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Rights Beyond Borders

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Article

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I. INTRODUCTION

In the United States and elsewhere, courts are confronting questions about where, and to whom, domestic rights extend. The resulting jurisprudence has sharpened the focus on who can assert claims based on a country's domestic rights provisions, and why. Despite this judicial attention, the question of whether a country's domestic rights regime constrains government action beyond national borders has largely escaped comparative scholarly analysis.[1]

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1. The leading casebooks on comparative constitutional law do not treat the question of

This is so even though any inquiry into extraterritorial rights is outward-facing by its nature, and thus invites comparative inquiry.

Courts have been somewhat more cosmopolitan. In 1891, the U.S. Supreme Court invoked "the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries"[2] as a basis for finding that the conviction of an American seaman by an American consular tribunal in Japan did not offend the U.S. Constitution. In 1950, the U.S. Supreme Court again invoked foreign practice when it found that German nationals taken into U.S. military custody in China, convicted of war crimes by a U.S. military commission there, and imprisoned in occupied Germany were not entitled to invoke the constitutional writ of habeas corpus to challenge the lawfulness of their detention.[3] In considering "the extraterritorial application of [U.S.] organic law"[4] to the German defendants, the Court found it significant that "[t]he practice of every modern government is opposed to it."[5] These cross-jurisdictional references, and the contemporary practice of domestic courts in citing each others' extraterritoriality jurisprudence,[6] point to a gap in scholarship that this Article seeks to fill.

This Article begins by identifying three basic ways of thinking about rights beyond borders. It then uses this framework to analyze jurisprudence on the extraterritorial application of domestic rights in the United States, Canada, and the United Kingdom, three countries whose legal systems share a common historical origin. Although case law from multiple other countries was canvassed at the outset of this project, this Article focuses on the three countries whose courts have developed substantial bodies of jurisprudence in

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extraterritorial application of constitutional provisions. *See* NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (2003); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (2d ed. 2006). Comparative scholarship on this question has been sparse, with partial exceptions, including Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004) (examining U.S. case law and also considering cases from bodies including the European Court of Human Rights, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights); 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) (comparing cases from different jurisdictions prior to the Supreme Court of Canada's transformative decision in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 248-67 (2010) (discussing U.S. doctrine in light of contrasting decisions by international tribunals); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 382-91 (2009) (discussing foreign and international cases arising in the contexts of transnational cooperation and armed conflict).

2. *In re* Ross, 140 U.S. 453, 462 (1891).

3. Johnson v. Eisentrager, 339 U.S. 763 (1950).

4. *Id.* at 784.

5. *Id.* at 785 (asserting this but not citing any specific foreign authorities).

6. *See, e.g.*, Canada (Prime Minister) v. Khadr, 2010 SCC 3, para. 44, [2010] 1 S.C.R. 44, para. 44 (Can.) (citing *Kaunda v. President of S. Afr.*, 136 I.L.R. 452 (CC 2004) (S. Afr.)); Khadr v. Canada (Prime Minister), 2009 FC 405, paras. 42-48, [2010] 1 F.C.R. 34, paras. 42-48 (Can.) (citing opinions from the United Kingdom, Australia, and South Africa); Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FC 336, paras. 237-66, [2008] 4 F.C.R. 546, paras. 237-66 (examining U.S., U.K., and European case law), *aff'd* 2008 FCA 401, [2009] 4 F.C.R. 149 (Can.); *Kaunda*, 136 I.L.R. 452 (citing R. v. Cook, [1998] 2 S.C.R. 597 (Can.)); Smith v. Sec'y of State for Def., [2010] UKSC 29, [236], [2010] 3 W.L.R. 223, [236] (Lord Collins) (appeal taken from Eng.) (citing U.S. cases); R (Al-Skeini) v. Sec'y of State for Def., [2004] EWHC (Admin) 2911, [241]-[242], [2005] 2 W.L.R. 1401, [241]-[242] (Eng.) (citing Rasul v. Bush, 542 U.S. 466 (2004) and R. v. Cook, [1998] 2 S.C.R. 597).

response to claims by individuals subjected to the extraterritorial exercise of government power. It therefore does not include detailed discussions of cases from other common law or civil law jurisdictions, leaving those to future scholarship.

The conceptual framework is structured around three basic approaches to reasoning about rights beyond borders, which I call country, compact, and conscience. Country-based reasoning takes a strictly territorial approach to regulating the government's actions outside the national territory, even vis-à-vis citizens. Compact-based reasoning focuses on the entitlement of a given individual to assert rights against the government based on his or her status as one of the governed, regardless of territorial location. Conscience-based reasoning holds that a government should act the same way beyond its borders as it does within them. At the micro level, emphasizing one of these approaches over another can determine whether or not a given individual can successfully invoke domestic rights provisions as a basis for seeking relief from a domestic court. At the macro level, emphasizing one approach can both signal and reinforce a particular conception of political ordering based on territory (country), membership (compact), or a set of fundamental values (conscience).

Judicial opinions merit scholarly attention both for their results and for their reasoning. Through the process of litigation, claimants, advocates, and judges develop and work through competing conceptions of the relationships that constitute and define the polity. Especially in common-law systems, the accretion of judicial opinions crystallizes sets of understandings that, in turn, inform individual expectations and define the range of permissible government action. In addition, although many of the cases discussed here involve issues related to national security, courts in the United States, Canada, and the United Kingdom have sought to articulate criteria for the extraterritorial application of domestic rights that transcend specific situations.

The jurisprudence examined here demonstrates the continued relevance of the nation-state model, which privileges territory and membership. Domestic courts tend to be pulled toward the country and compact models, and have not embraced a conscience approach unmoored from considerations of actual territorial control or, particularly in the U.S. cases, membership in the political community. That said, they have occasionally invoked elements of a conscience approach when confronted with serious threats to basic separation of powers principles, or egregious conduct by the political branches that would otherwise go unaddressed.

In reading the analysis that follows, comparative law scholars might be surprised at the attention given to conceptual categories, and legal theorists might be surprised at the detailed descriptions of case law. Each is intended to complement the other. The categories are designed to facilitate disentangling patterns of judicial reasoning, while the descriptions illustrate different approaches courts have taken to the geographic reach of domestic rights in particular circumstances. Even though common-law judges might decide difficult questions based on case-specific intuitions, they nonetheless have to articulate the basis for their decisions in terms that are more broadly applicable,

and that are (usually) consistent with previously stated rationales. The categories of country, compact, and conscience capture recurring patterns of judicial reasoning in the case law studied here.

The factors affecting a national court's willingness to find that domestic rights reach beyond national borders in a particular case are, indisputably, multiple and complex. That said, this study reveals the perhaps surprising tenacity of country-based reasoning that privileges the role of territory, even in an age of "globalization." Scholars, advocates, and policymakers would be well advised to take into account the stickiness of territorially based conceptions of domestic rights and obligations in proposing more expansive interpretations. Moreover, to the extent that judgments from international bodies are susceptible of both narrow and broad interpretations, national courts appear inclined to adopt the narrowest interpretation consistent with their own sense of minimum fairness. This can result in a disjunction between the limited reach of (enforceable) domestic rights provisions and the more global reach of (less readily enforceable) international rights provisions.

Despite this judicial reticence, national courts are increasingly coming under pressure from private litigants to apply legal constraints to extraterritorial government action. In practice, such pressures are most likely to be successful where the lack of judicial review most seriously threatens a polity's basic constitutive principles, especially the domestic separation (or balance) of powers. I am thus less sanguine than others about the linear progression of national jurisprudence toward something that approximates the conscience model.[7] Rather, although some international bodies have made statements tending toward a conscience approach based on universal human dignity, national courts are likely to continue lagging behind for reasons that include the entrenched political and legal significance of national boundaries, and the resistance and reaction of the domestic political branches to decisions that appear to intrude excessively into areas traditionally reserved to their discretion. At the end of the day, the most generative source of more expansive readings of domestic rights provisions might not be any comprehensive theory about the extraterritorial reach of rights, but rather individual judges' own senses of fundamental fairness and the perceived need for a minimum set of judicially enforceable legal constraints on the action of the political branches.

At this juncture, it is worth flagging several issues that this Article does not address. These include questions related to extraterritorial regulation, such as those raised in the U.S. Supreme Court case *Morrison v. National Australia Bank Ltd.*, that have been ably addressed by other scholars, and which continue to form the subject of lively debate.[8] This Article also does not address the

7. *Cf.* Cleveland, *supra* note 1, at 287 (advocating an "effective control" approach to extraterritorial rights and characterizing *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), as "an important first step" toward such an approach); Neuman, *supra* note 1, at 400-01 (characterizing *Boumediene* as "demonstrating majority support for the global due process/functional approach," but acknowledging that its results could also be seen as consistent with a more limited "mutuality" approach).

8. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which prompted a lively discussion in the blogosphere. See, for example, Gilles Cuniberti, *Extraterritorial Reach of US Securities Laws: Online Symposium*, CONFLICTOFLAWS.NET (June 29, 2010), http://conflictoflaws.net/

important questions of rights *within* borders,[9] or rights *at* the border,[10] which raise critical but distinct issues relating to the entitlements of various individuals present within the national territory. Finally, this Article does not linger on questions relating to the domestic incorporation of international norms, either directly or by analogy.[11] To be sure, the proliferation of international legal instruments means that individuals often benefit, at least on paper, from the overlapping protection of domestic law and international law. Nevertheless, the case law examined here involves claims based on domestic rights provisions enforceable in national courts. The focus on national courts both delineates the scope of this analysis and distinguishes it from scholarship that focuses either on a single jurisdiction's case law or on international rather than domestic rights.

The analysis proceeds as follows. Part II explores the three approaches identified above: country (Section II.A), compact (Section II.B), and conscience (Section II.C). Part III then examines the evolving jurisprudence of extraterritorial rights in three jurisdictions in terms of these approaches: the United States under the U.S. Constitution (Section III.A), Canada under the Canadian Charter of Rights and Freedoms (Charter) (Section III.B), and the United Kingdom under the U.K. Human Rights Act of 1998 (HRA), a statute that has quasi-constitutional status (Section III.C). The Conclusions indicate that, although claimants will continue to invite domestic courts to apply domestic rights provisions to extraterritorial government action, courts are likely to reject this invitation unless they perceive that the political branches are acting largely unchecked.

In the much longer term, if national courts remain unwilling to extend domestic rights, claimants may increasingly seek recourse under relevant international instruments in both domestic and international tribunals. This shift could generate additional pressure on domestic courts to recognize and enforce certain international rights where they have a jurisdictional basis for doing so. It could also have an effect in the court of public opinion by reorienting the terms in which claims about individual rights and governmental obligations are articulated and advanced, whether or not they are judicially enforced. This reorientation could, in turn, dilute the salience of national borders as the primary organizing principle for legal and political relations in future generations, even in high-functioning democracies.

2010/extraterritorial-application-of-us-securities-law-online-symposium/, and links contained therein.

9. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

10. *See* Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001).

11. *See, e.g.*, Fiona de Londras, *What Human Rights Law Could Do: Lamenting the Absence of an International Human Rights Law Approach in* Boumediene *&* Al-Odah, 41 ISR. L. REV. 562, 572-88 (2008) (arguing that the petitioners in *Boumediene* should have urged the Court to follow international human rights jurisprudence in determining both the content and geographical scope of U.S. constitutional standards).

II. THREE APPROACHES TO DOMESTIC RIGHTS

When government agents act beyond national borders, several distinct but interrelated sets of issues arise. One set of issues relates to the responsibility of the state, under international law, for the agent's actions. Another set of issues relates to the various legal regimes that constrain the agent's conduct, including the law of the agent's home state, the domestic law of the country where the agent acted, applicable treaty provisions, and customary international law. A third and related set of issues involves institutional mechanisms for affording redress to those affected by the agent's action.

In theory, various avenues of redress might exist for an individual harmed by the action of a government agent outside of that agent's "home" state, including seeking diplomatic protection, initiating proceedings in a court of the country where the harm occurred, filing an administrative claim with an appropriate body, or initiating proceedings before an international tribunal. In practice, however, such avenues can prove difficult to access or might not exist.

When an individual invokes a country's domestic rights regime to claim legal redress for harm that occurred outside of that country's borders, the question of the extraterritorial application of domestic rights arises. Cases of this nature have proliferated in recent years in response to extraterritorial government action in the so-called "War on Terror," but they also arise in the context of more routine extraterritorial law enforcement activities, such as search and seizure operations.

In the United States, Canada, and the United Kingdom, jurisprudence on the extraterritorial application of domestic rights provisions continues to evolve. In part, this is due to the variety of circumstances in which, and the variety of individuals by whom, extraterritorial claims may be asserted. It also reflects the shifting interaction among at least three patterns of reasoning, which I call country, compact, and conscience.[12] These rubrics aim to capture the most salient features of different approaches to extraterritorial rights. They also capture related differences in views about the role of domestic rights provisions in defining the boundaries of the polity (emphasized by a country approach), identifying who is "in" and who is "out" (emphasized by a compact approach), and constraining the action of the political branches (emphasized by a conscience approach).

No taxonomy is sacrosanct, including my own. Gerald Neuman's foundational work identifies four models: universalism; membership models; municipal law (including strict territoriality); and balancing approaches, or "global due process."[13] My categories have the nonsubstantive advantage of being alliterative, and thus easier to remember. They also seek to capture the

12. The names I have given two of these models echo the title of Louis Henkin's 1985 lecture on "The Constitution as Compact and Conscience," although Henkin did not use these terms the way I do. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 17 WM. & MARY L. REV. 11 (1985). Henkin's point in this article was not to examine extraterritorial rights per se, but rather to criticize U.S. enforcement of unfair immigration laws and the vulnerability of aliens to deportation. *Id.* at 27-28.

13. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 915-19 (1991).

essentially different emphases of each of these approaches: territory (reflected in Neuman's municipal law approach, and in my country approach), membership (reflected in Neuman's membership models approach, and in my compact approach), or a set of fundamental values (reflected in Neuman's universalism and global due process approaches, and in my conscience approach).[14]

More recently, Judge José Cabranes has contrasted a "compact theory" of constitutional rights with an "organic theory,"[15] essentially adopting a binary framework. Cabranes's compact category is akin to my country model and to Neuman's municipal law model because it focuses on the role of the Constitution as "a framework for establishing domestic order."[16] However, it does not differentiate between situations in which government action affects citizens and those in which it affects foreigners. Because certain cases find the distinction between citizens and foreigners highly significant, it seems more useful to reserve a separate category for strict territoriality (reflected in what I call the country approach) and to distinguish this from a model that emphasizes citizenship (which I call the compact approach).

The tripartite framework of country, compact, and conscience captures important differences in emphasis among recurring patterns of argument about the extraterritorial application of domestic rights. Although one could choose different names to denominate each category, each entails a different focus. A country approach focuses on *where* the government acted, a compact approach focuses on *who* the government harmed, and a conscience approach focuses on *what* the government did. Although most judicial reasoning involves combinations of these approaches, assigning them labels can help to isolate and disentangle strands of reasoning in judicial opinions and facilitate discussion of contending approaches and outcomes.

Approach	*Focus*
Country	Where did the government act?
Compact	Who did the government harm?
Conscience	What did the government do?

The rest of this Part sets out the underlying assumptions, and some limitations, of each of these approaches.

A. *Country*

Country-based reasoning emphasizes the absolute and exclusive

14. Kermit Roosevelt has suggested adopting five models: universalism, membership, mutuality, territoriality, and limited government. Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2042 (2005).

15. *See* José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1665 (2009) (identifying "two competing views on the extraterritorial application of constitutional requirements").

16. *Id.*

sovereignty of each country over its own territory.[17] Rather than recognizing, as international law does, that a country can legitimately exercise prescriptive jurisdiction over the extraterritorial actions of its own nationals,[18] a country-based approach treats domestic rights as ending at the water's edge. Country-based reasoning thus begins—and ends—by asking: where did the government act? If government agents act beyond their own national borders, then domestic rights provisions do not constrain their actions under a country approach, although their actions would be constrained (at least in theory) by applicable international law and the local law of the place where they acted.

The country approach is encapsulated by the U.S. Supreme Court's statement in *In re Ross* that "[t]he Constitution can have no operation in another country,"[19] and by the Canadian Supreme Court's much more recent decision in *R. v. Hape*.[20] In that case, the Canadian Supreme Court held that a Canadian citizen could not invoke the Canadian Charter of Rights and Freedoms to object to the introduction of evidence gathered by Royal Canadian Mounted Police (RCMP) officers in the Turks and Caicos Islands for use in a Canadian prosecution. The majority in *Hape* applied a country approach to the operation of law and legal authority to reach this result.

A country approach avoids three related problems. First, it avoids the problem of "legal limbo."[21] It does this by conceptualizing activities on a given segment of territory as governed exclusively by one sovereign's law (and possibly by international law, formed by the consent of all sovereigns), thereby avoiding many possible ambiguities about applicable legal regimes. Second, from an institutional perspective, it provides a way for courts to limit their intrusion into certain cases involving foreign relations and national security by radically circumscribing the role of judicial review when the government acts beyond national borders. Third, it prevents accusations that the extraterritorial application of domestic legal standards, which might conflict with local norms, amounts to legal imperialism.

Despite these possible advantages, a strict country approach remains unsatisfying for several reasons. First, it ignores the reality that countries routinely regulate extraterritorial and transnational activity, even if they require a domestic nexus to legitimate such regulation. Second, a country approach seems unduly susceptible to manipulation since, particularly in the context of claims related to detention and interrogation, it predicates entitlement to constitutional protection on presence within the national territory—something that the detaining or interrogating authority can control by transporting an individual from one location to another. Third, contrary to allegations of

17. This reasoning falls within what Neuman refers to as "municipal law approaches" to extraterritoriality. Neuman, *supra* note 13, at 918. Roosevelt separates out this line of reasoning under the rubric of "territoriality." Roosevelt, *supra* note 14, at 2044.

18. International law accepts the nationality of the actor as a valid basis for the exercise of prescriptive jurisdiction, subject to a reasonableness standard. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 402(2) (1987).

19. *In re* Ross, 140 U.S. 453, 464 (1891).

20. R. v. Hape, 2007 SCC 26, para. 69, [2007] 2 S.C.R. 292, para. 69.

21. My thanks to Máximo Langer for pointing out this perceived advantage.

imperialism, when a state's own agents operate extraterritorially, it is neither unreasonable nor imperialistic for their *own* actions to be constrained by standards prescribed by their domestic political processes, in addition to standards prescribed by the local jurisdiction and applicable international standards.

