Iraqi custody when they faced "a real

82. *Medvedyev*, Judgment, App. No. 3394/03.

83. Press Release, Grand Chamber Hearing, *Al-Skeini and Others and Al Jedda v. The United Kingdom* (Sept. 6, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=869517&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

84. *Plepi v. Albania*, Decision on Admissibility, Apps. Nos. 11546/05, 33285/05 and 33288/05 (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click "decisions" check box, search "case title" for "Plepi," and follow hyperlink); *Blagojevic v. The Netherlands*, Decision on Admissibility, App. No. 49032/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click "decisions" check box, search "case title" for "Blagojevic" and follow hyperlink); *Galic v. The Netherlands*, Decision on Admissibility, App. No. 22617/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click "decisions" check box, search "case title" for "Galic" and follow hyperlink); *Stephens v. Malta* (No. 1), Judgment, App. No. 11956/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "case title" for "Stephens" and follow hyperlink).

85. *Al-Saadoon v. U.K.*, Decision on Admissibility, App. No. 61498/08, ¶¶ 23–30, 57 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click check-box for "decisions," search "case title" for "Al-Saadoon" and follow hyperlink).

86. *Id.* ¶¶ 94–96.

risk of being sentenced to death and executed.”⁸⁷ In its initial decision on the jurisdictional question, the Court noted that American and British courts had recently determined that they had jurisdiction to apply human rights laws extraterritorially to foreign nationals.⁸⁸ It then reviewed its own case law, affirming *Banković* and stating that jurisdiction was essentially territorial, subject to certain important exceptions such as a state’s exercise of judicial or military authority abroad.⁸⁹

The British government maintained that the special circumstances triggering extraterritorial jurisdiction under *Banković* were not present in *Al-Saadoon*.⁹⁰ The Court summarized the United Kingdom’s argument as follows:

In the circumstances, the United Kingdom was not exercising any public powers through the effective control of any part of the territory or the inhabitants of Iraq, such as would exceptionally justify the extra-territorial application of the Convention (see *Banković*, cited above, § 71). Nor did the actions of the United Kingdom forces, in detaining the applicants at the United Kingdom base at the request of the Iraqi courts and transferring them, also at the request of the Iraqi courts, involve the exercise of any recognised extra-territorial authority by the United Kingdom (see *Banković*, cited above, § 73).⁹¹

The Court concluded that, contrary to the government’s claims, the United Kingdom had in fact exercised “exclusive control” over the detention facilities.⁹² The United Kingdom’s military and legal authority in Iraq during the time of the complainants’ detention ensured the United Kingdom’s “total and exclusive *de facto*, and subsequently also *de jure*, control” over the premises and thus the individuals in question.⁹³ Specifically, the Court found that the government’s control over British detention facilities in Iraq and over the applicants had been “established . . . through the exercise of military force” and that this “*de facto* control” was

87. *Al-Saadoon v. United Kingdom*, Judgment, App. No. 61498/08, ¶ 143 (2010), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “case title” for “Al-Saadoon” and follow hyperlink)

88. *Al-Saadoon*, Decision on Admissibility, App. No. 61498/08, ¶ 61 (citing *Rasul v. Bush*, 542 U.S. 466 (2004)); *id.* ¶ 62 (citing *R (Al-Skeini) v. Sec’y of State for Def.*, [2007] UKHL 26, [2008] 1 A.C. 153 (appeal taken from Eng.) (U.K.)).

89. *Id.* ¶ 85.

90. *Id.* ¶ 79.

91. *Id.*

92. *Id.* ¶ 87.

93. *Id.* ¶ 88.

codified into law.⁹⁴ The Court thus concluded that the United Kingdom retained jurisdiction over the applicants until it transferred the applicants to Iraqi custody.⁹⁵

2. *Medvedyev v. France* (2010)

In *Medvedyev v. France*, the European Court held that France had unlawfully deprived nine applicants of their liberty when France intercepted the cargo vessel *Winner* in international waters and took custody of the applicants, who were crew members on board.⁹⁶ Three of the applicants were later found guilty in a French court of conspiracy to illegally import narcotics.⁹⁷ The French government did not rely on *Banković* to argue that the Court lacked jurisdiction over the applicants. Instead the government “stressed that the events in this case had taken place on the high seas, so that it was necessary to take into account the specificities of the maritime environment and of navigation at sea.”⁹⁸ The European Convention should be inapplicable, France argued, “for want of any provision in the Convention concerning arrangements for rerouting ships, or specific provisions concerning maritime matters.”⁹⁹

As in *Al-Saadoon*, however, the Court disagreed; it found that France had exercised effective control over the *Winner* and the applicants.¹⁰⁰ The Court affirmed the “effective control” standard of *Banković* and noted that exceptional circumstances in which a state’s extraterritorial jurisdiction applied included “activities of [a state’s] diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State.”¹⁰¹ Here, France had instructed a French warship originating from France to take over the *Winner*; an armed French commando team had kept the crew confined within the ship; and France had instructed a tug and second warship to bring the crew back to a French port. The Court concluded that:

94. *Id.* ¶ 87 (“CPA Order No. 17 (Revised) (see paragraph 13 above) provided that all premises currently used by the MNF [Multi-National Force] should be inviolable and subject to the exclusive control and authority of the MNF.”).

95. *Id.* ¶ 89.