A country approach privileges territorial sovereignty as the primary organizing principle of legal and political relations.[22] Elements of a country approach remain remarkably tenacious in contemporary jurisprudence, as illustrated in Part III. That said, particularly where a government's extraterritorial action affects its own citizens, individuals may seek protection under that country's domestic rights regime. In so doing, they claim entitlement to protection based not on territory but rather on membership—the focus of a compact approach.

B. *Compact*

When extraterritorial government action affects citizens, claimants often invoke a compact-based approach to domestic rights. A compact approach identifies "the people" as rights holders and, thus, potential claimants against the government.[23] Whereas a country approach focuses on *where* the government acted, a compact approach focuses on *who* the government harmed. Compact-based reasoning has a long pedigree in Western political theory and represents a familiar trope for judges and policymakers.[24] As historian Gordon Wood has noted, the American colonists were imbued with contractual images, most prominently "that of a mutual bargain between two parties drawn from the legal and mercantile world, more specifically, the political agreement between ruler and people in which protection and allegiance became the considerations."[25] A compact approach highlights the role of a constitution as a mutual agreement enforceable by parties to that agreement.

In the context of extraterritorial rights, a compact approach is more expansive than a country approach, because it extends constitutional protections to citizens overseas. (This is true even though *within* a particular country a compact approach could be more restrictive than a country approach by according greater rights to citizens than to others who are present on the

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22. I agree with Paul Schiff Berman that "the reality of human interaction is chafing against the strictures our current conception of legal jurisdiction imposes," but, like Berman, I recognize the continued reassertion of those strictures by national legal and political actors. *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 543 (2002).

23. Neuman categorizes contractual approaches as "membership models," and notes the existence of various approaches to defining members and nonmembers. *See* Neuman, *supra* note 13, at 917-18.

24. *See* CHIMÈNE I. KEITNER, THE PARADOXES OF NATIONALISM: THE FRENCH REVOLUTION AND ITS MEANING FOR CONTEMPORARY NATION BUILDING 35-42 (2007) (discussing Hobbesian, Lockean, and Rousseauean models).

25. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 268-69 (2d ed. 1998). Philip Hamburger's recent work on the principle of protection could be viewed as one example of a compact-based model. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

territory, but who are not considered part of "the people.")[26] A compact approach differentiates among individuals based on their membership in a given political community, rather than their physical location.

Chief Justice Rehnquist's opinion in *United States v. Verdugo-Urquidez* encapsulates a compact approach to extraterritorial rights.[27] The Chief Justice reasoned that a nonresident alien whose foreign property was searched by U.S. agents could not invoke Fourth Amendment protections because the Fourth Amendment was only designed to protect "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[28] Because compact-based reasoning focuses on the status of an individual as part of a particular community, it denies domestic rights to nonmembers when a government acts outside its national territory. Compact-based reasoning would, however, extend domestic rights to members regardless of their physical location. A compact approach thus would have compelled a different result in the case of Mr. Hape, the Canadian citizen who was unable to invoke the Canadian Charter of Rights and Freedoms to object to the introduction of evidence gathered by Canadian RCMP officers abroad.[29] This approach would also encompass U.S. citizens affected by other forms of extraterritorial government action, such as the son of the plaintiff in *Al-Aulaqi v. Obama*, who has allegedly been singled out for targeted killing in Yemen, and who claims that this violates his Fourth and Fifth Amendment rights.[30]

The most obvious normative difficulty with a compact approach based on citizenship is the arbitrariness of differentiating among individuals based solely on their citizenship (which is often determined by their place of birth or the place of their parents' birth). This is, of course, an endemic feature of citizenship-based models of political entitlements, and it is not specific to the context of extraterritorial rights. Even if one defines the compact more broadly to include noncitizens with significant ties to an existing political and territorial community, the compact approach excludes individuals who are involuntarily affected by government action on a basis unrelated to any choice they have made (except perhaps in the rare case of an individual who has voluntarily declined an opportunity for naturalization). In part for this reason, Justice Stevens in *Verdugo* resisted the Chief Justice's definition of the compact,

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26. My thanks to Vicki Jackson for raising this point.

27. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

28. *Id.* at 265; *see also* Boumediene v. Bush, 128 S. Ct. 2229, 2301 (2008) (Scalia, J., dissenting) (stating that "merely because citizenship is not a *sufficient* factor to extend constitutional rights abroad does not mean that it is not a *necessary* one").

29. R. v. Hape, 2007 SCC 26, para. 69, [2007] 2 S.C.R. 292, para. 69; *see also supra* text accompanying note 20.

30. *See* Complaint for Declaratory and Injunctive Relief, Al-Aulaqi v. Obama, No. 1:10-cv-01469 (D.D.C. Aug. 30, 2010). Notably, the government's motion to dismiss the complaint did not claim that Al-Aulaqi does not benefit from constitutional rights (although it did emphasize that Al-Aulaqi is a *dual* U.S.-Yemeni citizen). Instead, it argued that his father lacks standing to bring claims on his behalf; that the case involves nonjusticiable political questions; and that litigation is barred by the states secrets privilege. *See* Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Al-Aulaqi v. Obama, No. 1:10-cv-01469-JDB (D.D.C. Sept. 25, 2010).

which would have extended certain extraterritorial rights only to individuals with "voluntary attachment" to the United States.[31] Instead, Justice Stevens would have included Mr. Verdugo-Urquidez in "the people" because he was lawfully present in the United States, even though he was brought there involuntarily.[32]

Justices Brennan and Marshall, dissenting in *Verdugo*, would have included Mr. Verdugo-Urquidez in "the people" on the basis of his obligation to comply with U.S. criminal laws. In their view, this obligation made him one of "the governed" and entitled him to domestic rights under the principle of mutuality.[33] This approach attempts to avoid the problem of arbitrariness, because it provides that citizens and foreigners who are held "to the same standards of conduct" benefit from the same protections.[34] However, although moving away from a citizenship model of the compact makes the membership criteria less arbitrary, it also makes these criteria less determinate, as the question arises of what combination of attachment, territorial presence, and legal obligation is sufficient to make an individual one of the governed.

A compact model that is not based purely on citizenship is an improvement over a strict citizenship model because it more accurately reflects the reality that governmental power affects individuals of many nationalities, who are all worthy of protection by virtue of their humanity. A similar observation stands at the core of the international human rights system that, as Stephen Gardbaum has recognized, "enshrines—and clarifies—the distinct normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens."[35] That said, precisely because constitutional law is often understood as protecting the rights of citizens, an infinitely elastic compact model has not found favor with courts, and it is unlikely to do so.

If one focuses on connections rather than merely citizenship, a court following Chief Justice Rehnquist's reasoning in *Verdugo* would presumably recognize only those connections voluntarily entered into by the individual as a potential basis for extending domestic rights. By contrast, a court following Justice Stevens's reasoning might be more sympathetic to the notion that unilateral government action could bring an individual within the ambit of certain domestic rights provisions. As the focus shifts away from the relationship between the government and the individual to the action of the government regardless of the individual's territorial location or personal status, a compact model blends into what I call a conscience approach.[36]

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31. *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring).

32. *Id.*

33. *Id.* at 283-84 (Brennan, J., dissenting).

34. *Id.* at 285.

35. Stephen Gardbaum, *Human Rights and International Constitutionalism*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 233 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

36. Roosevelt points out that Neuman's "mutuality of obligation" model, under which the U.S. government's requirement that an alien comply with U.S. law triggers constitutional protections, approaches the universalism model. *See* Roosevelt, *supra* note 14, at 2057-58. Because of their different rationales, I would categorize mutuality as a compact-based approach and universalism as a conscience-

C. *Conscience*

At the most basic level, a conscience model holds that a government should act the same way beyond its borders as it does within them. Justice Brennan appealed to a conscience model in his *Verdugo* dissent when he emphasized that "when United States agents conduct unreasonable searches, whether at home or abroad, they disregard our Nation's values."[37] Despite the risk of anthropomorphism, I use the term "conscience" for this model because (in addition to the fact that it starts with the letter "c") it captures the idea that constitutional limits, like a person's conscience, follow the government everywhere. Although the term "conscience" is potentially problematic because it may appear to entail a particular set of value judgments, I use it only to signal that this approach, unlike a country or compact approach, does not preclude the application of domestic constraints to government action on the basis of territory or membership. Accordingly, the D.C. Circuit in *Eisentrager v. Forrestal* held that "a distinction between citizens and aliens cannot be made in respect to the applicability of constitutional restrictions upon the power of government,"[38] even overseas. (The U.S. Supreme Court overruled that decision.)[39] More recently, the European Court of Human Rights (ECHR) articulated a conscience approach in *Issa v. Turkey*, a case brought by family members of Iraqi nationals allegedly harmed by Turkish forces operating in Northern Iraq. The Court opined that the European Convention on Human Rights "cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."[40]

In terms of U.S. constitutional history, it is interesting to note that the contractual analogy at the root of the compact model appears to have been largely displaced by the conscience-based idea of a constitution as "a fundamental law designed by the people to be separate from and controlling of all the institutions of government."[41] Seen from this perspective, a bill of rights or other written formulation of fundamental law defines the parameters of permissible government action wherever, and toward whomever, the

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based approach.

37. *Verdugo-Urquidez*, 494 U.S. at 285 (Brennan, J., dissenting).

38. Eisentrager v. Forrestal, 174 F.2d 961, 965 (D.C. Cir. 1949).

39. *See* discussion of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *infra* notes 72-73 and accompanying text.

40. Issa v. Turkey, App. No. 31821/96, 41 Eur. H.R. Rep. 567, ¶ 71 (2004). This language did not originate with the ECHR. As recognized by the U.K. divisional court in *Al-Skeini*, it had previously appeared in a report by the U.N. Human Rights Committee on alleged violations of the International Covenant on Civil and Political Rights (ICCPR) by Uruguay in detaining a Uruguayan trade unionist on Argentine territory. R (Al-Skeini) v. Sec'y of State for Def., [2004] EWHC (Admin) 2911, [213], [2005] 2 W.L.R. 1401, [213] (Eng.) (citing U.N. Human Rights Comm'n, Lopez Burgos v. Uruguay, Comm. No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981)). The extraterritorial application of human rights treaties generally, and the interaction between human rights and humanitarian law obligations in situations of occupation or armed conflict in particular, are beyond the scope of this Article. *See generally* Marko Milanović, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 HUM. RTS. L. REV. 411 (2008).

41. *See* WOOD, *supra* note 25, at 283.

government acts.[42] Rather than focusing on where the government acted or who the government harmed, the conscience approach asks: *what* did the government do?

Rhetorical appeals to a conscience model generally invoke a country's basic values. Those values might entail substantive prescriptions, such as not inflicting torture. They might also involve structural principles such as the value of living in a government characterized by checks and balances, or in which the government cannot act beyond the scope of its enumerated powers. In practice, courts appear to resort to conscience-based arguments when they feel that the political branches have seriously violated either a substantive or structural value, but not otherwise.

Given the practical limits to the extraterritorial application of constitutional guarantees, a conscience approach does not necessarily require universal entitlement to the full panoply of domestic rights.[43] Even within the territorial limits of a particular country, rights may be subject to balancing, as indicated for example by section 1 of the Canadian Charter of Rights and Freedoms, which guarantees enumerated rights subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[44] However, at a minimum, the conscience model guarantees certain core domestic rights to individuals affected by extraterritorial government action, regardless of their citizenship. Conscience-based reasoning is, broadly speaking, the most expansive of the three approaches. It is also potentially the least deferential to the territorial sovereignty of other countries and to the domestic political branches.

The main drawback of the conscience approach, particularly from the perspective of the political branches, is its potentially robust curtailment of government action (leading to accusations of "lawfare" against those who file suit in domestic court to challenge extraterritorial government action).[45] In addition, if one posits that "what a state owes should depend on what it can deliver,"[46] then the inevitable question arises of who will determine what the state can, in fact, deliver, and how a state will know ex ante what obligations it owes in particular circumstances. Gerald Neuman argues compellingly in support of his "global due process" approach (which I would characterize as a form of conscience-based reasoning) that this "uncertainty is preferable to the

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42. Neuman has described this as a "universalist" approach to the extraterritorial constitution. *See* Neuman, *supra* note 13, at 916. Roosevelt proposes slightly different terminology, using the term "textualism" synonymously with Neuman's universalism model and identifying "limited government" as a separate model. *See* Roosevelt, *supra* note 14, at 2049-50.

43. Neuman uses the term "global due process" to denote an approach that "recognize[s] constitutional rights as potentially applicable worldwide, and then balance[s] them away." Neuman, *supra* note 13, at 920.

44. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

45. *See, e.g.*, Al Maqaleh v. Gates, 605 F.3d 84, 89-90. (D.C. Cir. 2010) (emphasizing concerns about lawfare expressed in the *Eisentrager* opinion); U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005), *available at* http://www.defense.gov/news/mar2005/d20050318nds1.pdf (identifying the threat posed by "those who employ a strategy of the weak using international fora, judicial processes, and terrorism").

46. Neuman, *supra* note 1, at 391.

brutal clarity of denying any rights to foreign nationals abroad."[47] However, while this is no doubt true as a general proposition, it has not deterred governments and some courts from adopting a country- or a narrow compact-based approach that has the benefit of "brutal clarity," as explored in more detail below.

Despite the lack of predictability, the conscience model remains normatively attractive for several reasons. First, it recognizes that both territorial location and personal status are largely accidental, and that no set of individuals intrinsically "deserves" protection more than another. Second, it reflects the idea of a constitution or fundamental law as defining the outer limits of permissible government action wherever the government acts. Third, it prevents the categorical insulation of certain types of government action from judicial review. However, despite these potential benefits, courts have almost uniformly rejected the argument that an individual who is affected by a government's extraterritorial action can automatically invoke that government's domestic rights regime. The normative appeal of a conscience model has not outweighed its perceived practical and institutional costs.

The analysis in Part III suggests that domestic courts are unlikely to invoke conscience-based reasoning unless they are faced with a flagrant violation of separation of powers principles (for example, the deliberate relocation of individuals in custody in order to avoid judicial review) or with what they perceive to be particularly egregious conduct by the political branches that is not justified by extenuating circumstances. Consequently, not all individuals who are injured by government agents can assert rights-based claims in that government's domestic courts, particularly if those courts do not provide remedies for violations of foreign or international law. In the Conclusions, I offer some thoughts about the long-term effect that this judicial reticence to extend domestic rights might have in creating pressure for more robust enforcement of international rights. To date, however, the disjunction between international rights and domestic remedies has failed to persuade judges to extend domestic rights extraterritorially in all but exceptional circumstances, as illustrated in Part III.

III. THREE DOMESTIC RIGHTS REGIMES

Recent cases from the United States, Canada, and the United Kingdom illustrate the range of rationales that animate judicial decisions about the extraterritorial reach of domestic rights. This Part examines some of these cases in light of the framework set out above. At least two caveats apply. First, judicial opinions are certainly not the only vehicle for the interpretation of domestic rights guarantees. All branches of government in a constitutional democracy are bound to act in accordance with that country's fundamental law and, thus, to determine when actions might run afoul of applicable restrictions. Judicial opinions nonetheless merit close attention because of their public and authoritative role in interpreting the reach of rights, and because individuals

47. *Id.* at 401.

seeking redress for alleged violations often do so through domestic courts. Second, my goal in the pages that follow is not to offer a comprehensive historical account of any country's jurisprudence, nor to suggest that any country has adopted a particular mode of reasoning wholesale. Rather, I aim to illuminate patterns of reasoning in recent cases to show how different courts have grappled with similar questions. In all three jurisdictions, cases continue to be brought by individuals seeking domestic rights protections in a variety of extraterritorial settings. The outcomes of novel cases may appear largely unpredictable, precisely because the relevant jurisprudence continues to evolve. Identifying patterns of reasoning, and exploring their implications, can help explain this evolution and make it more transparent.

Of the three domestic rights regimes whose application is examined here, the U.S. model of judicial review will likely be the most familiar to readers. According to this model, in the words of U.S. Supreme Court Chief Justice John Marshall, "an act of the legislature, repugnant to the constitution, is void."[48] Marshall himself looked beyond U.S. borders in establishing the role of judicial review as a cornerstone of U.S. constitutionalism, observing in *Marbury v. Madison* that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."[49] Conversely, following World War II and again following the collapse of many communist regimes, it was not a great exaggeration to say that the "growth of world constitutionalism [was] the growth of the model of constitutionalism invented in the United States."[50]

There is more to the global constitutional landscape, however, than U.S.-style constitutional regimes. As Stephen Gardbaum has emphasized, some countries have sought a middle ground between constitutional and legislative supremacy by institutionalizing judicial review while still enabling the legislature to "have the final word," albeit at a potential political cost.[51] These countries' charters of rights, which include the Canadian Charter of Rights and Freedoms and the United Kingdom's Human Rights Act (HRA), "attempt . . . to create institutional balance, joint responsibility, and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights."[52] Even though judicial opinions in these countries are more explicitly envisioned as part of a dialogue with the legislature, they remain important expressions of constitutional commitments that cannot easily be set aside.

The Canadian Charter of Rights and Freedoms applies to both the federal

48. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

49. *Id.*

50. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 708 (2001). There are indications, however, that U.S. influence in this respect may be waning. *See* Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, at A1.

51. Gardbaum, *supra* note 50, at 709. Professor Gardbaum has recently completed a project reassessing the Commonwealth model in light of the intervening nine years of jurisprudence. Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167 (2010).