96. *Medvedyev v. France*, Judgment, App. No. 3394/03, ¶¶ 9–13, 24 (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click on “Decisions,” and then search “case title” text for “Medvedyev” and follow hyperlink).

97. *Id.* ¶¶ 24–25.

98. *Id.* ¶ 49.

99. *Id.*

100. *Id.* ¶ 67.

101. *Id.* ¶ 64–65.

[A]s this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention (contrast *Banković*, cited above).¹⁰²

The Court thus found that the Convention could apply extraterritorially even on the high seas, and, accordingly, France assumed jurisdiction over the applicants when it used military force to control the *Winner* and its crew.¹⁰³

3. *Al-Skeini v. United Kingdom* and *Al Jedda v. United Kingdom* (Pending)

Two cases mentioned above—*Al-Skeini v. U.K.* and *Al Jedda v. U.K.*—are currently pending before the Grand Chamber of the Court.¹⁰⁴ National proceedings in the cases are discussed above. In both cases, the only European Court filings available at this time are the Statement of Facts and Questions to the Parties, and therefore filings describing the United Kingdom's position in the cases are not yet available. However, it is possible to glean important themes from the video of the oral arguments. First, the United Kingdom continues to rely on *Banković* in arguing that jurisdiction is, and should remain, primarily territorial with only narrow exceptions.¹⁰⁵ Second, the United Kingdom frequently urged the Court to consider the impracticalities and risks of applying human rights law during war.¹⁰⁶

During oral arguments, the government of the United Kingdom asserted that the applicants in *Al-Skeini* were not within the jurisdiction of the United Kingdom.¹⁰⁷ The government argued that *Banković*'s primarily territorial

102. *Id.* ¶ 67.

103. *Id.*

104. Oral arguments were heard on June 9, 2010. Press Release, European Court of Human Rights, Grand Chamber Hearing: *Al-Skeini and Others and Al Jedda v. The United Kingdom* (June 9, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=869517&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

105. As mentioned above, these exceptions would still be considered quite broad relative to current U.S. practice. See *supra* note 78.

106. Oral Argument, *Al-Skeini v. United Kingdom*, App. No. 55721/07, and *Al Jedda v. United Kingdom*, App. No. 27021/08, available at http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20100609-1/en/.

107. *Id.*

notion of jurisdiction applied, and it provided several reasons why territorially based jurisdiction was appropriate.¹⁰⁸ It further argued that the five applicants who were allegedly killed by patrolling U.K. troops did not fall under the *Banković* exceptions to territorial jurisdiction because the United Kingdom did not have “effective control” over Iraq outside of its military bases.¹⁰⁹ The government contested the argument that all of the applicants were under British jurisdiction because they were affected by the actions of state agents—no European Court case law, the government argued, supported such a conception of jurisdiction.¹¹⁰ The government also contested the applicants’ argument that they were under British jurisdiction because British troops were exercising legal control over the applicants.¹¹¹ Throughout its remarks on *Al-Skeini*, the government underscored the narrowness of space available for exceptions to the essentially territorial understanding of jurisdiction, and it warned the Court that any further exceptions could have serious ramifications during times of war. It urged the Court to consider, for example, the practical impossibility of securing all Convention rights while serving as an occupying force during wartime.¹¹²

In its discussion of *Al-Jedda* during the oral arguments, the United Kingdom asserted that it had been permitted by the United Nations to participate in the internment of the applicant.¹¹³ The actions of the British troops who interned the applicant were therefore attributable to the United Nations—making those actions compliant with Article 5 of the Convention. Moreover, even if the actions were *not* properly attributable to the United Nations, the government argued, the Security Council Resolution granting the United Kingdom authority to intern the applicant had superior force to Article 5.¹¹⁴ If the United Kingdom must have complied with Article 5, the government argued, the Security Council would have had no ability to exercise its power.¹¹⁵ The government emphasized that the Security Council Resolution had been an urgent and necessary response to a threat to peace.¹¹⁶ Had the United Kingdom failed to intern the applicant, it would have been acting inconsistent with the aims of the international mission and

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

thereby would have risked undermining it.¹¹⁷ It remains to be seen how the Court will resolve these issues.

4. Other Cases Concerning Extraterritorial Control

The European Court of Human Rights has affirmed *Banković* in four additional recent cases concerning the extraterritorial application of human rights for detainees, holding that jurisdiction ultimately turns on whether a state bears responsibility for an individual's arrest, prosecution, or detention. In two cases, the Court affirmed that when an individual is *outside* of a state's territory, that individual is within that state's jurisdiction for purposes of the Convention if the state bears responsibility for the alleged victim's arrest, prosecution, or detention.¹¹⁸ In two other cases, the Court held that if an individual is *inside* a state's territory, the individual still is not within that state's "jurisdiction" if another state bears responsibility for the arrest, prosecution, or detention.¹¹⁹

In *Plepi v. Albania*, the Court determined that Albania had not exercised control over the Albanian applicants when it refused to demand that Greece transfer the applicants into Albanian custody, concluding therefore that the applicants were not within Albania's jurisdiction.¹²⁰ The applicants—who were arrested in Greece for drug trafficking and sentenced to life in prison—had requested to be transferred to serve their sentences in Albania under a bilateral agreement.¹²¹ Greece initially had no objection, but when Albania determined that the applicants would be eligible for early parole in Albania, Greece refused to go through with the transfer.¹²² The applicants argued that Greece's refusal to transfer them to Albanian custody violated their rights under the European Convention and that Greece and Albania had "failed to take adequate steps to guarantee their rights and have the

117. *Id.*

118. *Plepi v. Albania*, App. Nos. 11546/05, 33285/05 and 33288/05 (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click "decisions" check box, search "case title" for "Plepi" and follow hyperlink); *Stephens v. Malta* (No. 1), App. No. 11956/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "case title" for "Stephens" and follow hyperlink).

119. *Blagojevic v. The Netherlands*, App. No. 49032/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click "decisions" check box, search "case title" for "Blagojevic" and follow hyperlink); *Galic v. The Netherlands*, App. No. 22617/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click "decisions" check box, search "case title" for "Galic" and follow hyperlink).

120. *Plepi*, App. Nos. 11546/05, 33285/05 and 33288/05, at 7.

121. *Id.* at 1.

122. *Id.* at 2.

transfer proceedings completed.”¹²³ Albania argued that the applicants were not under its jurisdiction.¹²⁴ Citing *Banković*, the Court agreed: “The applicants were prosecuted and convicted by the Greek authorities, as a consequence of which they are serving their sentence in Greece. The court considers that there is no indication that the Albanian authorities exercised jurisdiction over the applicants within the meaning of Article 1 of the Convention.”¹²⁵ The Court stressed that Albania “assumed [no] responsibility over the applicants” even though Albania had held proceedings on the matter of the applicants’ possible transfer, because these proceedings “took place as a result of the transfer request submitted by the Greek authorities and were designed solely to validate and enforce the decision of the Greek court.”¹²⁶ For these and other reasons, the Court dismissed the application.

The Court employed similar reasoning in *Stephens v. Malta (No. 1)*.¹²⁷ It held that when Spain arrested a British applicant in Spain at Malta’s request, Malta exercised control over the applicant, bringing him within Malta’s jurisdiction.¹²⁸ Thus, even though the applicant was in Spain under Spain’s physical control at the relevant time, the Court found that Malta would properly be liable for any unlawful arrest.¹²⁹ As in *Plepi*, the Court affirmed *Banković* and held that Malta bore responsibility for the applicant because, even though he was arrested in Spain, “the applicant’s deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition.”¹³⁰

In two recent cases regarding international criminal courts, the European Court has clarified that presence within a state’s territory is neither a necessary nor sufficient condition for the application of the Convention.¹³¹

123. *Id.* at 6.

124. *Id.* at 7.

125. *Id.*

126. *Id.*

127. *Stephens v. Malta (No. 1)*, Judgment, App. No. 11956/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “case title” for “Stephens” and follow hyperlink).

128. *Id.* ¶¶ 51–54.

129. *Id.* ¶ 51.

130. *Id.* In this case, Malta never contested that the applicant was under its jurisdiction, but the court raised the issue *sua sponte*. *Id.* ¶ 45.

131. *Blagojevic v. The Netherlands*, App. No. 49032/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click “decisions” check box, search “case title” for “Blagojevic” and follow hyperlink); *Galic v. The Netherlands*, App. No. 22617/07 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (click “decisions” check box, search “case title” for “Galic” and follow hyperlink).

Even if the applicant is within the respondent state's territory at the relevant time, the Court held, jurisdiction still turns on effective control and responsibility for the arrest, prosecution, or detention.¹³² This issue arose in two admissibility decisions on complaints against the Netherlands by Serbian nationals indicted for war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY), *Blagojevic v. The Netherlands* and *Galic v. The Netherlands*.¹³³ In both complaints, the Serbian nationals alleged that the ICTY violated their rights under the European Convention and that these rights violations occurred in the jurisdiction of the Netherlands.¹³⁴ The Court found both complaints inadmissible.¹³⁵ In concluding that the Netherlands did not bear responsibility for the actions of the ICTY, the European Court affirmed *Banković* and reasoned that "Convention liability normally arises in respect of an individual who is 'within the jurisdiction' of a Contracting State, in the sense of being physically present on its territory. However, exceptions have been recognised in the Court's case-law."¹³⁶ One of these exceptions is that international criminal trials do not automatically "engage the responsibility under public international law of the State on whose territory it is held."¹³⁷ The Court suggested that the United Nations ultimately bore responsibility for the trials, not the Netherlands, since the ICTY was an "'operation' 'fundamental to the mission of the UN.'"¹³⁸

B. *Inter-American Commission on Human Rights*

There have been no dramatic new developments in the jurisprudence of the Inter-American Commission on Human Rights (Inter-American Commission) related to the extraterritorial application of human rights in the last two years. Rather, the Commission—which has had extensive past experience addressing questions of extraterritorial application of human rights guaranteed in the American Declaration of the Rights and Duties of Man¹³⁹ and the American Convention on Human Rights—has continued to

132. *Blagojevic*, App. No. 49032/07; *Galic*, App. No. 22617/07.

133. *Blagojevic*, App. No. 49032/07; *Galic*, App. No. 22617/07.

134. *Blagojevic*, App. No. 49032/07, ¶¶ 1, 29; *Galic*, App. No. 22617/07, ¶¶ 1, 29.

135. *Blagojevic*, App. No. 49032/07, ¶¶ 46–47; *Galic*, App. No. 22617/07, ¶¶ 46, 49.