52. Gardbaum, *supra* note 50, at 710.

and provincial governments.[53] Unlike the U.S. Constitution, the Charter contains a "notwithstanding" clause, which authorizes the Canadian Parliament or a provincial legislature to enact legislation that would otherwise violate a specified Charter right for a renewable five-year period, if it attaches an explicit declaration to this effect to the legislation.[54] In practice, the Notwithstanding Clause has been used sparingly.[55] Some observers in the United Kingdom, seeking lessons for their own system, have maintained that "political reluctance to use the Notwithstanding Clause means that the Charter has evolved in a manner indistinguishable from American-style judicial review."[56]

Under the HRA, Chapter 42, the House of Lords (now the U.K. Supreme Court) and other specified courts cannot invalidate legislation, but they can issue a "declaration of incompatibility" under section 4 where a legislative provision is found to be incompatible with a right guaranteed by the European Convention on Human Rights.[57] The Lord Chancellor at the time the HRA was enacted opined that "'[i]f a Minister's prior assessment of compatibility (under [section] 19) is subsequently found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action."[58] Also, importantly, under section 3 of the HRA, courts can read down legislation incompatible with the Act to make it compatible.[59] Thus, although the effect of judicial review might be somewhat attenuated in the Canadian and U.K. contexts, it is by no means insubstantial. Observers have indicated that, since the enactment of the HRA, a rights-based approach has become entrenched, perhaps irreversibly, in U.K. common law.[60]

The judicial decisions examined below all endeavor to interpret and apply core codifications of domestic rights guarantees, even though the U.K. cases do so with explicit reference to the jurisprudence of the European Court of Human Rights (ECHR). I therefore treat these decisions as relevantly similar for the purpose of comparing their approaches to the extraterritorial reach of domestic

53. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 32, § 1 (U.K.).

54. *Id.* c. 33.

55. *See* Barbara Billingsley, *Section 33: The Charter's Sleeping Giant*, 21 WINDSOR Y.B. ACCESS JUST. 331, 339 (2002) (indicating that between 1982 and 2002, the Notwithstanding Clause was used a total of seventeen times, and never by the federal legislature).

56. Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1976 (2004) (citing FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM'S NEW BILL OF RIGHTS 165-66 (2000)).

57. U.K. Human Rights Act, 1998, c. 42.

58. Hiebert, *supra* note 56, at 1977 (quoting 582 PARL. DEB., H.L. (5th ser.) (1997) 1229-30 (U.K.)); *see also* Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 670 (2003) (indicating that "Parliament has a powerful incentive to take very seriously a judicial declaration of incompatibility"). For a list of declarations of incompatibility issued through August 1, 2006, see DEP'T FOR CONSTITUTIONAL AFFAIRS, DECLARATIONS OF INCOMPATIBILITY MADE UNDER SECTION 4 OF THE HUMAN RIGHTS ACT 1998 (2006), http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf.

59. *See, e.g.*, Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [26] (Lord Nicholls), [2004] 2 A.C. 557, [26] (appeal taken from Eng.); *id.* [39] (Lord Steyn).

60. *See, e.g.*, DEP'T FOR CONSTITUTIONAL AFFAIRS, REVIEW OF THE IMPLEMENTATION OF THE HUMAN RIGHTS ACT 38 (2006) (U.K.), *available at* http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

rights, even though each is indisputably embedded in a particular political and institutional context.[61] By expanding the analysis beyond a single jurisdiction, this Article can more confidently claim that the patterns of argument it identifies are not merely a product of national idiosyncrasies, but have broader significance as modes of reasoning about a common set of problems that arise in different legal systems, albeit ones with a common historical origin.

A. *The United States*

U.S. jurisprudence on extraterritorial rights has received recent scholarly and public attention because of its central role in defining the ability of noncitizen detainees held by the U.S. government outside the territorial United States to challenge the lawfulness of their detention and treatment. As scholars have recognized, the detainee cases raise issues that go beyond the terrorism context, including core questions relating to the normative and doctrinal basis for extending—or declining to extend—constitutional protections overseas.[62]

In its most recent statements regarding extraterritorial rights, the Supreme Court has continued to reject the D.C. Circuit's conscience-based conclusion in *Eisentrager v. Forrestal*, which the Supreme Court promptly overturned, that "[i]f the action of Government officials be beyond their constitutional power, it is for that reason a nullity."[63] The Supreme Court also rejected the D.C. Circuit's country-based conclusion almost sixty years later in *Boumediene v. Bush* that "the Constitution does not confer rights on aliens without property or presence within the United States."[64] Instead, the Supreme Court's *Boumediene* decision enumerates three factors relevant to whether or not a given individual detained outside the territorial United States has a constitutional right to seek habeas review, which correspond to the three categories enumerated above: the nature of the site of apprehension and detention (country); the citizenship and status of the detainee (compact); and practical obstacles to extending the writ of habeas corpus (conscience).[65] Tracing the path to *Boumediene* can help illuminate the significance of each of these factors, which lower courts are now attempting faithfully to apply.[66]

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61. To a large extent, the same could be said of judicial opinions by the same national court in different historical periods.

62. *See, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009) [hereinafter RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG]; Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); Anthony J. Colangelo, *"De Facto Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623 (2009); David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47; Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005); Eric A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism* (Chi. Pub. Law & Legal Theory, Working Paper No. 228, 2008), *available at* http://ssrn.com/abstract=1211426.

63. Eisentrager v. Forrestal, 174 F.2d 961, 965 (D.C. Cir.1949).

64. Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007).

65. Boumediene v. Bush, 128 S. Ct. 2229, 2257 (2008).

66. *See, e.g.*, Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (declining to extend habeas rights to detainees at Bagram Air Force Base).

1. *A "Functional Approach" to Domestic Rights*

Detainees have attempted to invoke the jurisdiction of U.S. courts in two principal ways: first, by challenging the lawfulness of their continued detention, and second, by seeking civil damages for allegedly unlawful treatment. The posture of these cases reflects peculiarities of the U.S. legal system, which predicates federal jurisdiction on the existence of a case or controversy, and which institutionalizes tort damages as a central vehicle for deterring and remedying rights violations. This Subsection describes the tensions among various strands of reasoning in U.S. jurisprudence on extraterritorial rights, which are currently being mediated through what the Supreme Court calls "a functional approach to questions of extraterritoriality."[67]

The Court's 2008 decision in *Boumediene v. Bush* must be read against prior cases, none of which it explicitly overrules. The first case is *In re Ross*, in which the Court found that the constitutional right to a jury trial did not apply to individuals subject to the jurisdiction of U.S. consular courts in "non-Christian" countries.[68] The Court deemed Ross, a British subject from Prince Edward Island, a de facto U.S. citizen during his period of enlistment as a crewmember on a U.S. ship. Ross was accused of murdering the ship's second mate while the ship was in Japanese territorial waters, and he was convicted in a proceeding conducted in Japan under the authority of the U.S. consul. Having found that Ross was an American for jurisdictional purposes,[69] the Court nevertheless rejected Ross's argument that he was entitled to a jury trial:

> The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, *cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States*. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution.[70]

The *Ross* Court adopted a country-based approach, emphasizing that Ross had not been "brought within the actual territorial boundaries of the United

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67. *Boumediene*, 128 S. Ct. at 2258.

68. *In re* Ross, 140 U.S. 453, 465 (1891).

69. Ross argued that the U.S. consul did not have jurisdiction over him because Congress had only given the consul jurisdiction over U.S. citizens. The Court disagreed, holding that

> [w]hile he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty [conferring jurisdiction on the consul], an American, under the protection and subject to the laws of the United States equally with the seaman who was native born.

Id. at 479.

70. *Id.* at 464 (emphasis added). The *Ross* Court, however, was careful to specify that all other guarantees of a fair trial under U.S. law applied to the consular proceeding. *Id.* at 470 (emphasizing that "the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel, and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates").

States."[71] Had it instead adopted a compact approach based on citizenship, it would likely have found that Ross was entitled to a jury trial, because he was enlisted as a crewmember on a U.S. ship.

The second significant case is *Johnson v. Eisentrager*, which involved the habeas petitions of twenty-one German nationals who were apprehended in China, convicted of war crimes by a U.S. military commission in Nanking, and repatriated to Germany to serve their sentences.[72] The Supreme Court found that the petitioners were not entitled to habeas review by U.S. courts because they were enemy aliens captured, tried, and detained outside of U.S. territory. The Court explicitly rejected the broad conscience approach that had been taken by the D.C. Circuit in reaching the opposite conclusion.[73] The result in *Eisentrager* could be viewed as consistent with a country approach (because the petitioners were not physically present on U.S. territory) or a compact approach (because they were German nationals).

The third case is *Reid v. Covert*, which determined that the wives of U.S. servicemen stationed at U.S. military bases in England and Japan and accused of murdering their husbands there were constitutionally entitled to trial by a civilian jury instead of a military court-martial.[74] Justice Black's plurality opinion on rehearing in *Reid* found that "the Constitution in its entirety applied to the trials" of the wives,[75] because "[t]he term 'land and naval Forces' [in Article I, Section 8, Clause 14, under which Congress authorizes military rather than civilian trials] refers to persons who are members of the armed services and not to their civilian wives, children and other dependents."[76] The second Justice Harlan wrote a concurring opinion advocating a less textualist approach. In Justice Harlan's view, the wives were entitled to a civilian jury trial in these particular circumstances (capital cases involving civilian dependants of the armed forces stationed overseas in times of peace), because applying the jury trial provisions of the Constitution would not be "impracticable and anomalous."[77] In contrast to Justice Black's more formalist plurality opinion, Justice Harlan asked "*which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[78] He deemed this question "one of judgment, not of compulsion,"[79] which required "weighing the competing considerations"[80] rather than trading in doctrinal absolutes. Justice Harlan resisted a bright-line rule and emphasized the importance of context, rather than finding as an absolute matter that U.S. citizens who are not members of the

71. *Id.* at 464.
72. Johnson v. Eisentrager, 339 U.S. 763 (1950).
73. Eisentrager v. Forrestal, 174 F.2d 961, 965 (D.C. Cir. 1949).
74. Reid v. Covert, 354 U.S. 1 (1957).
75. *Id.* at 18 (plurality opinion) (Black, J.). According to Kal Raustiala, "What motivated the rehearing is unclear." RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG, *supra* note 62, at 280 n.70.
76. *Reid*, 354 U.S. at 19-20.
77. *Id.* at 74 (Harlan, J., concurring).
78. *Id.* at 75 (emphasis in original).
79. *Id.*
80. *Id.* at 77.

armed services are entitled to trial by a civilian jury.

Justice Black criticized Justice Harlan's approach, insisting that

> [t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.[81]

This critique resists the Harlan approach because it is potentially *too narrow*, not too broad. Perhaps Justice Harlan had greater confidence than Justice Black in his approach because he trusted courts, rather than the political branches, to determine whether or not extending domestic rights in a particular situation would be "impracticable."

Justice Harlan's approach has long appealed to Justice Kennedy, who first demonstrated his affinity for it in *United States v. Verdugo-Urquidez*.[82] In that case, a Mexican citizen and resident claimed that the warrantless search and seizure of his residence and property in Mexico by U.S. agents violated the Fourth Amendment.[83] The majority opinion in *Verdugo*, authored by Chief Justice Rehnquist, adopted a compact approach to limit the extraterritorial reach of the Fourth Amendment's warrant requirement to U.S. citizens and those with substantial voluntary ties to the United States.[84] While Justice Kennedy agreed with the majority that the extraterritorial search at issue did not violate the Fourth Amendment, he distanced himself from the majority's heavy reliance on the Fourth Amendment's use of the term "the people" to circumscribe its application. Instead, Justice Kennedy opined that

> [t]he restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend . . . on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of "the people."[85]

Justice Kennedy thus rejected a definition of constitutional guarantees based purely on personal status and/or sustained voluntary presence within U.S. territory—in other words, he rejected a compact approach.

Justice Kennedy did not embrace a country approach, however, because he acknowledged that the Constitution could, in appropriate circumstances, constrain extraterritorial government action. He also rejected an absolutist version of the conscience-based approach. He quoted Justice Harlan's *Reid*

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81. *Id.* at 14 (plurality opinion) (Black, J.).

82. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

83. The foreign location of the alleged violation of the warrant requirement distinguishes *Verdugo* from cases suppressing evidence obtained abroad and used in violation of the Fifth Amendment's privilege against self-incrimination. The majority reasoned in *Verdugo* that "[a]lthough [extraterritorial] conduct by law enforcement officials prior to trial may ultimately impair th[e] right [against self-incrimination], a constitutional violation occurs only at trial" in the United States. *Id.* at 264; *see also* United States v. Bin Laden, 132 F. Supp. 2d 168, 181 (2d Cir. 2001) (indicating that "any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant's involuntary statements are actually used against him at an American criminal proceeding").

84. *See supra* text accompanying notes 27-28, 31-34.

85. *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring).

concurrence at length for the proposition that "'there is no rigid and abstract rule that Congress . . . must exercise [its power overseas] subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.'"[86] Justice Kennedy thus drew a line of continuity from Justice Harlan's concurrence in *Reid* to his own concurrence in *Verdugo*, foreshadowing his approach to the petitions filed on behalf of Guantanamo detainees in *Boumediene*.

As indicated above in Section II.B, Justice Stevens, who concurred separately in *Verdugo*, took a somewhat different approach from Chief Justice Rehnquist and from Justice Kennedy. Like the Chief Justice, he employed compact-based reasoning, but he defined the compact more expansively. In his view, Mr. Verdugo-Urquidez *was* one of "the people" by virtue of having been brought into the United States for the purpose of prosecution.[87] Even so, Justice Stevens found that the search and seizure of Mr. Verdugo-Urquidez's property in Mexico with the "approval and cooperation of the Mexican authorities" was not "unreasonable" under the first clause of the Fourth Amendment.[88] He further reasoned that the Warrant Clause of the Fourth Amendment did not apply to searches of noncitizens' property in foreign jurisdictions, where U.S. magistrates have no power to authorize such searches—a reflection consistent with a country approach, which emphasizes territorial limits on the exercise of a particular country's prescriptive jurisdiction.[89]

This is where U.S. jurisprudence stood on the eve of *Rasul v. Bush*, a case that involved the statutory (rather than the constitutional) right to seek habeas review. Justice Stevens wrote the majority opinion in *Rasul*, which affirmed the ability of Guantanamo detainees to invoke the statutory habeas jurisdiction of U.S. federal courts under 28 U.S.C. § 2241—the provision whose subsequent modification by Congress prompted the constitutional challenge in *Boumediene*. Although statutory cases are outside the scope of this analysis, it is worth noting that Justice Stevens gave an oblique nod to the functional approach to extraterritorial rights previously endorsed by Justice Harlan in *Reid* and Justice Kennedy in *Verdugo*.[90] It is also worth noting elements of Justice Kennedy's concurring opinion in *Rasul* that foreshadowed his approach in *Boumediene*. First, Justice Kennedy expressed the view that "Guantanamo Bay is in every practical respect a United States territory."[91] Second, he distinguished the facts of *Rasul* from those in *Eisentrager* by emphasizing that "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status."[92] He reasoned:

> Because the prisoners in *Eisentrager* were proven enemy aliens found and

86. *Id.* at 277-78 (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

87. *Id.* at 279 (Stevens, J., concurring).

88. *Id.*

89. *Id.*

90. Rasul v. Bush, 542 U.S. 466, 484 n.15 (2004) (referring to Justice Kennedy's concurrence in *Verdugo* with a "*cf.*" citation).

91. *Id.* at 487 (Kennedy, J., concurring).

92. *Id.* at 487-88.

> detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts to hear the prisoner's claims.[93]

Justice Kennedy found that this separation of powers rationale for judicial restraint was much weaker in *Rasul* than it was in *Eisentrager* and therefore did not preclude extending habeas jurisdiction to the claims of Guantanamo detainees.[94]

In October 2006, in response to *Rasul*, the 109th U.S. Congress purported to strip federal courts of their jurisdiction to hear any application for a writ of habeas corpus "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[95] The petitioners in *Boumediene* challenged this legislation by invoking the Suspension Clause, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[96] The writ of habeas corpus has achieved iconic status in common law systems that have institutionalized judicial review of detentions as a check on the arbitrary exercise of executive power. The Suspension Clause literally confers constitutive status on this protection as a defining feature of government based on the separation of powers. While separation-of-powers concerns animate any consideration of the scope of judicial review, they are especially salient where the right to petition for habeas relief is involved.

Justice Kennedy begins his opinion for the majority in *Boumediene* by affirming that "foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles."[97] The detainees' lack of U.S. citizenship does not, by itself, bar their claims. The majority turns first to history to discern whether or not the constitutional writ of habeas corpus (as opposed to its statutory counterpart) extends to Guantanamo detainees, while emphasizing that the Court "has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ [of habeas corpus]."[98] The majority finds a founding-era resolution of the Guantanamo dilemma elusive:

> In none of the cases cited do we find that a common-law court would or would not have granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a

93. *Id.* at 486.

94. Justice Stevens's opinion for the *Rasul* majority instead distinguished *Eisentrager* on the basis that *Eisentrager* did not involve the statutory habeas jurisdiction of U.S. courts, and was therefore not controlling in *Rasul*. *Id.* at 476 (majority opinion); *see also id.* at 479 (finding that "*Eisentrager* plainly does not preclude the exercise of § 2441 jurisdiction over petitioners' claims"). *But see id.* at 491 (Scalia, J., dissenting) (disputing this interpretation of *Eisentrager*).

95. Military Commissions Act of 2006, 28 U.S.C. § 2241(e)(1) (2006).

96. U.S. CONST. art. I, § 9, cl. 2.

97. Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008) (citing INS v. Chadha, 462 U.S. 919, 958-59 (1983)).

98. *Id.* at 2248 (citing INS v. St. Cyr, 533 U.S. 289, 300-01 (2001)).

> standard like the one the Department of Defense has used in these cases, and when held in a territory, like Guantanamo, over which the Government has total military and civil control.[99]

The majority recognizes that both territory (country) and citizenship (compact) have played a role in historical definitions of the scope of habeas protection, but it does not find historical analogies close enough to the Guantanamo situation to compel a particular result. Instead, the majority draws a negative lesson from these historical cases, highlighting the "prudential" concerns that arguably animated their results,[100] and rejecting "a categorical or formal conception of sovereignty"[101] that defined or defines the geographical scope of habeas protection. The majority appears to accept as a starting premise that constitutional protections may apply extraterritorially in certain circumstances, but that such protections do not automatically apply extraterritorially simply because the U.S. government has acted. The question is how to define the parameters of constitutional constraints, if not through bright-line rules associated with formal territorial boundaries or citizenship.

The majority's rejection of "formal" conceptions of sovereignty in defining the geographic boundaries of habeas protection proves pivotal because Cuba indisputably maintains de jure sovereignty over Guantanamo Bay.[102] The majority "take[s] notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."[103] As a doctrinal matter, the majority rejects the government's position that "at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."[104] On its face, it is not clear whether the majority is simply adopting a different definition of what counts as U.S. territory for habeas purposes (thus essentially adopting a country approach), or whether its reasoning is more expansive. One clue that the holding can properly be construed as more than just a redefined country approach is the majority's emphasis on the "[p]ractical considerations"[105] that informed the Court's decision in *Eisentrager*, whereas a country approach would instead adopt a bright-line rule.