136. *Blagojevic*, App. No. 49032/07, ¶¶ 42–43.

137. *Id.* ¶ 44.

138. *Galic*, App. No. 22617/07, ¶¶ 37–39.

139. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by 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 at 17 (1988).

affirm its previous approach.¹⁴⁰ On those rare occasions when the issue has emerged at the Commission in recent years—and none that have been identified here have occurred in contentious cases¹⁴¹—the Commission has applied a non-territorial “authority and control” standard for the extraterritorial application of relevant human rights norms. In short, the Commission focuses its analysis on “the state’s control over a specific person or situation—not [on] the state’s control over the territory in which the event occurred.”¹⁴²

The Inter-American Commission’s 2002 Report on Terrorism and Human Rights¹⁴³ provides a useful summary of the Commission’s approach to the question of the extraterritorial application of human rights. In the Report, the Commission indicated that it “wishe[d] to emphasize . . . the overriding significance of the principles of necessity, proportionality, humanity and non-discrimination in *all* circumstances in which states purport to place limitations on the fundamental rights and freedoms of persons under their *authority and control*.”¹⁴⁴ The Report does not mention territorial jurisdiction, but rather focuses on a state’s authority and control over people as its operating standard.

The Commission cited this extraterritoriality standard in two very different contexts in 2007 and 2008, indicating that the standard has retained its vitality. In a 2007 Article on access to justice, the Commission affirmed the applicability of the “authority and control” standard in the detention context.¹⁴⁵ It quoted a 2001 decision of the Commission in *Rafael Ferrer-Mazorra et al. v. United States*:

[I]n respect of individuals falling within the authority and control of a state, effective judicial review of the detention of such individuals as required under Article XXV of the Declaration must proceed on the fundamental premise that the individuals are

140. 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. This approach is outlined in Sarah Cleveland’s 2010 article, *Embedded International Law and the Constitution Abroad*. Cleveland, *supra* note 3, at 248–51.

141. This conclusion was drawn based on a search of every Inter-American Commission case from approximately the last two years, using search terms like “extraterritorial” and “authority and control,” which turned up no relevant results.

142. Cleveland, *supra* note 3, at 251.

143. INTER-AM. COMM’N H.R., REPORT ON TERRORISM AND HUMAN RIGHTS (2002), available at <http://www.cidh.org/terrorism/eng/toc.htm>.

144. *Id.* ¶ 374 (emphasis added).

145. INTER-AM. COMM’N H.R., ACCESS TO JUSTICE AS A GUARANTEE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A REVIEW OF THE STANDARDS ADOPTED BY THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS ¶ 194 n.144 (2007), available at <http://www.cidh.org/countryrep/AccessoDESC07eng/Accessodescindice.eng.htm>.

entitled to the right to liberty, and that any deprivation of that right must be justified by the state in accordance with the principles underlying Article XXV.¹⁴⁶

Again, the Commission emphasizes authority and control, not territoriality. Similarly, in a 2008 statement on the implementation in the Americas of the U.N. Convention on the Rights of the Child's Second Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, Commission representatives noted that:

[I]t is . . . important for States to assess the adoption of measures to establish their extraterritorial criminal jurisdiction for all criminal offenses related to child sexual exploitation, to prosecute all those accused of allegedly being responsible for commission of crimes related to sexual exploitation, in a way that makes it possible to prosecute a suspect who is in the territory of a State Party, even though the crime was committed abroad.¹⁴⁷

The Commission, therefore, applied a similarly aggressive extraterritoriality standard in the children's rights context as well. Thus, the "authority and control" standard summarized in the 2002 Article on Terrorism and Human Rights continues to guide the Commission's decisions on extraterritoriality.

C. *International Court of Justice*

In *Georgia v. Russian Federation*, a pending case initiated by Georgia in August 2008, the International Court of Justice has applied the "effective control" standard for determining jurisdiction under human rights treaties.¹⁴⁸ In its decision on provisional measures in the case, the ICJ held that the Convention on the Elimination of All Forms of Racism (CERD) applies beyond the territorial jurisdictions of states parties.¹⁴⁹

146. *Id.*

147. The quotation provided is a translation of the original Spanish text, adapted from GOOGLE TRANSLATE, <http://translate.google.com> (last visited Apr. 13, 2011). The original source is: PAULO SÉRGIO PINHEIRO & CECILIA ANICAMA, DESAFÍOS PARA EL CUMPLIMIENTO PLENO Y EFECTIVO EN EL HEMISFERIO DEL PROTOCOLO FACULTATIVO DE LA CONVENCIÓN SOBRE LOS DERECHOS DEL NIÑO RELATIVO A LA VENTA DE NIÑOS, LA PROSTITUCIÓN INFANTIL Y LA UTILIZACIÓN DE LOS NIÑOS EN LA PORNOGRAFÍA 8 (2008).

148. Cleveland, *supra* note 3, at 259.

149. Both Georgia and Russia are parties to CERD without reservations. The ICJ will be holding public hearings on Russia's preliminary objections to the court's jurisdiction from September 13–17, 2010. Press Release, International Court of Justice, Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (*Geor. v. Russ. Fed'n*): Preliminary Objections (Aug. 5, 2010), <http://www.icj-cij.org/docket/files/140/16023.pdf>.

In this case, Georgia alleged various “violent discriminatory acts by Russian armed forces,” and argued that CERD’s application was not limited to Russian territory.¹⁵⁰ Rather, it argued, “Russia’s obligations under the Convention extend to acts and omissions attributable to Russia which have their locus within Georgia’s territory and in particular in Abkhazia and South Ossetia.”¹⁵¹ Russia, however, claimed that CERD—in particular Articles 2 and 5 of the Convention—could not apply extraterritorially.¹⁵² Given that CERD lacks explicit extraterritoriality provisions, Russia argued that “obligations under CERD as a general matter only apply on the territory of the States parties.”¹⁵³ Russia further stated that such an approach to extraterritoriality would be “in line with the position of general international law, which provides that, unless specifically indicated, treaty obligations apply only territorially.”¹⁵⁴ Ultimately, the Court determined that the lack of a specific territorial limitation within CERD had the opposite meaning. It held that Article 2 and Article 5 of CERD “generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”¹⁵⁵

The Court did not specify in what circumstances a state’s actions beyond its territory would be subject to the obligations imposed by the Convention. It did, however, make clear that without an explicit territorial limitation written into the Convention itself, the CERD generally would be read to apply to a state’s extraterritorial actions.

150. Summary of the Order, International Court of Justice, Application of the Int’l Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed’n): Request for the Indication of Provisional Measures 4 (Oct. 15, 2008), <http://www.icj-cij.org/docket/files/140/14809.pdf> [hereinafter Summary of the Order].

151. *Id.*

152. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed’n), Preliminary Objections of the Russian Federation, 185 (Dec. 1, 2009), available at <http://www.icj-cij.org/docket/files/140/16099.pdf>.

153. *Id.*

154. *Id.* Russia cites the ICJ’s Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 240 (Dec. 19); and European Court of Human Rights case Banković v. Belgium, App. No. 52207/99, Eur. Ct. H.R. (2001), available at 41 I.L.M. 517 (2002), to support this proposition that human rights obligations primarily apply territorially. Russia also used the fact that jurisdiction clauses can be found in human rights treaties such as Article 2(1) of the International Covenant on Civil and Political Rights and Article 1 of the Convention on the Protection Human Rights and Fundamental Freedoms, among others, as a contrast to CERD’s absence of specific statement on this issue. Preliminary Objections, *supra* note 152, at 191–95.

155. Summary of the Order, *supra* note 150, at 4.

III. RECENT DEVELOPMENTS IN U.N. HUMAN RIGHTS BODIES

Human rights bodies operating under the auspices of the United Nations have also grappled with questions involving the extraterritorial reach of human rights treaties. In particular, the Committee Against Torture—tasked with monitoring countries’ compliance with the Convention Against Torture—and the Human Rights Committee—tasked with overseeing countries’ compliance with the International Covenant on Civil and Political Rights—have both examined the issue in depth. The two bodies have both concluded that the extraterritorial reach of a state’s human rights treaty obligations turns on the “state’s exercise of control over either persons or places.”¹⁵⁶ The Human Rights Committee has extended this even further, holding in 2009¹⁵⁷ that a state may be liable for a human rights violation that occurs even outside of its area of control, as long as that state’s activity was “a link in the causal chain” bringing about the human rights violation.¹⁵⁸ These decisions represent the most far reaching assertion of extraterritorial effect for state obligations under human rights treaties.

A. *Committee Against Torture*

The Committee Against Torture applies an “effective control” standard for the extraterritorial application of the Convention Against Torture.¹⁵⁹ Recently, in its Concluding Observations on the report submitted by the Macao Special Administrative Region, the Committee voiced concern that, while the region’s jurisdiction over acts of serious torture committed abroad could be established, “the exercise of extra territorial jurisdiction with respect to other torture offences . . . [was] conditional to the requirement of double criminality.”¹⁶⁰ Under this principle, Macao’s extraterritorial torture statute would apply abroad only if the conduct in question was criminal under both Macao law and the law of the state in whose territory the conduct occurred. Concerned that this requirement would restrict the extraterritorial application of human rights norms, the Committee therefore

156. Cleveland, *supra* note 3, at 251, 254.

157. U.N. Human Rights Comm., *Munaf v. Romania*, 96th Sess., July 13–31, 2009, U.N. Doc. CCPR/C/96/D/1539/2006 (Aug. 21, 2009), available at <http://www.unhcr.org/refworld/docid/4acf500d2.html> (last visited Sept. 7, 2010).

158. *Id.* ¶ 14.2.

159. For a discussion of the CAT’s practice before the period under study in this Article, see Cleveland, *supra* note 3, at 258.

160. Rep. of the Comm. Against Torture, Macao Special Administrative Region, *Consideration of Articles Submitted by States Parties Under Article 19 of the Convention*, 41st Sess., Nov. 3–Nov.21, 2008, ¶ 6, CAT/C/MAC/CO/4 (Jan. 19, 2009), available at www2.ohchr.org/english/bodies/cat/docs/CAT.C.MAC.CO.4.pdf.

recommended that the Macao Special Administrative Region establish full jurisdiction over torture crimes committed extraterritorially, “in accordance with . . . the Convention.”¹⁶¹ The Committee thus interpreted the Convention to require states to prohibit torture extraterritorially to the full extent of their effective control.