The majority rejects a bright-line approach based on formal sovereignty on separation-of-powers grounds. Justice Kennedy reasons:

> The necessary implication of the [government's] argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political

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99. *Id.* The majority emphasizes the idiosyncrasy of the cases before it while at the same time suggesting that these cases could have analogs by using the phrases "*like* the one the Department of Defense has used" and "*like* Guantanamo." *Id.* (emphasis added). *But see id.* at 2251 (referring to "the unique status of Guantanamo Bay").

100. *Id.* at 2250; *see also id.* at 2255 (emphasizing the practical considerations that influenced later cases).

101. *Id.* at 2250.

102. *Id.* at 2251.

103. *Id.* at 2253.

104. *Id.*

105. *Id.* at 2257.

> branches to govern without legal constraint . . . . The test for determining the scope of [the writ of habeas corpus] must not be subject to manipulation by those whose power it is designed to restrain.[106]

This concern flows from the susceptibility of a country approach to government policies designed to keep individuals quite literally beyond the reach of domestic rights provisions. Indeed, there are indications that the Executive initially opted to detain individuals at Guantanamo Bay at least in part for this reason.[107]

In lieu of a country approach, Justice Kennedy's majority opinion in *Boumediene* directly invokes the "impracticable and anomalous" standard from the Harlan concurrence in *Reid* and from Justice Kennedy's own concurrence in *Verdugo*[108] to support its application of a "functional" approach to extraterritoriality. In the end, the majority identifies "at least three factors" relevant to determining the scope of constitutional habeas: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[109] The majority thus explicitly enshrines elements of *all three* approaches in its multifactor test: (1) citizenship and status, focusing on the relationship between the government and the individual (compact); (2) nature of the sites of apprehension and detention, focusing on territory (country); and (3) practical obstacles, focusing on contextual factors without drawing bright lines based on territory or membership (conscience).

The question is how these three approaches will interact in cases involving detainees held in other locations.[110] In *Boumediene*, Justice Kennedy echoed his observation in *Rasul* that "Guantanamo Bay is in every practical respect a United States territory,"[111] and he concluded that "[i]n every practical sense Guantanamo is not abroad."[112] This left room for the *Boumediene* majority to differentiate other habeas petitions, such as those filed by detainees at Bagram Air Force Base in Afghanistan, without deciding them:

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106. *Id.* at 2258-59.

107. Justice Scalia's dissent in *Boumediene* states that "the President's Office of Legal Counsel advised him 'that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].'" *Id.* at 2294 (Scalia, J., dissenting) (citing Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. 1 (Dec. 28, 2001)); *see also* Initial Brief of Appellee-Respondent at 9-10, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195) (arguing that "as aliens held outside the sovereign territory of the United States, petitioners may not invoke the protections of our Constitution, including those guaranteed by the Suspension Clause").

108. *Boumediene*, 128 S. Ct. at 2255-57 (quoting Reid v. Covert, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring)).

109. *Id.* at 2259.

110. The D.C. District Court has held that the availability of habeas relief does not benefit former Guantanamo detainees. *See In re* Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay, 700 F. Supp. 2d 119 (D.D.C. 2010).

111. Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).

112. *Boumediene*, 128 S. Ct. at 2261 (citing *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring)).

> While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the [Guantanamo] base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be "impracticable or anomalous" would have more weight.[113]

This left the door open for the government to argue that the *Boumediene* holding was, in fact, limited exclusively to Guantanamo.

In a May 2010 opinion applying *Boumediene* to petitions filed by detainees at Bagram Air Force Base in Afghanistan, the D.C. Circuit emphasized the "practical obstacles" to allowing these detainees to file habeas petitions and declined to find jurisdiction over their petitions largely on that basis.[114] Although the D.C. Circuit did not find that territorial location was determinative, it concluded that habeas jurisdiction did not extend to detainees "in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."[115] The district court had previously held that a Bagram detainee who was an Afghan citizen could not file a habeas petition because of "unique 'practical obstacles' in the form of friction with the 'host' country,"[116] but it would have found jurisdiction over the habeas petitions of non-Afghan detainees. This illustrates the subjectivity involved in applying the "practical obstacles" test. That said, although Justice Kennedy's functional approach preserves more judicial discretion to extend domestic rights provisions than a categorical approach, it has not resulted in the wholesale extension of constitutional rights to noncitizens overseas.

2. *Suing U.S. Officials*

Although the habeas petitions filed by detainees have garnered the most attention, civil suits also have been filed in U.S. courts as a means of seeking redress for extraterritorial violations of U.S. and international law. Courts confronting these cases also must determine whether certain provisions of the U.S. Constitution apply to noncitizens outside the territorial United States. Four such cases brought in 2005 were consolidated by the Judicial Panel on Multidistrict Litigation under the caption *In re Iraq and Afghanistan Detainees Litigation*, and were transferred for pretrial proceedings to Chief Judge Thomas Hogan of the D.C. District Court. Judge Hogan dismissed the cases.[117] Notably,

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113. *Id.* at 2261-62.

114. Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

115. *Id.* at 98.

116. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009). The Afghan detainee's petition was not one of those consolidated for interlocutory review before the D.C. Circuit.

117. *In re* Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85 (D.D.C. 2007). On April 25, 2008, the plaintiffs petitioned for an initial appeal hearing en banc to reconsider the district court's holding that noncitizens can never bring a claim under the U.S. Constitution against government officials for extraterritorial rights violations. Appellants' Petition for Initial Hearing En Banc, Ali v. Rumsfeld, No. 07-5178 (D.C. Cir. Apr. 25, 2008). The D.C. Circuit, on its own motion, has scheduled oral argument before a three-judge panel on January 13, 2011. *See* Clerk's Order, Ali v. Rumsfeld, No. 07-5178 (D.C. Cir. Nov. 12, 2010). For the record, I was co-counsel for the plaintiffs in these cases as a law firm associate from 2004 to 2006.

Judge Hogan found that the plaintiffs could not pursue a *Bivens* remedy for their detention and mistreatment, even though "the facts alleged in the plaintiffs' Amended Complaint stand as an indictment of the humanity with which the United States treats its detainees."[118]

Bivens causes of action can be created by federal courts against federal officials who violate individuals' constitutional rights. However, government officials benefit from qualified immunity from civil liability "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[119] The "clearly established" standard presents a significant doctrinal hurdle for foreign plaintiffs seeking civil damages for extraterritorial violations of constitutional rights under *Bivens*.

Relying largely on *Eisentrager*, Judge Hogan found that the Iraqi and Afghan plaintiffs had failed to assert a right protected by the Constitution.[120] Judge Hogan emphasized that "what must be 'clearly established' is the constitutional right," not simply that torture is unlawful.[121] This is because "a *Bivens* remedy is available only for constitutional violations, not for violations of some other source of law, such as international law or treaties."[122] Critically, in Judge Hogan's view, "Supreme Court precedent at the time the plaintiffs were injured established that the Fifth Amendment [right to due process] did not apply to nonresident aliens outside the sovereign territory of the United States."[123] Anticipating Justice Scalia's dissent in *Boumediene*, Judge Hogan said the following about the plaintiffs' proposed "impracticable and anomalous" test: "As one defendant observed, 'plaintiffs attempt to create binding Supreme Court precedent based solely on a footnote, citing to a concurring opinion that cites to yet another concurring opinion.' This Court agrees."[124]

Ultimately, as recounted above, this very footnote from Justice Stevens's majority opinion in *Rasul*, citing Justice Kennedy's concurrence in *Verdugo*, which in turn cited Justice Harlan's concurrence in *Reid*, did provide much of the doctrinal basis for the *Boumediene* majority's adoption of the "impracticable and anomalous" standard at the heart of its functional test. However, as long as judges determine qualified immunity based on whether a right was "clearly established" at the time of the alleged violation, this development will provide little comfort to those allegedly injured by U.S. action prior to 2008.[125] The *Boumediene* majority's characterization of

118. *In re* Iraq, 479 F. Supp. 2d at 96 n.9.

119. *Id.* at 108 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

120. *Id.*

121. *Id.* at 109.

122. *Id.*

123. *Id.* at 108-09.

124. *Id.* at 102 (internal citation omitted).

125. *See* Rasul v. Myers, 563 F.3d 527, 530-32 (D.C. Cir. 2009); Rasul v. Myers, 512 F.3d 644, 665-66 (D.C. Cir. 2008); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 112 (D.D.C. 2010); *see also* Arar v. Ashcroft, 532 F.3d 157, 179 (2d Cir. 2008) (declining to create a *Bivens* remedy and criticizing the dissent for ignoring "the constitutional significance of geographic borders"), *aff'd en banc* 585 F.3d 559 (2d Cir. 2009).

Guantanamo Bay as "not abroad" has also failed to benefit plaintiffs who have brought claims under the Alien Tort Statute against U.S. officials for their alleged violations of international (as opposed to constitutional) law.[126] Guantanamo still *is* "abroad" for all but limited purposes, notwithstanding the Supreme Court's rejection of a pure country approach.

B. *Canada*

The Canadian Charter of Rights and Freedoms has been the touchstone for judicial review of legislative and executive action in Canada since 1982. By its terms, the Charter applies

> a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . . ; and
>
> b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[127]

The two leading Supreme Court cases interpreting the territorial scope of Charter guarantees are *R. v. Cook*[128] and *R. v. Hape*.[129] Although *Hape* did not explicitly overrule *Cook*, it did entrench a substantially more restrictive approach to the geographic reach of the Charter. This approach subsequently has been applied by lower courts in cases including *Amnesty International Canada v. Canada (Chief of the Defence Staff)*,[130] and by the Supreme Court itself in *Canada (Prime Minister) v. Khadr* (2008) (*Khadr I*)[131] and *Canada (Justice) v. Khadr* (2010) (*Khadr II*).[132]

Canadian jurisprudence has moved from an assertion of nationality jurisdiction over the conduct of Canadian officials acting abroad (*Cook*) to a much more restrictive view of the extraterritorial application of the Charter only in circumstances of explicit consent by the territorial state (*Hape*) or to mitigate international law violations (*Khadr I*). The *Khadr* cases illustrate the potentially unintended gaps in protection left by the *Hape* decision, which adopts a more restrictive view of the Charter's geographic scope than is required by the Court's decision in *Cook* or by international law. The Canadian Charter explicitly subjects the rights it extends to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[133] Yet *Hape* instructed lower courts to refrain categorically from

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126. Under the Westfall Act, the United States is substituted as the defendant in these cases, which transforms the claim into one under the Federal Tort Claims Act (FTCA). Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. §§ 2671-2680 (2006). The FTCA contains an exception for claims arising in a foreign country, which continues to include Guantanamo. *See Al-Zahrani*, 684 F. Supp. 2d at 117-19 (rejecting argument that Guantanamo is not a foreign country for purposes of the FTCA).

127. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

128. R. v. Cook, [1998] 2 S.C.R. 597.

129. R. v. Hape, 2007 SCC 26, [2007] 2 S.C.R. 292.

130. Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FC 336, [2008] 4 F.C.R. 546, *aff'd* 2008 FCA 401, [2009] 4 F.C.R. 149.

131. Canada (Justice) v. Khadr (*Khadr I*), 2008 SCC 28, [2008] 2 S.C.R. 125.

132. Canada (Prime Minister) v. Khadr (*Khadr II*), 2010 SCC 3, [2010] 1 S.C.R. 44.

133. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being*

applying the Charter to extraterritorial government action, even vis-à-vis Canadian citizens, in all but exceptional circumstances. Under *Hape*, Canada has the benefit of a bright-line rule embodied in the country approach, but its mechanism for addressing egregious violations (by deeming the Charter to apply where there have been clear violations of international law) is circuitous and has perplexed some lower courts. It would be preferable to formulate guidelines permitting a contextual evaluation of when to extend certain Charter constraints to extraterritorial government action, rather than relying on a bright-line rule combined with an ambiguous exception.

1. *Comity and Deference*

The Canadian Supreme Court's decision in *R. v. Cook* arose from the trial of a U.S. citizen, Deltonia Cook, for the murder of a Vancouver taxi cab driver. Cook was arrested in the United States pursuant to an extradition request by Canada. While he was detained at a New Orleans prison, he was interviewed by two Vancouver police detectives. At his trial in Canada, Cook argued that a statement he made to these detectives denying involvement in the murder should not be admitted for the purpose of impeaching his credibility on cross-examination, because the detectives did not adequately advise him of his right to counsel as required by section 10(b) of the Canadian Charter.[134] The divisional court admitted the statement. Cook was convicted, and appealed. Seven out of nine justices found that the Vancouver detectives breached section 10(b) of the Charter when they interviewed Cook in New Orleans and did not clearly inform him of his right to counsel prior to questioning him, and that Cook's statement should therefore have been excluded.[135]

Nine years later, Lawrence Hape, a Canadian citizen, was tried in Canada for laundering money through an investment company in the Turks and Caicos Islands. RCMP officers from Canada conducted a warrantless perimeter search of the company, which they understood to be permissible under Turks and Caicos law even though it is not permitted under the Charter. They also conducted covert entries in March 1998 and February 1999 that they understood to be authorized by warrants issued in the Turks and Caicos, although no warrants were admitted into evidence at Hape's trial.[136] At all times, the RCMP officers acted with the permission and under the authority of a Turks and Caicos police superintendent.[137] Mr. Hape objected to the introduction of documents seized from the investment company during these covert entries on the grounds that the RCMP's activities violated section 8 of

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Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

134. Section 24(2) of the Charter provides for the exclusion of evidence "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter" if "the admission of [the evidence] in the proceedings would bring the administration of justice into disrepute." Even if the Charter did not apply to the actions of the Canadian detectives, Charter Sections 7 and 11(d), taken together, permit the exclusion of evidence that would render the trial unfair. *Id.* c. 11; *see* R. v. Cook, [1998] 2 S.C.R. 597, para. 22.

135. R. v. Cook, [1998] 2 S.C.R. 597, para. 22.

136. R. v. Hape, 2007 SCC 26, paras. 5-11, [2007] 2 S.C.R. 292, paras. 5-11.

137. *Id.* para. 3.

the Charter, which prohibits unreasonable searches and seizures. The divisional court admitted the documents. Hape was convicted and appealed. This time, all nine justices agreed that the documents seized in the Turks and Caicos were properly admitted at trial.

Only one of the five justices who joined the majority opinion in *Cook*, Justice Binnie, was still on the Court at the time *Hape* was decided. Justice Binnie concurred in the majority's judgment in *Hape*, but he did not join the majority's reasons. The *Hape* majority included one of the *Cook* dissenters, Chief Justice McLachlin, and four justices who were not on the Court at the time *Cook* was decided. Justice Bastarache, who has since retired from the Court, wrote concurring reasons in both *Cook* and *Hape*. Although *Hape* is now controlling law in Canada, it is worthwhile to note the shift in reasoning that has occurred since *Cook* was decided, along with the shift in the Court's composition.

In *Cook*, seven out of nine justices found that the Vancouver detectives breached section 10(b) of the Charter when they interviewed the suspect in New Orleans without properly advising him of his right to counsel. Five of the seven analyzed the problem by reasoning that the Canadian detectives were governed by the Canadian Charter because of their Canadian nationality, even though the interview took place in the United States.[138] The other two justices agreed with this conclusion,[139] but would have focused more on the relative roles of the Canadian and U.S. authorities in the interview to determine whether Canada's extension of the Charter to the detectives' actions was warranted in the circumstances.[140] Only the two dissenters attributed significance to the U.S. citizenship of the accused, advocating elements of a compact-based approach that would exclude aliens subject to extraterritorial government action from the protection of the Charter.[141] However, since the parties did not put forward arguments based on Cook's nationality, even the dissenters focused on whether the Charter could control the actions of the Canadian detectives, rather than whether the affected individual (Cook) could assert Charter rights.[142]

Justice Bastarache, who concurred in the judgment in *Cook*, wrote separately to emphasize that "the status of a police officer as an officer of the state is not altered by crossing a jurisdictional border, even if he or she is deprived of all the coercive powers conferred by the home state."[143] In his view, "[T]he key issue in cases of cooperation between Canadian officials and foreign officials exercising their statutory powers is determining who was in

138. *Cook*, 2 S.C.R. 597, paras. 28, 41, 46, 48 (Cory and Iacobucci, JJ.). These Justices implicitly viewed the breach as occurring during the interview, rather than when the statement was used for impeachment at trial.

139. *Id.* para. 122 (Bastarache, J., concurring).

140. *Id.* paras. 125-26.

141. *Id.* paras. 81, 85-86 (L'Heureux-Dubé, J., dissenting). The majority did note that "it is reasonable to permit the appellant, who is being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interview conducted by the Canadian detectives in New Orleans," but it did not emphasize this line of reasoning. *Id.* para. 51 (Cory and Iacobucci, JJ.).

142. *Id.* paras. 87-88 (L'Heureux-Dubé, J., dissenting).

143. *Id.* para. 120 (Bastarache, J., concurring).

control of the specific feature of the investigation which is alleged to constitute the *Charter* breach."[144] In this case, the Charter applied to the Canadian detectives in New Orleans because "the foreign officials invited the Canadian officials to conduct their questioning in an entirely autonomous fashion."[145]

Only the dissenters argued that any extraterritorial law enforcement activity *necessarily* occurs under the authority of a foreign state and therefore falls outside the terms of section 32 of the Charter. As Justice L'Heureux-Dubé wrote in dissent:

> When officials of a s. 32 government participate in an action that falls under the legal authority of a foreign government, it is not a matter "within the authority" of Parliament or a provincial legislature, as required by s. 32 . . . . [T]he *Charter* does not apply to any investigation where Canadian officials no longer have the legal attributes of "government"; this occurs whenever an investigation takes place under the sovereignty of another government.[146]

For Justice L'Heureux-Dubé, even Justice Bastarache's more limited "control" test would be inappropriate, because "[o]n territory under foreign sovereignty, the Canadian government no longer has authority, and Canadian officials, in the sense of having the coercive powers of the Canadian state behind them, are never really 'controlling.'"[147] This reasoning most closely reflects the country-based approach that later prevailed in *Hape*, even though this is precisely the approach that *Cook* appeared to have rejected.

Cook represents a relatively expansive interpretation of section 32, where the "authority" of Canadian state actors, and thus their Charter obligations, are deemed to travel with them across borders as long as this would not generate an "objectionable interference" with the foreign state's authority, for example by purporting to govern the conduct of a foreign state's own agents. Given that Cook was a U.S. citizen, it might seem that a Canadian citizen subject to the extraterritorial law enforcement activities of Canadian officials would have an even stronger claim to exclude evidence obtained in violation of the Charter from a Canadian criminal trial. So one might have thought before the *Hape* decision in 2007.

Nine years after *Cook*, all nine justices in *Hape* agreed that the documents seized by RCMP officers in the Turks and Caicos were properly admitted against a Canadian citizen at a Canadian trial.[148] Writing for a majority, Justice LeBel adopted a country approach to the Canadian Charter.[149] He found that

144. *Id.* para. 126.

145. *Id.* para. 128.

146. *Id.* para. 93 (L'Heureux-Dubé, J., dissenting).

147. *Id.* para. 96. The dissent further concluded that "in this case the conduct of the Canadian detectives was not so serious that admission of the evidence would violate the appellant's right to a fair trial, taking into account all the circumstances and society's interest in finding out the truth." *Id.* para. 105.

148. Kent Roach criticizes what he calls the *Hape* majority's "radical" approach, stating: "It does not build on or attempt to distinguish prior precedents in this area but rather rejects them, as a critic working outside of the system might do. This is not the way that judges should develop the law." Kent W. Roach, R. v. Hape *Creates Charter-Free Zones for Canadian Officials Abroad*, 53 CRIM. L.Q. 1, 3 (2007).

149. R. v. Hape, 2007 SCC 26, para. 69, [2007] 2 S.C.R. 292, para. 69.

customary international law, which is automatically incorporated into Canadian law in the absence of conflicting legislation,[150] prohibits the exercise of extraterritorial enforcement jurisdiction absent the explicit consent of the foreign state. Justice LeBel criticized the *Cook* majority for "fail[ing] to distinguish prescriptive from enforcement jurisdiction"[151] when it found that the Canadian Charter applied to the Canadian detectives in New Orleans. He reasoned that "[t]he powers of prescription and enforcement are both necessary to application of the *Charter*."[152] Consequently, "Since extraterritorial enforcement is not possible [without consent], and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible."[153] For Justice LeBel, when Canadian agents are acting under the legal authority of a foreign sovereign, even vis-à-vis a Canadian citizen, "the matter falls outside the authority of Parliament and the provincial legislatures,"[154] and thus outside the scope of the Charter.

Justice Bastarache, joined by two other justices, again advanced his "control" theory of the extraterritorial Charter,[155] which again failed to attract a majority. In his concurrence, he emphasized that "[s]ection 32(1) of the *Charter* defines *who* acts, not *where* they act."[156] Unlike the interview in *Cook*, foreign officials took part in the search and seizure in *Hape*. Justice Bastarache would therefore have held that "[w]here the host state takes part in the action by subjecting Canadian authorities to its laws, the *Charter* still applies to Canadian officers[,] but there will be no *Charter* violation where the Canadian officers abide by the laws of the host state"[157] unless "it is shown that those laws or procedures are substantially inconsistent with the fundamental principles emanating from the *Charter*."[158] For Justice Bastarache, the Charter remains the appropriate touchstone for the conduct of Canadian officials participating in extraterritorial law enforcement activities, and for the review of those activities by Canadian courts: "I believe it is preferable to frame the fundamental rights obligations of Canadian officials working abroad in a context that officers are already expected to be familiar with—their obligations under the *Charter*."[159] Justice Bastarache's approach comes the closest to a conscience model, because it does not turn on the location of the search or the

150. *Id.* para. 39.

151. *Id.* para. 83. In fact, *Hape*, not *Cook*, misconceptualizes enforcement jurisdiction, as Pierre-Hugues Verdier, among others, has pointed out. *See* Pierre-Hugues Verdier, *International Decision:* R. v. Hape, 102 AM. J. INT'L L. 143, 147 (2008); *see also* John H. Currie, Comment, Khadr*'s Twist on* Hape*: Tortured Determinations of the Extraterritorial Reach of the* Canadian Charter, 42 CAN. Y.B. INT'L L. 307, 317-18 (2008).

152. *Hape*, 2007 SCC 26, para. 85.

153. *Id*.

154. *Id.* para. 69.

155. *Id.* para. 154 (Bastarache, J., concurring); *see also* Michel Bastarache, *La Charte canadienne des droits et libertés, reflet d'un phénomène mondial?* [*Does the Canadian Charter of Rights and Freedoms Reflect a Global Phenomenon?*], 48 CAHIERS DE DROIT 735, 742-44 (2007) (Fr.).

156. *Hape*, 2007 SCC 26, para. 161; *see also* R. v. Cook, [1998] 2 S.C.R. 597, para. 118 (Can.) (Bastarache, J., concurring).

157. *Hape*, 2007 SCC 26, para. 176 (Bastarache, J., concurring).

158. *Id.* para. 174.

159. *Id.* para. 173.

nationality of the suspect. Even so, it is still narrower than the approach adopted by the majority in *Cook*.

Mindful of the potential implications of the *Hape* majority's adoption of a country-based approach, Justice Binnie concurred in the judgment but wrote separately to reject the majority's "premature pronouncements"[160] restricting the ability of the Charter to protect Canadian citizens from extraterritorial government action. In his view, the majority's approach "effectively overrules *Cook*"[161] by finding that "*any* extraterritorial effect [of the Charter] is objectionable."[162] He would have reached the same result by applying *Cook* to find that enforcing a warrant requirement in these circumstances would have generated an objectionable extraterritorial effect by interfering with the sovereign authority of the Turks and Caicos.[163] Justice Binnie would therefore have preserved the privileged role of the Charter in protecting rights, especially "as between the Canadian government and Canadian citizens,"[164] as emphasized by a compact approach.

The central problem with the majority's rationale in *Hape* is that it misconceptualizes the application of the Charter to Canadian officials acting abroad as an exercise of *enforcement* jurisdiction, rather than *prescriptive* jurisdiction.[165] Although the majority's result in admitting the evidence might have been warranted (no pun intended) for other reasons, its rationale is not supported by the international law standards it invoked.

The majority's approach illustrates how the deference to foreign authority reflected in a country-based approach radically circumscribes the role of domestic judicial review. The majority recognized the importance of intergovernmental cooperation in transnational law enforcement, and was likely concerned that the imposition of Canadian standards would interfere with the effectiveness of that cooperation, either symbolically (by showing inadequate regard for local law) or practically (because of logistical obstacles to compliance). For the majority, "[W]hen one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders,"[166] even when Canadian agents are directly involved. Consequently, "Without evidence of consent [by the Turks and Caicos to the extraterritorial enforcement of the Canadian Charter], that is enough to conclude that the *Charter* does not apply."[167] This requirement of

160. *Id.* para. 183 (Binnie, J., concurring); *see also id.* para. 187.

161. *Id.* para. 182.

162. *Id.* (emphasis in original).

163. *Id.* para. 181 (finding that "superimposing the Canadian law of search and seizure on top of that of the Turks and Caicos Islands would be unworkable").

164. *Id.* para. 186.

165. *See id.* paras. 69, 115 (majority opinion). It is unclear, following this rationale, what basis remains for Canada's criminalization of certain extraterritorial conduct absent the express consent of the territorial state. *See, e.g.*, LAURA BARNETT, INTERNATIONAL DIMENSIONS OF DOMESTIC CRIMINAL LAW: EXTRATERRITORIALITY AND EXTRADITION (2008), *available at* http://www2.parl.gc.ca/Content/LOP/researchpublications/prb0117-e.pdf (enumerating Canadian statutes that criminalize extraterritorial conduct based on the nationality principle, the protective principle, and universal jurisdiction).

166. *Hape*, 2007 SCC 26, para. 52.

167. *Id.* para. 115.

"consent" is not only difficult to put into effect, but it also puts the question of whether a domestic rights regime constrains the actions of that country's government agents in the hands of a foreign government.

The *Hape* majority does stop short of endorsing a "no holds barred" approach to extraterritorial law enforcement activities: "That deference [to foreign sovereigns] ends where clear violations of international law and fundamental human rights begin."[168] Under this framework, the outer limits of permissible action by Canadian agents abroad are defined first by local law, then by international law, which establishes a threshold that can trigger the exceptional extraterritorial application of the Charter.[169] In his concurrence, Justice Binnie expressed skepticism about the effectiveness of international human rights law as a substitute for the Charter under this framework, reasoning that "[t]he content of such obligations is weaker and their scope is more debatable than *Charter* guarantees."[170]

Although animated by understandable concerns, the majority's country-based approach in *Hape* led it to draw sweeping conclusions about the territorially limited nature of the Charter that neglect the Charter's special role in defining core aspects of the Canadian polity, including the relationship between the government and governed (emphasized by a compact approach) and a set of fundamental values (emphasized by a conscience approach).[171]

The implications of *Hape*'s country approach became apparent in *Amnesty International v. Canada*, in which petitioners invoked the Charter to challenge the actions of Canadian forces abroad.[172] In that case, Amnesty International Canada and the British Columbia Civil Liberties Association were granted public interest standing to challenge Canada's practice of transferring individuals captured and detained by Canadian forces in Afghanistan into the custody of Afghan forces, on the grounds that these individuals are thereby exposed to a substantial risk of torture. In addition to various forms of injunctive relief, the applicants sought a declaration "that sections 7, 10 and 12 of the *Canadian Charter of Rights and Freedoms* apply to individuals detained by the Canadian Forces in Afghanistan."[173] These Charter provisions establish the right not to be deprived of "life, liberty and security . . . . except in accordance with principles of fundamental justice[;]"[174] the right to challenge the lawfulness of one's detention;[175] and "the right not to be subjected to cruel

168. *Id.* para. 52. Although "deference" in this sentence refers to deference to local authorities, it could also, by extension, suggest that courts should be less deferential to the political branches where "clear violations" are involved.

169. *Id.* para. 90.

170. *Id.* para. 186 (Binnie, J., concurring).

171. *See, e.g.*, Roach, *supra* note 148, at 4 (criticizing the decision in *Hape* as insufficiently attentive to the role of the Charter in defining and expressing Canadian values).

172. Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FC 336, para. 4, [2008] 4 F.C.R. 546, para. 4, *aff'd* 2008 FCA 401, [2009] 4 F.C.R. 149.

173. *Id.* para. 8.

174. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.).

175. *Id.* § 10.

and unusual treatment or punishment."[176] The trial judge, Justice Mactavish, found that the Supreme Court's ruling in *Hape* compelled dismissal. Although Afghanistan had clearly consented to the Canadian Forces' detention of non-Canadians, including Afghan citizens, in Afghanistan,[177] Justice Mactavish determined that Afghanistan had not consented to the extraterritorial application of Canadian law.[178] She reasoned:

> [I]t is clear that while Afghanistan has consented to its citizens being detained by the Canadian Forces for the purposes described by the Afghanistan Compact [concluded on February 1, 2006], it cannot be said that Afghanistan has consented to the application or enforcement of Canadian law, including the *Canadian Charter of Rights and Freedoms*, to constrain the actions of the Canadian Forces in relation to detainees held by the Canadian Forces on Afghan soil.
>
> Furthermore, the Government of Afghanistan has not consented to having Canadian Charter rights conferred on non-Canadians, within its territorial limits.[179]

She further observed that "the majority decision of the Supreme Court of Canada in *Hape* specifically rejected the control-based test that had been advocated by Justice Bastarache in *Cook* as a means of grounding the extraterritorial application of the Charter."[180] Consequently, following *Hape*, the rights of detainees in Canadian custody are defined by the Afghan constitution and by international law, including international humanitarian law, not by the Canadian Charter.[181] In her view, even if the applicants established a substantial risk of human rights violations resulting from their transfer to Afghan custody, the Charter would not apply to the actions of the Canadian Forces.[182] This is so, even though "the enforcement mechanisms for [international law] standards may not be as robust as those available under the Charter,"[183] which is, at least in part, what led the applicants to seek relief under the Charter in the first place.

Less than three months after the trial court's decision in *Amnesty International*, the Supreme Court rendered its decision in *Canada v. Khadr* (*Khadr I*).[184] In *Khadr I*, a unanimous Court invoked the human rights exception in *Hape* to apply the Charter to the activities of Canadian intelligence officials who interviewed Omar Khadr in 2003 while he was detained by the

176. *Id.* § 12.

177. *Amnesty Int'l Can.*, 2008 FC 336, para. 149.

178. *Id.* para. 159; *see also id.* para. 172.

179. *Id.* paras. 182-84.

180. *Id.* para. 282; *see also id.* para. 294 (indicating that "in *Hape*, the Supreme Court of Canada seemingly rejected Canadian control over activities taking place on foreign soil as a basis for extending Canadian Charter jurisdiction to protect individuals affected by those activities, in favour of its consent-based test").

181. *Id.* paras. 161-62.

182. *Id.* para. 328.

183. *Id.* para. 338. The trial judge nevertheless emphasized that members of the Canadian Forces can face disciplinary sanctions and criminal prosecution under Canadian law for violating international humanitarian law standards, *id.* para. 344, as well as the possibility of prosecution by the International Criminal Court, *id.* para. 345.

184. *Khadr I*, 2008 SCC 28, [2008] 2 S.C.R. 125.

United States at Guantanamo Bay. The Canadian officials then shared the resulting records and information with U.S. authorities for use in Khadr's eventual prosecution by a U.S. military commission.[185] The Court in *Khadr I* applied precisely the approach that the trial judge in *Amnesty International* deemed an illogical and implausible reading of *Hape*—namely, finding that the Charter applies extraterritorially when Canadian officials act in violation of international law, but not otherwise.[186]

Under *Khadr I*, the Charter defines the remedy for Canada's participation in a process that violated international law. The *Khadr I* Court held:

> The process in place [at Guantanamo] at the time Canadian officials interviewed Mr. Khadr and passed the fruits of the interviews on to U.S. officials has been found by the United States Supreme Court to violate U.S. domestic law and international human rights obligations to which Canada is party. In light of these decisions . . . the comity concerns that would normally justify deference to foreign law do not apply in this case. Consequently, the *Charter* applies, and Canada is under a s. 7 duty of disclosure.[187]

The Court also explained that "if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation."[188]

Although the Court characterized Canada's provision of information to U.S. authorities as a violation of Canada's international law obligations,[189] it identified the relevant Charter breach as Canada's subsequent refusal to disclose that information to Khadr.[190] The Court held that "to mitigate the effect" of its participation in illegal U.S. processes, Canada was required to disclose to Khadr "information given to U.S. authorities as a direct consequence of Canada's having interviewed him . . . . subject to the balancing

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185. Khadr, a Canadian citizen, was taken prisoner in Afghanistan on July 27, 2002, when he was fifteen years old, and transferred to Guantanamo Bay. *Id.* para. 5. On October 25, 2010, Khadr entered a guilty plea before a U.S. military commission in exchange for an eight-year sentence, with one year to be served at Guantanamo and the rest in Canada. *See Guantanamo Bay's Youngest Militant Omar Khadr Jailed*, BBC NEWS (Oct. 31, 2010), http://www.bbc.co.uk/news/world-us-canada-11662961; Adam Levine, *Canada Says It Will Accept Guantanamo Detainee Khadr in a Year*, CNN (Nov. 1, 2010), http://articles.cnn.com/2010-11-01/world/canada.khadr_1_guantanamo-detainee-omar-khadr-youngest-detainee?_s=PM:WORLD.

186. *See Amnesty Int'l Can.*, 2008 FC 336, paras. 310-11.

187. *Khadr I*, 2008 SCC 28, para. 3. Section 7 of the Charter has been interpreted as entitling criminal defendants to "disclosure of the information in the hands of the Crown." *Id.* para. 16.

188. *Id.* para. 19; *see also id.* para. 27 (holding that "at the time Canada handed over the fruits of the interviews to U.S. officials, it was bound by the *Charter*, because at that point it became a participant in a process that violated Canada's international obligations"). As Benjamin Berger has pointed out, the *Khadr* Court did not engage in its own analysis of the international lawfulness of detention and trial at Guantanamo Bay, but instead relied on U.S. Supreme Court rulings. Benjamin L. Berger, *The Reach of Rights in the Security State: Reflections on* Khadr v. Canada (Minister of Justice), 56 CRIM. REP. (6th) 268, 270-71 (2008). The same is true of the second *Khadr* decision rendered in 2010. *See Khadr II*, 2010 SCC 3, para. 16, [2010] 1 S.C.R. 44, para. 16. If relevant U.S. decisions did not exist or had reached a different conclusion, Berger finds it difficult to envision circumstances in which a Canadian court would "adjudg[e] a foreign legal system as, in part, illegal at international law" in light of the "comity and sovereignty" concerns that were deemed paramount in *Hape*. Berger, *supra*, at 270-71. In order for this to happen, conscience-based reasoning would have to prevail over country-based reasoning, as it ultimately did in the death penalty jurisprudence described below. *See infra* notes 204-226 and accompanying text.

189. *Khadr I*, 2008 SCC 28, para. 32.

190. *Id.* para. 33.

of national security and other considerations" under the relevant provisions of the Canada Evidence Act by the designated federal court judge.[191]

In a sequel to the first *Khadr* appeal, the Supreme Court of Canada granted expedited review of another case involving Omar Khadr.[192] In that case, the trial judge held that Khadr was entitled to a judicial order requiring the government of Canada to seek his repatriation from Guantanamo Bay.[193] A divided court of appeal affirmed this decision.[194] The Supreme Court agreed that Canada had infringed Khadr's section 7 rights under the Charter (the right not to be deprived of life, liberty, and security except in accordance with principles of fundamental justice), but determined that the appropriate remedy was to grant a declaration of infringement, not to order the government to request Khadr's repatriation.[195]

As an international legal matter, the remedy of requesting repatriation, which would be available to Khadr based on his Canadian nationality, seems to fall within the realm of diplomatic protection, rather than an assertion of Charter rights vis-à-vis the Canadian government. This interpretation is consistent with the trial court's and the Supreme Court's citation to the South African case of *Kaunda v. RSA*,[196] in which a group of South African citizens detained in Zimbabwe and facing extradition to Equatorial Guinea sought a court order compelling the South African government to intervene on their behalf. In this respect, the dissenting appeals court judge in *Khadr II* made a valid point when he indicated that he "[could] not see the link between the inappropriateness of the interviews and the remedy of repatriation."[197] The opacity of this link can be attributed in large part to the circuitous reasoning involved in applying *Hape* to a request for diplomatic protection which, in turn, arises from the conceptual incoherence of relying on an international law violation to trigger the extraterritorial application of the Charter.