B. Human Rights Committee of the ICCPR

The Human Rights Committee has considered one relevant case during the last couple of years: *Munaf v. Romania*, decided in 2009.¹⁶² This case provides a helpful discussion on the “power or effective control” standard adopted by the Committee in 2004, under which jurisdiction is defined according to the relationship between the state and an individual allegedly harmed with respect to a given International Convention on Civil and Political Rights obligation.¹⁶³

The Committee focused its analysis on determining the nature of the relationship between the plaintiff, Mohammad Munaf, and Romania. Munaf, an Iraqi-American dual national, had been kidnapped along with three Romanian journalists and released, then detained in the Romanian Embassy in Baghdad, and subsequently handed over to U.S. military officers on accusations that he was a co-conspirator in the kidnapping.¹⁶⁴ Munaf alleges that he was then tortured, and after he was handed over to Iraqi authorities, was sentenced to death.¹⁶⁵ The Committee thus considered whether “by allowing [Munaf] to leave the premises of the Romanian Embassy in Baghdad, [Romania] exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under . . . the Covenant, which [Romania] could reasonably have anticipated.”¹⁶⁶ On this issue, the Committee affirmed 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

161. *Id.* Article 5, paragraph 2, states: “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph I of this article.” G.A. Res. 39/46 (V), ¶ 2, U.N. Doc. A/RES/39/46 (Dec. 17, 1984).

162. U.N. Human Rights Comm., *Munaf*, *supra* note 157.

163. U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess., ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>.

164. U.N. Human Rights Comm., *Munaf*, *supra* note 157, ¶¶ 1.1, 2.1–2.2.

165. *Id.* ¶ 2.2–2.4.

166. *Id.* ¶ 14.2.

jurisdiction.”¹⁶⁷ The Committee then refined its pre-existing doctrine, stating that the risk of a violation outside a country’s territory “must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.”¹⁶⁸

The Romanian government did not challenge the “power or effective control” standard outlined in General Comment 32.¹⁶⁹ Rather, the government argued that the circumstances surrounding Munaf’s “custody” in the Romanian Embassy and his subsequent release did not meet the key elements of this standard.¹⁷⁰ In particular, the government claimed that Munaf’s presence in its embassy had “no legal significance,” because he allegedly remained in the custody of the multinational and/or U.S. forces at all relevant times, an argument the court swiftly dismissed.¹⁷¹ Second, and more persuasively, the Romanian government argued that because “there was no information at that time to indicate the future initiation of criminal proceedings against [Munaf] in Iraq, . . . [it] could not have known at that time whether there were substantial grounds to believe that he was at risk of torture, ill-treatment or a death sentence.”¹⁷² The government therefore argued that Munaf did not meet the foreseeability prong of the test, thus failing to prove a causal link “between the action of the agents of a State and the subsequent alleged acts.”¹⁷³ The Committee ultimately agreed with this assessment.¹⁷⁴

The Committee’s elaboration of the “effective control” standard through a causal link analysis thus makes clear that the standard can apply in cases in which the conduct constituting a violation does not actually occur within a particular state’s jurisdiction. If an *ex ante* risk of a Covenant violation

167. *Id.* (emphasis added). This is not the first time the Committee has used causal link analysis. In the 1997 case of *A.R.J. v. Australia*, the Committee stated, “[i]f a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.” U.N. Human Rights Comm., *A.R.J. v. Australia*, 60th Sess., July 14–Aug. 1, 1997, ¶ 6.9, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997). In the more recent case of *Judge v. Canada*, the Committee conducted similar analysis, holding that “by deporting [Roger Judge] to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.” U.N. Human Rights Comm., *Roger Judge v. Canada*, 78th Sess., July 14–Aug 8, 2003, ¶ 10.6, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003).

168. U.N. Human Rights Comm., *Munaf*, *supra* note 157, ¶ 14.2.

169. *Id.*

170. *See id.* ¶ 4.10–4.13.

171. *Id.* ¶¶ 4.12, 7.5.

172. *Id.* ¶ 4.12.

173. *Id.* ¶ 9.3.

174. *Id.* ¶ 14.4.

was a necessary and foreseeable consequence of a state's action, that state may be held accountable for a later violation of the Covenant, even if it occurred outside the state's territory or control. A state therefore does not need to be exercising unilateral control over an individual at the time of the violation; rather, it can merely be a "link in the causal chain" that ultimately made possible the Covenant violation in another jurisdiction.¹⁷⁵ Although the Human Rights Committee has long eschewed a purely territorial approach to the applicability of the Covenant, this case demonstrates that, in its current approach, state responsibility rather than presence or territory is paramount.

IV. CONCLUSION

This Article's survey of foreign and international tribunals' approach to extraterritorial application of human rights treaties leads to a clear conclusion: most jurisdictions have settled on a variation of the effective control test for extraterritorial application of human rights treaty obligations. This approach, moreover, has been consistent among courts for some time now—and has largely been reaffirmed in recent years. To the extent there has been any recent shift in jurisprudence of any of these bodies, it has been toward more generous extraterritorial application of human rights treaty obligations abroad. Most notably, the U.K. Supreme Court, deferring to the rulings of the European Court of Human Rights, has accepted a somewhat broader extraterritorial application of human rights obligations than it had a few years earlier.¹⁷⁶ In the process, it has come more closely into line with other international bodies and tribunals—leaving the United States more isolated than ever.