It is unclear how much effect the *Khadr* cases are having in mitigating the country approach taken by the majority in *Hape*. For example, even with the benefit of the Supreme Court's analysis of the international law exception in *Khadr I*, the appeals court in *Amnesty International v. Canada* affirmed the trial court's judgment and held that the Charter did not apply to the activities of Canadian forces stationed there.[198] The appeals court based its conclusion on

191. *Id.* paras. 34, 37; *see also id.* para. 35 (stating that "to the extent that Canada has participated in that process, it has a constitutional duty to disclose information obtained by that participation to a Canadian citizen whose liberty is at stake"). Although Canadian officials presumably would not have interviewed Khadr at Guantanamo Bay had he not been a Canadian, there is no indication in the *Khadr I* opinion that Khadr's Canadian citizenship informed the Court's reasoning about the extraterritorial scope of the Charter in the circumstances of this case.

192. *See* Supreme Court of Canada, Judgment in Leave Application (Sept. 4, 2009), *available at* http://scc.lexum .umontreal.ca/en/news_release/2009/09-09-04.3a/09-09-04.3a.pdf.

193. Khadr v. Canada (Prime Minister), 2009 FC 405, [2010] 1 F.C.R. 34.

194. Canada (Prime Minister) v. Khadr, 2009 FCA 246, [2010] 1 F.C.R. 73.

195. *Khadr II*, 2010 SCC 3, [2010] 1 S.C.R. 44.

196. *Kaunda v. President of S. Afr.*, 136 I.L.R. 452 (CC 2004).

197. *Khadr*, 2009 FC 405, para. 114 (Nadon, J., dissenting).

198. Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FCA 401, para. 20, [2009] 4 F.C.R. 149, para. 20.

the fact that, following the reasoning of the European Court of Human Rights (ECHR) in *Banković v. Belgium*,[199] Canada did not have "effective control" of Afghan territory.[200] It is unclear why the appeals court deemed it proper to apply the ECHR's *Banković* test to the extraterritorial application of the Canadian Charter, rather than following the Canadian Supreme Court's reasoning in *Khadr I*. In part, it could be that the *Khadr I* approach simply remains too puzzling. This might explain the appellate court's statement, contrary to the language in *Hape* and *Khadr I*, that although "deference and comity end where clear violations of international law and fundamental rights begin," that exception "does not mean that the Charter then applies as a consequence of these violations."[201] Given this confusion, and the Supreme Court's attempts to mitigate the impact of its country approach, it appears clear that, as Gib van Ert has suggested, "*Hape* will surely have to be revisited one day."[202]

2. *Asserting Fundamental Values*

When *Hape* is revisited, it might be useful for the Supreme Court to recall its analysis in another line of cases that could also be conceptualized as giving extraterritorial effect to Charter guarantees, which the Court referenced in *Khadr II* on the specific question of remedies.[203] These cases ask whether the Charter protects individuals who are subject to extradition by Canada to countries that continue to apply the death penalty. In these cases, the Canadian Supreme Court has moved from a more deferential, country-based mode of reasoning to a conscience-based approach, which is the inverse of its progression from *Cook* to *Hape*. To a large extent, this shift seems attributable to the Court's perception of and sensitivity to a growing international consensus against the death penalty. It is unclear whether the death penalty cases are sui generis, or whether they can be read to suggest a hierarchy of rights, some of which (such as the right against warrantless searches) might be curtailed in the name of comity, but others (such as the right not to be deprived of life except in accordance with principles of fundamental justice) will be enforced in the name of fundamental Canadian values.

The Canadian Supreme Court's movement toward a more expansive approach to the application of the Charter in death penalty extradition cases can be traced from its 1991 opinion in *Kindler v. Canada*[204] to its opinion ten years later in *United States v. Burns*.[205] Both cases involved the extradition of individuals to face trial in the United States on charges that could carry the

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

200. *Amnesty Int'l Can*., 2008 FCA 401, para. 20.

201. *Id.*

202. Gibran van Ert, *Canadian Cases in Public International Law in 2006-7*, 45 CAN. Y.B. INT'L L. 527, 555 (2007).

203. *Khadr II*, 2010 SCC 3, para. 37, [2010] 1 S.C.R. 44, para. 37 (citing United States v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283 (Can.)).

204. Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779.

205. *Burns*, 2001 SCC 7.

death penalty. In *Kindler*, a majority declined to interfere with the extradition of a fugitive who had fled to Canada after a Pennsylvania jury had found him guilty of first-degree murder, among other offenses, and recommended the death penalty. The majority found that the Canadian Minister of Justice's decision to order the appellant's extradition without seeking assurances from the United States that the death penalty would not be imposed did not violate the appellant's rights under section 7 (the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice) or section 12 (the right not to be subjected to any cruel and unusual treatment or punishment).

Seven justices heard the *Kindler* case, and four of them wrote opinions. Two of the dissenting justices urged the importance of deciding the case according to "Canadian traditions and values."[206] In their view, "Although the *Charter* has no extraterritorial application, persons in Canada who are subject to extradition proceedings must be accorded all the rights which flow from the *Charter*."[207] Because Canada's actions could result in the appellant's execution, "To surrender a fugitive who may be subject to the death penalty violates s. 12 of the *Charter* just as surely as would the execution of the fugitive in Canada."[208] For three justices in the majority, by contrast, no Charter rights were implicated in these circumstances because the Canadian government would not itself be imposing the death penalty. Justice La Forest emphasized on their behalf:

> The execution, if it ultimately takes place, will be in the United States under American law against an American citizen in respect of an offence that took place in the United States. It does not result from any initiative taken by the Canadian Government. Canada's connection with the matter results from the fact that the fugitive came here of his own free will, and the question to be determined is whether the action of the Canadian Government in returning him to his own country infringes his liberty and security in an impermissible way.[209]

Justice La Forest's reasoning emphasized the lack of connection between Canada and the harm alleged. For him, whether Canadian society accepts the death penalty is simply "not the issue."[210] He declined to view "the fugitive" as a beneficiary of the Canadian Charter, even though Kindler was subject to the coercive authority of Canadian officials in extraditing him to the United States.[211]

Two of the justices who signed this opinion also joined a separate opinion written by Justice McLachlin (who is now the Chief Justice). Justice

206. *Kindler*, 2 S.C.R. at 812 (Sopinka, J., dissenting).

207. *Id.* at 819.

208. *Id.* at 785.

209. *Id.* at 831 (La Forest, J.).

210. *Id.* at 833; *see also id.* at 842 (McLachlin, J.) ("The essence of these cases is not whether the death penalty offends the *Charter*. It is rather whether the Canadian extradition procedure, as expressed in the *Extradition Act* and in the Minister's decision, violates the *Charter*.").

211. *Cf.* Canada v. Schmidt, 1987 SCC 48, para. 30, [1987] 1 S.C.R. 500, 516 (invoking international comity as a basis for declining to find a Charter right to claim double jeopardy as a defense in extradition proceedings, rather than at trial in the foreign country). *But see id.* para. 65, 1 S.C.R. at 531 (Wilson, J., dissenting) (finding that a Canadian citizen who is the subject of extradition proceedings in Canada should be able to invoke Charter protections, including the protection against double jeopardy).

McLachlin's opinion emphasized that extradition by its nature "is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions."[212] In her view, applying the Charter to the extradition procedure here would result in the impermissible extraterritorial imposition of Charter guarantees on criminal proceedings in a foreign country.[213] Moreover, because the extradited fugitive would not face "a situation that is shocking and fundamentally unacceptable to our society,"[214] deferring to the executive's decision to extradite without assurances would not violate section 7 principles of fundamental justice.[215] This was true, she reasoned in 1991, in part because "[t]here is no clear consensus in [Canada] that capital punishment is morally abhorrent and absolutely unacceptable."[216] The different justices' conclusions about the application of the Charter in *Kindler* appear to have been closely tied to their assessment of the strength of opposition to the death penalty itself.

Ten years after *Kindler*, the Court revisited its holding. In a per curiam opinion in *United States v. Burns*, all nine justices agreed that extradition to face the death penalty uniquely implicates "basic constitutional values,"[217] and that extradition without assurances violates section 7 of the Charter in all but "exceptional" cases.[218] Although the fugitives in *Burns* sought to distinguish *Kindler* on the basis that they, unlike Kindler, were Canadian citizens,[219] the Court did not find this factor dispositive. Instead, it engaged in more expansive reasoning to find that the Charter constrains the Justice Minister's discretion to extradite individuals without assurances that the requesting state will not impose or carry out the death penalty.[220] The Court chose not to focus on the section 12 right not to be subjected to cruel and unusual treatment and punishment and the question of whether Canada's role in extraditing an individual to face the death penalty is sufficiently causally connected to the ultimate imposition of that penalty to incur state responsibility for such treatment.[221] Instead, the Court focused on the section 7 right not to be deprived of life except in accordance with the principles of fundamental justice.[222] It emphasized that "[t]he death penalty has been rejected as an acceptable element of criminal justice by the Canadian people, speaking through their elected

212. *Kindler*, 2 S.C.R. at 844 (McLachlin, J.).

213. *Id.* at 845 (quoting Canada v. Schmidt, 1987 SCC 48, para. 30, [1987] 1 S.C.R. at 518 (La Forest, J.)); *see also id.* at 846 (explaining, in language foreshadowing *Hape*, that "[t]o apply s. 12 directly to the act of surrender to a foreign country where a particular penalty may be imposed, is to overshoot the purpose of the guarantee and to cast the net of the *Charter* broadly in extraterritorial waters. Effective relations between different states require that we respect the differences of our neighbors and that we refrain from imposing our constitutional guarantees on other states . . . ."); *id.* at 847 (indicating that applying the Charter in these circumstances would give section 12 "extraterritorial effect").

214. *Id.* at 850.

215. *See id.* at 853-54 (articulating a deferential standard of review).

216. *Id.* at 851.

217. United States v. Burns, 2001 SCC 7, para. 35, [2001] 1 S.C.R. 283, para. 35.

218. *Id.* para. 8; *see also id.* para. 65.

219. *Id.* para. 17.

220. *Id.* para. 8.

221. *Id.* paras. 54-55.

222. *Id.* para. 55.

federal representatives, after years of protracted debate,"[223] and that Canada has taken a proactive position in international relations in advocating abolition of the death penalty.[224] The Court explained: "Assurances are not sought out of regard for the respondents, but out of regard for the principles that have historically guided this country's criminal justice system and are presently reflected in its international stance on capital punishment."[225] This reasoning explicitly privileged "regard for . . . principles" over "regard for the respondents," consistent with a conscience-based approach.

In stark contrast to its restrained approach in *Hape*, the Court in *Burns* did not hesitate to project Canadian values into the international sphere. Although the Court could have focused on the territorial location of the extradition decision (country) or on the Canadian nationality of the fugitives (compact), it instead emphasized the incompatibility of the death penalty with Canadian values (conscience). The *Burns* Court found that Canadian opposition to the death penalty in both domestic and international fora trumped the competing territorial principle that local criminal law and punishment should apply in all but exceptional cases.[226]

The conscience-based rationale in *Burns* stands in tension with the country approach in *Hape*. Moreover, *Burns* goes further than the international law exception set forth in *Hape* and applied in *Khadr* by suggesting that the Charter can be breached by action that facilitates the violation of *Canadian* principles of fundamental justice by a foreign government, even where the action by the Canadian or foreign government does not violate international law.[227] Following this reasoning to its logical conclusion would have compelled a different result in the *Amnesty International* case, which the Supreme Court declined to review.[228]

The relative absence of compact-based reasoning from the Canadian Supreme Court cases examined here stands in contrast to the central role of Canadian citizenship in a lower court case, *Abdelrazik v. Minister of Foreign Affairs*.[229] Abousfian Abdelrazik, who was born in Sudan, became a naturalized Canadian citizen in 1995.[230] In 2003, he travelled to Sudan, but was prevented from returning to Canada by a variety of factors including the expiration and nonrenewal of his Canadian passport.[231] He was arrested, detained, and

223. *Id.* para. 76; *see also id.* para. 84 (finding that "in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped"). Although the Court stopped short of finding "an international law norm against the death penalty, or against extradition to face the death penalty," *id.* para. 89, it did find it illuminating in "testing [Canadian] values against those of comparable jurisdictions," *id.* para. 92, in determining what constitute principles of fundamental justice under section 7 of the Charter.

224. *Id.* para. 81.

225. *Id.* para. 126.

226. *Id.* paras. 2-8.

227. *Id.* paras. 54-55.

228. Supreme Court of Canada, Judgments in Leave Applications (May 21, 2009), *available at* http://scc.lexum.umontreal.ca/en/news_release/2009/09-05-21.3a/09-05-21.3a.pdf.

229. Abdelrazik v. Canada (Minister of Foreign Affairs), 2009 FC 580, [2010] 1 F.C.R. 267.

230. *Id.* para. 10.

231. *Id.* paras. 12, 14.

allegedly tortured by Sudanese authorities, and also interrogated by Canadian Security Intelligence Service agents during his detention.[232] Abdelrazik was listed as an associate of Al-Qaeda by the United Nations 1267 Committee and subjected to a global asset freeze and travel ban.[233] He took refuge in the Canadian Embassy in Khartoum out of fear of further detention, but was unable to secure the assistance of the Canadian authorities in his attempts to return to Canada.[234] Abdelrazik finally filed suit against the government of Canada, alleging that the government breached his Charter rights by "engag[ing] in a course of conduct designed to thwart his return to Canada."[235]

The trial court agreed that Abdelrazik's Charter rights had been breached.[236] It did not linger on the question of whether or not Abdelrazik was entitled to the protection of the Charter, because the provision he invoked explicitly states: "*Every citizen* of Canada has the right to enter, remain in and leave Canada."[237] Because section 6(1) of the Charter applies to "every citizen," the issue was not whether section 6(1) applied to Abdelrazik, but rather how Canada should reconcile its international and national obligations,[238] and how it should balance the roles of the executive and the judiciary.[239] Even so, the trial court's opinion, which does not cite *Hape*, does make compact-based points in passing. For example, it asserts that "[w]hen the Government takes actions that are not in accordance with the law, and its actions affect a citizen, then that citizen is entitled to an effective remedy,"[240] and it emphasizes that although Abdelrazik "is also a national and citizen of Sudan, he says that he considers Canada to be his home."[241] Although the court's focus on citizenship in *Abdelrazik* was dictated largely by the wording of the Charter provision at issue, the compact-based language in that opinion shows what a compact approach to other Charter rights might look like. Such reasoning has not prevailed, or even played a significant role, in reasoning about the extraterritorial reach of the Charter in other contexts.

Overall, Canadian jurisprudence is pulled between conscience and country approaches, with a country approach in the ascendancy outside of the death penalty context. The resulting jurisprudence provides a less robust set of Charter protections for citizens affected by extraterritorial government action than those provided to U.S. citizens under the U.S. Constitution. That said, both citizens and noncitizens can invoke the fundamental human rights exception to bring claims under the Charter in extreme circumstances.

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232. *Id.* paras. 13-16.

233. *Id.* paras. 23, 26.

234. *Id.* paras. 30, 36.

235. *Id.* para. 2.

236. *Id.* para. 7.

237. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 6(1) (U.K.) (emphasis added).

238. *Abdelrazik*, 2009 FC 580, para. 4.

239. *Id.* para. 5.

240. *Id.* para. 6.

241. *Id.* para. 10.

C. *The United Kingdom*

Although the United Kingdom does not have a codified constitution, the U.K. House of Lords (now the Supreme Court) has been called upon to determine the extraterritorial reach of domestic legislation designed to afford individuals certain protections and remedies vis-à-vis the U.K. government. In recent years, individuals affected by the actions of British forces in Iraq have brought claims under the Human Rights Act (HRA), which creates the domestic right to have public authorities act compatibly with rights articulated in the European Convention on Human Rights. Section 6(1) of the HRA provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right."[242] By virtue of this provision, individuals can seek judicial review of the actions of U.K. government agents in U.K. courts for compliance with the substantive provisions of the European Convention.

Although claimants can also petition the ECHR in Strasbourg for redress (and still do if they do not receive satisfaction from the U.K. courts), the HRA was enacted in substantial part to prevent them from having to do so.[243] From the perspective of this analysis, the U.K. House of Lords's discussion of the extraterritorial application of the HRA offers a counterpoint to the U.S. and Canadian supreme courts' discussions of the extraterritorial constraints on their governments contained in their respective domestic rights regimes. Of course, the HRA is different from the U.S. Constitution and the Canadian Charter in that it explicitly creates a domestic right to have public authorities act compatibly with a regional human rights convention. That said, judgments under the HRA do not simply parrot ECHR jurisprudence, and ECHR judgments are not binding authority on U.K. courts, even though a U.K. court "determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the [ECHR]."[244] Claimants who are not satisfied with a U.K. judgment cannot appeal that judgment to the ECHR; rather, they must file a separate petition against the United Kingdom in the ECHR based on the same facts. Thus, although the House of Lords inevitably references the jurisprudence of the ECHR in discussing the extraterritorial application of the HRA, my focus here is not on the jurisprudence of the ECHR, but rather on what the House of

242. Human Rights Act 1998, c. 42, § 6(1) (U.K.). "Convention rights" are defined as including Articles 2-12 and 14 of the Convention. *Id.* § 1(1)(a).

243. *See* Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [56], [2008] 1 A.C. 153, [56] (Lord Rodger of Earlsferry) (appeal taken from Eng.) (U.K.), (indicating that "[t]he Secretary of State accepts that the central purpose of Parliament in enacting sections 6 and 7 [of the HRA] was to provide a remedial structure in domestic law for the rights guaranteed by the Convention" (internal quotation marks omitted)).

244. Human Rights Act, c. 42, § 2(1)(a) (U.K.). Even though the HRA does not make Strasbourg jurisprudence binding on U.K. courts, Baroness Hale of Richmond has observed that because advocates before the U.K. Supreme Court "are common lawyers[,] they tend to treat the Strasbourg jurisprudence in the same way that they would treat the English case law." Baroness Hale of Richmond, Justice Tom Sargant Memorial Annual Lecture 2008: Law Lords at the Margin: Who Defines Convention Rights? at 1 (Oct. 15, 2008), *available at* http://www.justice.org.uk/images/pdfs/annuallecture2008.pdf.

Lords and other U.K. courts have made of that jurisprudence.

The analysis of U.K. cases on the extraterritorial application of the HRA shows a marked tendency to interpret ECHR decisions narrowly and apply country-based reasoning that emphasizes control over territory, rather than the link between the government and a particular individual. In *Al-Skeini v. Secretary of State for Defence*, for example, the U.K. House of Lords expressed the concern that, by construing the HRA too broadly, "the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism."[245] Another factor driving U.K. courts toward a country-based model appears to be the persistent notion that extending the HRA to U.K. agents means importing U.K. law wholesale into foreign territory. In situations of occupation, there is no mandate or license to import a foreign legal regime.[246] Whether the imperialism concerns expressed by courts are sincere or strategic, the fact remains that, as a whole, the national courts canvassed here have been reluctant to construe the geographic scope of rights regimes broadly.[247] This is particularly interesting in light of the view that U.K. courts should construe Convention rights broadly rather than narrowly.[248] Although the ECHR might reach a different conclusion in the

245. *Al-Skeini*, [2007] UKHL 26, [78] (Lord Rodger of Earlsferry). Anticipating and rejecting this argument, the Canadian Federal Court in *Amnesty International Canada v. Canada* made a point of observing that

> this case does not involve "human rights imperialism", with the applicants endeavouring to have Canadian standards imposed on government officials and citizens of another country, in that country's territory. Rather, what the applicants seek to restrain is the conduct of Canada's own military forces, in relation to decisions and individuals entirely within their control.

Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FC 336, para. 341, [2008] 4 F.C.R. 546, para. 341, *aff'd* 2008 FCA 401, [2009] 4 F.C.R. 149. That said, where an individual invokes domestic rights to prevent cooperation between one government and another, concerns about imposing one country's domestic standards on another country could arise and would have to be evaluated on a case-by-case basis.

246. *See* Ralph Wilde, *Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms*, 42 ISR. L. REV. 80, 90-91 (2009).

247. Human rights treaties have been construed somewhat more broadly by international bodies. *See, e.g.*, Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L./V/II.106, doc 3 rev. ¶ 25 (1999) (stating that, contrary to the ECHR's conclusion in *Banković*, "when agents of a state, whether they be military or civil, exercise power and authority over persons outside the national territory, [the state's] obligation to respect human rights . . . continues"); Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En (indicating that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party"); Christos Pourgourides, Comm. on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *Areas Where the European Convention on Human Rights Cannot be Implemented*, Doc. 9730, ¶ 45 (Mar. 11, 2003), *available at* http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc03/EDOC9730.htm (proposing that "the extent to which Contracting Parties must secure the rights and freedoms of individuals outside their borders, is commensurate with the extent of their control").

248. This has been referred to as the "*Ullah* principle," after Lord Bingham's statement that "[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." R (Ullah) v. Special Adjudicator, [2004] UKHL 26, [20], [2004] 2 A.C. 323, [20]; *see also* Hale, *supra* note 244, at 11 ("Our present situation, of implementing an international treaty rather than a home grown constitutional instrument, has imposed a discipline but it has also given us a freedom which we might be unwise to give up. I could well see us being even more cautious in

pending *Al-Skeini* case (and thus force U.K. courts to revisit their jurisprudence on this issue), national courts left to their own devices have rejected the claim that certain domestic constraints should apply should apply wherever, and with respect to whomever, a government acts.

1. *The Search for a "Jurisdictional Link"*

The central U.K. case testing the extraterritorial application of the HRA arose from the deaths of six Iraqi civilians in Basra during the British occupation of Iraq in 2003. The claimants in *Al-Skeini v. Secretary of State for Defence* claimed that the Secretary of State for Defence violated Article 2(1) of the Convention, which protects the right to life and prohibits the intentional deprivation of life except following a lawful conviction.[249] This right has been interpreted as requiring a public inquiry where a death has been caused by agents of the state in a manner that could be unlawful under section 6 of the HRA.[250] The relatives of the six decedents in *Al-Skeini* sought judicial review of the Secretary of State for Defence's refusal to order such an inquiry. This analysis focuses on the House of Lords's approach to this question, whether or not the ECHR ultimately validates that approach.[251]

By the time *Al-Skeini* reached the House of Lords, two central points were at issue. The first was whether the relatives of those who were allegedly shot by British troops on military patrol in Basra[252] were entitled to invoke the HRA. The second was on what basis the Convention applied to the sixth decedent, who was beaten to death by British troops while in British custody,[253] and whether the HRA should be congruent in scope. Article 1 of the Convention binds contracting parties to secure enumerated rights "to everyone within their jurisdiction."[254] The HRA does not incorporate Article 1 of the Convention,[255] but four out of five Law Lords found it appropriate to interpret the HRA's territorial scope in light of the scope the Convention would be accorded by the ECHR in Strasbourg.[256] Only one, Lord Bingham of Cornhill,

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interpreting and applying a home grown Bill of Rights than we have been with the European Convention.").

249. European Convention on Human Rights art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221.

250. Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [36], [2008] 1 A.C. 153, [36] (Lord Rodger of Earlsferry) (appeal taken from Eng.).

251. The Grand Chamber of the ECHR heard arguments in *Al-Skeini* on June 9, 2010. Oral Argument, Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R. June 9, 2010), *available at* http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20100609-1/lang/.

252. *Al-Skeini*, [2007] UKHL 26, [6] (Lord Bingham of Cornhill). The Secretary of State for Defence accepted that four of the five victims were shot by British troops, but contended that the fifth victim might have been killed instead by Iraqi crossfire. *See id.* [100] (Lord Brown of Eaton-Under-Heywood).

253. *Id.* [6] (Lord Bingham of Cornhill).

254. European Convention on Human Rights art. 1, Nov. 4, 1950, 213 U.N.T.S. 221.

255. *Al-Skeini*, [2007] UKHL 26, [4] (Lord Bingham of Cornhill).

256. *Id.* [79] (Lord Rodger of Earlsferry) (adopting the *Banković* "effective control of the territory" test); *id.* [90]-[91] (Baroness Hale of Richmond) (adopting the *Banković* approach); *id.* [97] (Lord Carswell) (concurring with the reasons of Lord Rodger and Lord Brown); *id.* [107] (Lord Brown of Eaton-Under-Heywood) (holding that "existing Strasbourg jurisprudence" should control the territorial scope of the rights protected by the HRA).

would have rejected any extraterritorial application of the HRA in Iraq regardless of the scope of the Convention, emphasizing the divisional court's statement that "'[i]t is intuitively difficult to think that Parliament intended to legislate for foreign lands.'"[257]

The majority conceded the exceptional nature of extraterritorial jurisdiction but observed that the nationality principle permits Parliament to regulate the conduct of British citizens outside the United Kingdom as long as this does not "offend against the sovereignty" of other states.[258] The majority emphasized the special nature of the HRA as not "just another domestic statute"[259] and focused on its "overall nature and purpose."[260] Lord Rodger of Earlsferry observed:

> [W]here a public authority has power to operate outside of the United Kingdom and does so legitimately—for example, with the consent of the other state—in the absence of any indication to the contrary, when construing any relevant legislation, it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home.[261]

This statement resonates with the ECHR's statement in *Issa v. Turkey* that "article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory."[262] However, although the majority in *Al-Skeini* did not adopt a strict country approach,[263] it also stopped short of endorsing the strong conscience approach reflected in the ECHR's statement in *Issa*, which was issued by a chamber of seven judges, and not a seventeen-judge "Grand Chamber." Lord Rodger found the language from *Issa* inconsistent with other ECHR jurisprudence, because it "appears to focus on the activity of the contracting state, rather than on the requirement that the victim should be within its jurisdiction."[264] Instead, the *Al-Skeini* majority adopted a position that emphasizes the importance of territory without precluding the extraterritorial application of the HRA in exceptional circumstances, based on its reading of the unanimous decision of the ECHR

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257. *Id.* [24] (Lord Bingham of Cornhill) (quoting R (Al-Skeini) v. Sec'y of State for Def., [2004] EWHC (Admin) 2911, [304], [2005] 2 W.L.R. 1401, [241]-[242] (Eng.)).

258. *Id.* [46] (Lord Rodger of Earlsferry). This is consistent with the pre-*Hape* approach of the Supreme Court of Canada.

259. *Id.* [138] (Lord Brown of Eaton-Under-Heywood).

260. *Id.* [52] (Lord Rodger of Earlsferry).

261. *Id.* [53].

262. Issa v. Turkey, App. No. 31821/96, 41 Eur. H.R. Rep. 567, ¶ 71 (2004).

263. Lord Rodger specifically rejected the idea, reflected in *Hape*, that applying the HRA to British agents would offend against the sovereignty of Iraq:

> The purpose of the 1998 Act is to provide remedies in our domestic law to those whose human rights are violated by a United Kingdom public authority. Making such remedies available for acts of a United Kingdom authority on the territory of another state would not be offensive to the sovereignty of the other state. There is therefore nothing in the wider context of international law which points to the need to confine sections 6 and 7 of the 1998 Act to the territory of the United Kingdom.

Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [54], [2008] 1 A.C. 153, [54] (Lord Rodger of Earlsferry) (appeal taken from Eng.).

264. *Id.* [75].

Grand Chamber in *Banković v. Belgium*.[265]

The *Banković* case arose from the NATO bombing of the Radio-Television Serbia headquarters in Belgrade during the 1999 conflict in Kosovo. The Grand Chamber found that the victims were not within the jurisdiction of the states that carried out the attack and could therefore not invoke the protections of the Convention.[266] The Law Lords in *Al-Skeini* drew the conclusion from *Banković* that "when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting state."[267] Absent such a link, individuals will not be considered within the jurisdiction of the acting state and will therefore be unable to invoke Convention rights. The question is whether the facts of a particular case are sufficient to create the required jurisdictional link.

The divisional court in *Al-Skeini*, whose reasoning the House of Lords endorsed, expressed doubt that the "effective control of an area" by U.K. forces could, by itself, confer rights on individuals outside the territorial borders of the Convention's forty-seven states parties.[268] Under the Law Lords' reading of *Banković*, the fact that a contracting state's action has allegedly harmed the victim does not itself provide a jurisdictional link. Instead, in order for the Convention—and thus the HRA—to constrain the state's actions, (1) the state must have "effective control" of the area in which the alleged rights violation occurred, and (2) that area must be within the "*espace juridique*" of the Convention.[269] Absent these factors, there will not be a sufficient link between the state and the affected individual to bring that individual (or his or her surviving relatives) within the scope of the HRA's protections.

The House of Lords's approach in *Al-Skeini* has attracted criticism as a misinterpretation of ECHR case law.[270] From the perspective of this analysis, the more salient question is why the Law Lords saw fit to impose the additional *espace juridique* requirement in applying the HRA, rather than whether this approach is faithful to European precedents. In support of this approach, the Law Lords seized upon language from *Banković* characterizing the Convention as "'a constitutional instrument of European public order', operating 'in an essentially regional context.'"[271] They heeded the divisional court's warning

265. *See id.* [68] (Lord Rodger of Earlsferry) (citing Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333); *see also id.* [131]-[132] (Lord Brown of Eaton-Under-Heywood) (rejecting *Issa* approach in favor of *Banković*).

266. *Banković*, 2001-XII Eur. Ct. H.R. 333, ¶ 82.

267. *Al-Skeini*, [2007] UKHL 26, [64].

268. R (Al-Skeini) v. Sec'y of State for Def., [2004] EWHC (Admin) 2911, [219], [2005] 2 W.L.R. 1401, [219] (Eng.).

269. *See generally Banković*, 2001-XII Eur. Ct. H.R. 333.

270. *See, e.g.*, Ralph Wilde, *The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?*, 2005 EUR. HUM. RTS. L. REV. 115, 120; Joanne Williams, Al-Skeini: *A Flawed Interpretation of* Banković, 23 WIS. INT'L L.J. 687 (2005); *see also* Olivier de Schutter, *Globalization and Jurisdiction: Lessons from the European Convention on Human Rights* 17 (Ctr. for Human Rights and Global Justice, Working Paper No. 9, 2005).

271. *Al-Skeini*, [2007] UKHL 26, [127] (Lord Brown of Eaton-Under-Heywood) (quoting *Banković*, 2001-XII Eur. Ct. H.R. 333, ¶ 80).

that endorsing a broad approach to the extraterritorial application of the Convention would leave "entirely side-lined the doctrine that there is any difference between the *espace juridique* of the Convention and any other space anywhere in the world."[272] This observation emphasizes the role of a constitutional instrument in subdividing geographic space by defining the relationship between those who exercise lawful coercive power and those who are subject to it in primarily spatial terms.

Applying elements of this reasoning, the Law Lords rejected the claims brought on behalf of the five individuals shot by British troops on patrol in Basra. Lord Brown emphasized:

> [I]t would be quite another [proposition] to accept that whenever a contracting state acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Bankovic*, not least as to the Convention being "a constitutional instrument of European public order", operating "in an essentially regional context", "not designed to be applied throughout the world, even in respect of the conduct of contracting states." It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of "authority and control" irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?[273]

The Law Lords appear to have taken for granted that the five individuals in *Al-Skeini* were within the "control" of British troops when they were shot, whether or not they were also within the "authority" of the U.K. government. They therefore turned to the concept of *espace juridique* as a limitation on the geographic scope of the HRA in order to explain why these five individuals were not within U.K. jurisdiction at the time of their deaths and thus did not benefit from the right to a public inquiry.

Imposing an *espace juridique* requirement also flowed from the Law Lords' understanding that the Convention (and the HRA) must apply in whole, or not at all, to a particular geographic area.[274] The Law Lords' finding that

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272. *Al-Skeini*, [2004] EWHC (Admin) 2911, [219]. The divisional court acknowledged that the *espace juridique* doctrine might not play a role where state action affects a national of that state, because nationality rather than territory would supply the necessary jurisdictional link in that circumstance. *Id.* [271] (stating that "[t]here is perhaps a separate question, which does not need to be answered in the present case and which was not pursued in argument, as to whether there is or could be an additional exception to the principle of territoriality to the extent that a state agent exercises control over a national of that state, wherever that occurs"). *But see* Smith v. Sec'y of State for Def., [2010] UKSC 29, [2010] 3 W.L.R. 223 (appeal taken from Eng.) (finding that a soldier serving in the British Army in Iraq is only within the jurisdiction of the United Kingdom for the purposes of the HRA when physically present on a British military base); Abbasi v. Sec'y of State for Foreign and Commonwealth Affairs, [2002] EWCA (Civ) 1598, [77], [79] (Eng.) (holding that a British national detained at Guantanamo Bay was not within U.K. jurisdiction for HRA purposes because U.K. state agents did not exercise any "control or authority" over him).

273. *Al-Skeini*, [2007] UKHL 26, [127] (Lord Brown of Eaton-Under-Heywood) (quoting *Banković*, 2001-XII Eur. Ct. H.R. 333, ¶ 80).

274. *See id.* [79] (Lord Rodger of Earlsferry). For rejections of this premise, see Hugh King, *Unravelling the Extraterritorial Riddle: An Analysis of* R (Hassan) v. Secretary of State for Defence, 7 J. INT'L CRIM. JUST. 633, 640 (2009); U.N. Econ. & Soc. Council, Comm'n on Human Rights, Subcomm. on the Promotion & Prot. of Human Rights, Françoise Hampson & Ibrahim Salama, *Administration of Justice, Rule of Law and Democracy: Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law*, 57th Sess., ¶ 88, U.N. Doc. E/CN.4/Sub.2/2005/14 (June 21,

individuals in the homes and streets of Basra could not assert a right to a public inquiry under the HRA was buttressed by their observation that "the idea that the United Kingdom was obliged to secure observance of *all* the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd."[275] Consequently, under *Al-Skeini*, "[T]he obligation 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."[276] Under this reading, arguably none of the six claimants ought to have benefitted from the protection of the HRA, not because the HRA can never apply extraterritorially, but because in order for this to happen the foreign territory would essentially have to be transformed into a de facto extension of the United Kingdom.

The Secretary of State for Defence conceded on appeal that the HRA applied to Baha Mousa, who was beaten to death by British troops while detained in a British military detention unit. The question for the House of Lords was whether this was because of a special exception encompassing military detention facilities, as the divisional court had found, or because the United Kingdom had in fact exercised "authority and control" over Mr. Mousa from the time of his arrest, as found by the court of appeal.[277] Lord Brown determined, and the majority agreed, that a military detention facility could most appropriately be viewed as analogous to an embassy or consulate and was encompassed by the HRA on that basis.[278]

Lord Brown did not elaborate on his reasons for adopting the embassy analogy, making it difficult to discern why he preferred this approach. The embassy exception appears in the divisional court's opinion as an alternative to the effective control doctrine. The divisional court reasoned:

> It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison [within the British zone in West Berlin].[279]

This reasoning emphasizes the unique character of certain facilities (such as

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2005) (indicating that "[j]urisdiction is not an all or nothing affair"); and De Schutter, *supra* note 270, at 13.

275. *Al-Skeini*, [2007] UKHL 26, [78] (Lord Rodger of Earlsferry) (emphasis added).

276. *Id.* [79].

277. *Id.* [107] (Lord Brown of Eaton-Under-Heywood).

278. *Id.* [132].

279. R (Al-Skeini) v. Sec'y of State for Def., [2004] EWHC (Admin) 2911, [287], [2005] 2 W.L.R. 1401, [287] (Eng.). The divisional court noted that the European Commission in *Hess v. United Kingdom*, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975), had reasoned that "'there is in principle, from a legal point of view, no reason why the acts of British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.'" *Al-Skeini*, [2004] EWHC (Admin) 2911, [138]. However, the Commission ultimately found that Rudolf Hess's wife's application for his release was inadmissible on the grounds that the prison was under the joint administration of the four allied powers and therefore not within the United Kingdom's jurisdiction within the meaning of Article 1. *Id.*

embassies) and objects (such as aircraft) that are deemed, for certain purposes, to be enclaves or extensions of the national territory.[280] The court found itself resorting to these examples in an effort to justify the extension of the HRA to Mr. Mousa, even though his death did not occur within the *espace juridique* of the Convention but rather, by one account, in a "disused toilet block in a partly destroyed hotel requisitioned by British forces."[281] This resort to the embassy analogy was necessary because the *espace juridique* idea, and the corresponding notion that Convention rights must apply in their entirety or not at all, would otherwise preclude the extraterritorial application of the HRA to the activities of U.K. agents in Iraq under any circumstances.