Although the courts have adopted a broadly consistent approach to extraterritorial application of human rights treaties, different tribunals have given this test slightly different meanings. The European Court of Human Rights, the Inter-American Commission on Human Rights, the Committee Against Torture, the Human Rights Committee, and the International Court of Justice have all taken a broad approach, applying human rights

175. In this case, the Committee ultimately held that Romania could not have known at the time of Munaf's departure from its Embassy that he ran a risk of his Covenant rights being violated. The Committee therefore could not conclude "that the State party exercised jurisdiction over [Munaf] in a way that exposed him to a real risk of becoming a victim of any violations under the Covenant." *Id.* ¶ 14.6.

176. The Canadian Supreme Court has held that Canada's human rights obligations under its Charter apply abroad when Canada has violated international law, but it still has not squarely addressed whether human rights treaties could themselves be enforced extraterritorially.

obligations extraterritorially to the extent that the state has control over a person or situation, even if it does not have control over the territory where the conduct takes place. In two pending cases, it remains to be seen whether the European Court of Human Rights will extend this framework yet further to battlefield situations (the *Al-Skeini* case) or to detention situations where the state-actor arguably has U.N. Security Council authorization to use force (the *Al Jedda* case). The U.K. Supreme Court's approach has been a bit narrower, applying human rights obligations extraterritorially only when the state effectively controls the territory in question, for example, where the relevant conduct occurs on a military base, in a military hospital, or in a military detention center abroad, and not when the state's agents are acting on the battlefield (the *Smith* case). Canadian courts have not yet articulated a clear test for the extraterritorial applicability of human rights *treaties*, but the Canadian Supreme Court and the Canadian government have both recognized that Canada is bound by international law when it acts abroad, and that violations of international law by Canadian officials can trigger obligations under the Canadian Charter.

This emerging consensus—and the United States' growing status as an outlier—may provide a reference point for U.S. courts and policymakers struggling with the complicated questions raised by the exercise of power by the U.S. government outside the country's territorial limits. As Justice O'Connor has noted: "laws are organic, and they benefit from cross-pollination."¹⁷⁷ Cross-pollination on the issue of extraterritorial application of human rights treaties has already occurred among a range of international tribunals that have settled on variations of the effective control standard. In the words of Justice O'Connor, we in the United States would be well advised to "keep our eyes open for innovations" from these "foreign jurisdictions that, with some grafting and pruning, might be transplanted to our own legal system."¹⁷⁸

177. Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 45 *FED. LAW.* 20, 21 (1998).

178. *Id.*

APPENDIX

SUMMARY OF “EFFECTIVE CONTROL” TESTS
USED BY FOREIGN AND INTERNATIONAL COURTS

Court	Language from Key Cases	Summary of “Effective Control” Test as Applied
Supreme Court of Canada, Federal Court of Appeal of Canada	“[T]he Court finds that the ‘effective military control of the person’ test advocated by the applicants as the proper basis for establishing Charter jurisdiction is not appropriate in the context of a multinational military operation such as that which is currently under way in Afghanistan. Moreover, the use of such a control-based test as a legal basis on which to found Charter jurisdiction has been specifically rejected by the Supreme Court of Canada in <i>R. v. Hape</i> .” <i>Amnesty Int’l Canada v. Canada</i> , [2008] 4 F.C. 336, para. 299 (Can.).	As to the extraterritorial application of the Canadian Charter, the Canadian Supreme Court rejected any effective control test in <i>R. v. Hape</i> in favor of a consent-based test, and the Government of Afghanistan has not consented to the application of the Canadian charter to its citizens.
Supreme Court of Canada	“That deference [to the sovereignty of other states, which underlies the consent-based test for the extraterritorial application of the Canadian Charter] ends where clear violations of international law and fundamental human rights begin.” <i>R. v. Hape</i> , [2007] 2 S.C.R. 292, para. 52 (Can.).	There is an exception to the consent-based test for the extraterritorial application of the Canadian Charter for violations of international law and human rights. This suggests that Canada’s human rights obligations have some application beyond its borders—perhaps in line with some sort of effective control test—since otherwise this exception would constitute a null set.
Supreme Court of the United Kingdom	“So far as the exercise of executive authority is concerned, one can postulate that this requires effective control, either of territory or of individuals, before article 1 jurisdiction is established. The fact remains, however, that the Strasbourg Court has not propounded any such general principle. Nor can such a principle readily be reconciled with the proposition, approved in <i>Banković</i> , that article 1 jurisdiction is essentially territorial in nature and that other bases of jurisdiction are exceptional and	The United Kingdom has extraterritorial jurisdiction under Article 1 of the European Convention on Human Rights over members of its military only when they are within areas over which their armed forces have established total and exclusive de facto control such as a military base, a military hospital, or a detention center.

	require special justification in the particular circumstances of each case.” R v. Sec’y of State for Defence, [2010] UKSC 29, [47] (U.K.) (appeal taken from Eng. and Wales), <i>available at</i> http://www.supremecourt.gov.uk/docs/uksc_2009_0103_judgment_v2.pdf .	
United Kingdom House of Lords	“[Jurisdiction] under article 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in Section 1 of the Convention.” Al-Skeini v. Sec’y of State for Defence, [2007] UKHL 26, [79] (U.K.) (appeal taken from Eng. and Wales), <i>available at</i> http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm .	The United Kingdom as an occupying power does not have sufficient effective control over territory in Iraq, other than its military bases, to bring such territory within its jurisdiction under article 1 of the European Convention on Human Rights.
European Court of Human Rights	“The Court considers that, given the total and exclusive <i>de facto</i> , and subsequently also <i>de jure</i> , control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction . . .” Al-Saadoon v. U.K., Decision on Admissibility, App. No. 61498/08, ¶ 88 (2009), <i>available at</i> http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (click check-box for “decisions,” search “case title” for “Al-Saadoon” and follow hyperlink).	Even when acting in another state, when a government has total and exclusive <i>de facto</i> and <i>de jure</i> control over a territory and over individuals in that territory, the government has jurisdiction over that territory and those individuals.
European Court of Human Rights	“[T]he court considers that, as this was a case of France having exercised full and exclusive control over the <i>Winner</i> and its crew, at least <i>de facto</i> , from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France’s jurisdiction for the purposes of Article 1 of the Convention.” Medvedev v.	Even on the high seas, when a government has full and exclusive control over an area and the individuals in that area, the government has jurisdiction over that area and those individuals.

	France, App. No. 3394/03, ¶ 67 (2010) (internal citations omitted), <i>available at</i> http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (click check-box for “decisions,” search “case title” for “Medvedyev” and follow hyperlink).	
European Court of Human Rights	“The applicants were prosecuted and convicted by the Greek authorities, as a consequence of which they are serving their sentence in Greece. The Court considers that there is no indication that the Albanian authorities exercised jurisdiction over the applicants within the meaning of Article 1 of the Convention.” <i>Plepi v. Albania and Greece</i> , App. No. 11546/05, 33285/05, & 33288/05, ¶ 1 (2010), <i>available at</i> http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (click check-box for “decisions,” search “case title” for “Plepi” and follow hyperlink).	Even when a state has held proceedings regarding individuals, it does not have jurisdiction over those individuals if another country bears responsibility for arresting, prosecuting, and detaining the individuals.
European Court of Human Rights	“[T]he applicant’s deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition.” <i>Stephens v. Malta</i> (No. 1), App. No. 11956/07, ¶ 51 (Apr. 21, 2009), <i>available at</i> http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (click on “Decisions” and then search by “Application Number”).	Even when one state has physical and legal control over an individual, another state may have jurisdiction over that individual if it bears responsibility for his arrest, prosecution, and detention.
European Court of Human Rights	“Convention liability normally arises in respect of an individual who is ‘within the jurisdiction’ of a Contracting State, in the sense of being physically present on its territory. However, exceptions have been recognised in the Court’s case-law.” One exception is that international criminal trials do not automatically “engage the responsibility under public international law of the State on whose territory it is held.” <i>Blagojević v. The Netherlands</i> , App. No. 49032/07, ¶¶ 43–44 (June 9, 2009), <i>available at</i>	When an international organization ultimately bears responsibility for an individual’s arrest, prosecution, and detention, a state hosting the individual’s criminal trial does not have responsibility for the individual and the individual is not within that state’s jurisdiction.

	<p>http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (click on "Decisions," and then search text for "Blagojevic").</p>	
Inter-American Commission on Human Rights	<p>"The Commission wishes to emphasize . . . the overriding significance of the principles of necessity, proportionality, humanity and non-discrimination in all circumstances in which states purport to place limitations on the fundamental rights and freedoms of persons under their authority and control." Article on Terrorism and Human Rights, Inter-Am. Comm'n C.H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr, ¶ 374 (2002), available at http://www.cidh.org/terrorism/eng/part.q.htm#3.</p>	<p>The Commission has consistently applied a non-territorial "authority and control" standard for extraterritorial application of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The key consideration in this test is control over a specific person or situation, not territorial sovereignty.</p>
International Court of Justice	<p>Even though Articles 2 and 5 of the CERD do not contain explicit extraterritorial provisions, both articles "generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory." Application of Convention on International Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measure, 2008 I.C.J. 353, ¶ 109 (Oct. 15).</p>	<p>Effective control here is roughly equivalent to state responsibility. Even without an explicit extraterritorial provision written in to the relevant articles of the Convention itself, ICJ determined that the CERD generally would apply to a state's extraterritorial actions.</p>
Committee Against Torture	<p>See Rep. of the Committee Against Torture, Macao Special Administrative Region, <i>supra</i> note 161, ¶ 6.</p>	<p>CAT has acted to ensure that states criminalize torture beyond their borders to the greatest extent that their criminal law can reach.</p>

<p>U.N. Human Rights Committee</p>	<p>“[A] State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.” The risk of a violation outside a country’s territory “must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.” U.N. Human Rights Comm., <i>Munaf</i>, <i>supra</i> note 158, ¶ 14.2.</p>	<p>The interaction between “effective control” and causation analysis in this case enabled the Committee to broaden the extraterritorial reach of the Covenant so that it applies in cases in which the Covenant violation does not actually occur under a given state’s jurisdiction. Rather, if an <i>ex ante</i> risk of a Covenant violation occurring was a necessary and foreseeable consequence of a state’s action, that state may still be held accountable for the Covenant violation committed thereafter. A state therefore does not need to be exercising control over an individual at the time of the violation; rather, its action can merely be a “link in the causal chain” that ultimately made possible the Covenant violation in another jurisdiction.</p>
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