The House of Lords could have used the "authority and control" standard to differentiate between the case of Baha Mousa, who was arrested by British soldiers and died in British custody, from those of the other five claimants, as the court of appeal had done.[282] Instead, by relying on the embassy exception, the *Al-Skeini* opinion invited a very narrow reading of the territorial scope of the HRA, which the claimants subsequently challenged in the ECHR. If the ECHR in *Al-Skeini* applies a more expansive approach to claims involving the actions of member states outside the *espace juridique* of the Council of Europe, this will force a reevaluation of the persistent territorial emphasis in U.K. jurisprudence under the HRA to date.[283]

2. *Cabining Domestic Rights*

The implications of *Al-Skeini* have become apparent in subsequent cases.

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280. Interestingly, the divisional court also cited the Canadian Supreme Court's decision in *R. v. Cook* and the U.S. Supreme Court's decision in *Rasul v. Bush* in support of its conclusion that the HRA extends to a British military prison in Iraq (*Hape* and *Boumediene* had not yet been decided). *See id.* [287]. In turn, the plaintiffs in *Amnesty International Canada* urged the Canadian Federal Court to consider the House of Lords's decision in *Al-Skeini* in determining whether the Canadian Charter protects Afghan nationals in Canadian military custody in Afghanistan. Amnesty Int'l Can. v. Canada (Chief of the Def. Staff), 2008 FC 336, para. 201, [2008] 4 F.C.R. 546, para. 201, *aff'd* 2008 FCA 401, [2009] 4 F.C.R. 149. The Canadian Federal Court did not dispute *Al-Skeini*'s potential relevance, but found its reasoning unpersuasive, both because the court found the embassy analogy to be strained, *id.* paras. 247, 264, and because *Cook*, cited by the divisional court, had been supplanted by *Hape*, *id.* para. 253.

281. *See* Al-Saadoon v. Sec'y of State for Def., [2009] EWCA (Civ) 7, [26], [2009] 3 W.L.R. 957, [26] (appeal taken from Eng.).

282. *See* Al-Skeini v. Sec'y of State for Def., [2005] EWCA (Civ) 1609, [108]-[110], [2007] Q.B. 140, [108]-[110] (appeal taken from Eng.). This approach has been referred to as the "state agent authority" exception to the territorial scope of the Convention. *See Al-Skeini*, [2007] UKHL 26, [17] (Lord Phillips).

283. *See, e.g.*, Smith v. Sec'y of State for Def., [2010] UKSC 29, [30], [2010] 3 W.L.R. 223, [30] (Lord Phillips) (appeal taken from Eng.) (indicating that the ECHR's March 29, 2010 decision in *Medvedyev v. France*, App. No. 3394/03 (Eur. Ct. H.R. Mar. 29, 2010), *available at* http://echr.coe.int/echr/en/hudoc (follow "HUDOC database" hyperlink, then search for "Medvedyev," then follow link to case title), "when added to that in *Issa* suggests that the Strasbourg Court may be prepared to found article 1 jurisdiction on state agent authority, even though this principle does not seem consistent with the approach in *Bankovic*"). In *Medvedyev*, the Grand Chamber found that individuals on board a Cambodian vessel that was boarded by French authorities with Cambodian consent were within the jurisdiction of France during their thirteen-day voyage to a French port, because the ship was under the "full and exclusive control" of France. *Medvedyev*, App. No. 3394/03, ¶ 67. The Grand Chamber did not articulate a rationale for this finding other than to reiterate the "exceptional" nature of extraterritorial jurisdiction, which would not encompass "an instantaneous extraterritorial act." *Id.* ¶ 64.

In *Al-Saadoon v. Secretary of State for Defence*, the court of appeal relied in large part on the *espace juridique* idea to find that two Iraqi nationals arrested and detained by U.K. forces in 2003 were not within the jurisdiction of the United Kingdom for HRA purposes.[284] The applicants could therefore not invoke the HRA to block their transfer by U.K. forces to the Iraqi High Tribunal for trial on murder charges, which could carry the death penalty. The court of appeal posed the question as "whether the ECHR writ runs, so to speak, to the British base in Basra."[285] The divisional court had answered this question in the affirmative, but it had nevertheless declined to enjoin the transfer of the two Iraqis on the grounds that the United Kingdom's international obligation to comply with the transfer request took precedence over claims under the HRA in these circumstances.[286]

The court of appeal also declined to enjoin the transfer, but for different reasons. It found that the two individuals were not within U.K. jurisdiction even though they were in U.K. custody because, during the relevant time periods, U.K. forces "were not entitled to carry out any activities on Iraq's territory in relation to criminal detainees save as consented to by Iraq."[287] The court of appeal reasoned that, in order for the HRA to apply extraterritorially, the government actors involved "must enjoy the discretion to decide questions of a kind which ordinarily fall to the State's executive government."[288] The

284. *Al-Saadoon*, [2009] EWCA (Civ) 7, [39]. The House of Lords denied leave to appeal the decision in *Al-Saadoon* on February 16, 2009. *See* House of Lords, *House of Lords Business: Minutes of Proceedings of Monday 16 February 2009*, PARLIAMENT.UK (Feb. 19, 2009), http://www.publications.parliament.uk/pa/ld200809/minutes/090216/ldordpap.htm. Commentaries on this decision include Nehal C. Bhuta, *Conflicting International Obligations and the Risk of Torture and Unfair Trial*, 7 J. INT'L CRIM. JUST. 1133 (2009); and Matthew E. Cross & Sarah Williams, *Between the Devil and the Deep Blue Sea: Conflicted Thinking in the* Al-Saadoon *Affair*, 58 INT'L & COMP. L. Q. 689 (2009).

285. *Al-Saadoon*, [2009] EWCA (Civ) 7, [15].

286. Al-Saadoon v. Sec'y of State for Def., [2008] EWHC (Admin) 3098 (Eng.). Although the divisional court acknowledged that the ECHR's *Soering* principle would ordinarily preclude the United Kingdom from extraditing an individual to face the death penalty, it found that the court of appeal's judgment in *R (B) v. Secretary of State for Foreign and Commonwealth Affairs* compelled a different result in these circumstances. *See id.* [45] (citing Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) ¶ 86 (1989)); *id.* [49], [92] (citing and reluctantly following R (B) v. Sec'y of State for Foreign and Commonwealth Affairs, [2004] EWCA (Civ) 1344, [2005] W.L.R. 618 (Eng.)). The divisional court also invoked the U.S. Supreme Court's decision in *Munaf v. Geren*, in which the Court found that, although it had jurisdiction over the habeas petitions brought by two U.S. citizens detained by U.S. forces in Iraq, there was no basis to enjoin the transfer of those individuals into Iraqi custody for investigation and prosecution by the Iraqi courts. *See id.* [73] (citing Munaf v. Geren, 553 U.S. 674 (2008)).

287. *Al-Saadoon*, [2009] EWCA (Civ) 7, [32]; *see also id.* [33], [36], [40]. The applicants were transferred into the physical custody of Iraqi authorities on December 31, 2008. Although the charges against them were cancelled by the Iraqi High Tribunal due to insufficient evidence, the prosecutor appealed this decision, and the applicants therefore remain in custody. The ECHR also cited the court of appeal's reasoning in its decision. Al-Saadoon v. United Kingdom, App. No. 61498/08, ¶¶ 133-34 (Eur. Ct. H.R. Mar. 2, 2010), *available at* http://echr.coe.int/echr/en/hudoc (follow "HUDOC database" hyperlink, then search for "Al-Saadoon," then follow link to case title).

288. *Al-Saadoon*, [2009] EWCA (Civ) 7, [39]. The court of appeal also held that the *Soering* principle was inapplicable because the United Kingdom did not have "jurisdiction" over the applicants, *id.* [44], and that customary international law does not preclude transferring individuals in situations where they might face the death penalty, *id.* [63]; *cf.* U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, ¶ 35 (Jan. 26, 2007), *available at*

court in *Al-Saadoon* read the decision in *Al-Skeini* as privileging the country-based strand of reasoning in *Banković* over the conscience-based language in *Issa*. Although this is a fair reading of *Al-Skeini*, it is arguably not a fair reading of European precedents. The *Al-Saadoon* decision supports the observation that national courts appear inclined to take a narrower approach than their international counterparts to the definition of jurisdiction, and thus to the geographic reach of rights.

Indeed, the ECHR reached a different conclusion than the U.K. court of appeals in *Al-Saadoon* when asked to determine whether the Convention applied in the circumstances. The ECHR held in its admissibility decision that "given the total and exclusive *de facto*, and subsequently also *de jure*, 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."[289] The admissibility decision found a jurisdictional link between the applicants and the U.K. government based on the applicants' presence within a U.K.-run detention facility, notwithstanding their legal classification as "criminal detainees" by an Iraqi court order. On the merits, a chamber of the ECHR determined that the United Kingdom violated its obligation under the European Convention not to turn the applicants over to the Iraqi High Tribunal without assurances that they would not face the death penalty.[290]

Another noteworthy U.K. case is *Hassan v. Secretary of State for Defence*, which was argued before the divisional court in January 2009.[291] Tarek Resaan Hassan was detained by U.K. military personnel in Iraq in April 2003 and released in May 2003. In September 2003, his bruised and bullet-ridden body was found in the Iraqi countryside. Hassan's family brought an action under the HRA to compel a public inquiry. The claimants in *Hassan*, who were represented by the same lead counsel who represented the appellants in *Al-Skeini*,[292] argued that, under *Al-Skeini*, the exercise by U.K. agents of effective authority and control over an individual in foreign territory brings that individual within the jurisdiction of the United Kingdom for the purposes of the HRA.[293] The divisional court, invoking *Al-Saadoon*,[294] read *Al-Skeini* for the narrow proposition that *U.K.-run* detention facilities are analogous to embassies, and rejected an "authority and control" standard that would have

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http://www.unhcr.org/refworld/docid/45f17a1a4.html (finding, with respect to refugees, that nonrefoulement obligations apply whenever an individual is subject to a state's "effective authority and control").

289. *Al-Saadoon*, App. No. 61498/08, ¶ 88. For commentary, see Cornelia Janik & Thomas Kleinlein, *When Soering Went to Iraq . . . Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the European Court of Human Rights'* Al-Saadoon *Case*, 1 GOETTINGEN J. INT'L L. 459 (2009).

290. *Al-Saadoon*, App. No. 61498/08, ¶¶ 123, 128, 135, 143. This judgment became final in October 2010, after the ECHR rejected the United Kingdom's request for referral to the Grand Chamber. *See id.*, tit.

291. R (Hassan) v. Sec'y of State for Def., [2009] EWHC (Admin) 309, [1] (Eng.).

292. *Id.* [18].

293. *Id.* [19].

294. *Id.* [29].

brought Hassan within the jurisdiction of the United Kingdom when he was first detained by U.K. forces.[295]

The embassy analogy proved fatal to Hassan's claim because of the particular circumstances of his detention. Hassan was detained at Camp Bucca pursuant to a Memorandum of Understanding signed by the United Kingdom, the United States, and Australia, under which the United Kingdom was the "Detaining Power" and the United States was the "Accepting Power."[296] The divisional court found that only the "Accepting Power" had jurisdiction over the detainees under an "effective control" standard.[297] The embassy exception did not apply because the United Kingdom could not "impose its own law" at the facility.[298] Hassan's family could therefore not invoke the HRA to compel a public inquiry into the circumstances of his death.

Perhaps surprisingly, even members of the U.K. armed forces do not automatically benefit from the HRA under the *Al-Skeini* framework. Although the U.K. court of appeal found in *Secretary of State for Defence v. Smith* that individuals serving in the British Army are within U.K. jurisdiction for the purposes of the HRA, the U.K. Supreme Court rejected this result.[299] The question was "academic" because Private Smith died in a military hospital, and the Secretary of State for Defence conceded that he was therefore with U.K. jurisdiction under the holding in *Al-Skeini*.[300] However, the court of appeal had agreed with the divisional court that Private Smith's service in the British Army provided the jurisdictional link between the victim and the U.K. government required by *Al-Skeini*, whether or not the alleged harm occurred within a British base or hospital.[301] The court of appeal reasoned that it made no sense for Convention rights to depend on the accident of location in this context.[302] It distinguished *Al-Saadoon* on the grounds that, in that case, the victims were Iraqis.[303]

In *Smith*, the court of appeal applied the compact-based strand of reasoning in *Al-Skeini*, which focuses on the link between the victim and the government. It privileges the "Who?" question rather than the "Where?" question. When the *Smith* case reached the Supreme Court, only three out of

295. *Id.* [22].

296. *Id.* [9].

297. *Id.* [32]-[34]. For a critique of this reasoning, see King, *supra* note 274, at 634-35.

298. *Hassan*, [2009] EWHC (Admin) 309, [33]. One wonders how much of "its own law" the United Kingdom could have imposed at the facility where Mr. Mousa was detained, which was deemed in *Al-Skeini* to fall within the embassy exception, but which was apparently nothing more than a "disused toilet block in a partly destroyed hotel requisitioned by British forces." Al-Saadoon v. Sec'y of State for Def., [2009] EWCA (Civ) 7, [26], [2009] 3 W.L.R. 957, [26] (appeal taken from Eng.).

299. Smith v. Sec'y of State for Def., [2010] UKSC 29, [2010] 3 W.L.R. 223 (appeal taken from Eng.); Sec'y of State for Def. v. Smith, [2009] EWCA (Civ) 441, [2009] 3 W.L.R. 1099 (appeal taken from Eng.).

300. *Smith*, [2009] EWCA (Civ) 441, [8].

301. *Id.* [33].

302. *Id.* [30] (reasoning that "it is accepted that a British soldier is protected by the HRA and the Convention when he is at a military base. In our judgment, it makes no sense to hold that he is not so protected when in an ambulance or in a truck or in the street or in the desert. There is no sensible reason for not holding that there is a sufficient link between the soldier as victim and the UK whether he is at a base or not.").

303. *Id.* [40].

nine justices endorsed a compact approach. Lord Mance, articulating the minority approach, reasoned:

> The relationship [between the United Kingdom and its armed forces] is not territorial, it depends in every context and respect on a reciprocal bond, of authority and control on the one hand and allegiance and obedience on the other. The armed forces serve on that basis. The compact is that they will receive the support and protection of the country they serve.[304]

This is as clear an expression as one can find of a compact approach, but it was not the preferred approach of a majority of the justices in *Smith*.

Instead, a majority of the U.K. Supreme Court endorsed a "bright-line," territorial approach that would encompass British military bases and hospitals, but not other locations within occupied Iraq. Lord Brown, who had adopted the embassy analogy for military bases in *Al-Skeini*, rejected a compact model. He reasoned that, under a compact model, "those responsible for the planning, control and execution of military operations w[ould] owe [Convention] duties to our servicemen but not to the civilians whose safety is also imperilled by such operations," which would produce "an odd and unsatisfactory situation."[305] To avoid this situation, and absent explicit guidance from the ECHR, Lord Brown declined to extend Convention rights "to our armed forces generally whilst serving abroad."[306]

Lord Collins, whose reasons a majority of the justices endorsed, explicitly contrasted the result in *Smith* with the U.S. position that constitutional rights benefit U.S. citizens overseas.[307] He noted that it is "not easy to extract a common principled basis" for the extraterritorial application of the Convention under ECHR case law,[308] which could in any event occur only on an exceptional basis. Relying on the Grand Chamber's decision in *Banković*, he rejected the court of appeal's approach, which interpreted Lord Rodger's decision in *Al-Skeini* as making a simple "jurisdictional link" sufficient to establish jurisdiction under the HRA.[309] Lord Rodger agreed with this interpretation and joined the reasons of Lord Collins.[310] Lord Collins found no support in the understandings of the framers of the Convention,[311] or in policy arguments, for "extending the scope of the Convention to armed forces abroad"[312] when they are not on a British military base or in a British hospital. Five other justices agreed.

The net result of this jurisprudence is that the HRA extends on an exceptional basis to individuals located in U.K.-run military facilities overseas, but it does not otherwise extend to any individuals located outside the *espace juridique* of Europe, even if they are U.K. citizens. It remains to be seen

304. *Smith*, [2010] UKSC 29, [192] (Lord Mance).
305. *Id.* [145] (Lord Brown).
306. *Id.* [147].
307. *Id.* [236] (Lord Collins).
308. *Id.* [247].
309. *Id.* [307].
310. *Id.* [111] (Lord Rodger).
311. *Id.* [303] (Lord Collins).
312. *Id.* [308].

whether the ECHR will adopt a more expansive interpretation of the reach of Convention rights. If the ECHR does adopt a more expansive interpretation, it seems safe to predict that U.K. courts will continue to take the narrowest possible approach to the extraterritorial application of the HRA that is consistent with the ECHR's reasoning and with the limited exceptions already recognized for British embassies, military bases, and hospitals.

IV. CONCLUSIONS

Several observations emerge from the foregoing analysis. First, domestic courts do not view the reach of domestic rights as commensurate with the exercise of government power. Rather, on the whole, these courts gravitate toward country-based reasoning that restricts the operation of rights-based constraints beyond the national territory by focusing on *where* the government acted. Domestic judicial reasoning thus tends to reflect and reinforce a fundamentally territorial conception of constitutional rights that assumes a strong—although not impermeable—barrier between a government's domestic and international activities, and its domestic and international obligations. This stands in contrast to the approach increasingly taken by international bodies, which have been willing to construe the geographic scope of regional and international rights more broadly.[313]

Second, a compact approach that focuses on *who* was affected by the government's action has appeared in the reasoning of U.S. courts, but it has been largely absent from recent Canadian and U.K. cases at the supreme court level. Courts in the United States have been more willing to differentiate among individuals on the basis of their presumed national allegiance and to conceptualize certain constitutional guarantees as part of a bargain between the government and a defined group of individuals. Canadian and U.K. courts, by contrast, have been more inclined to resist differentiating among individuals, even if this means denying domestic rights protections to citizens and noncitizens alike.

Third, a conscience-based approach that focuses *what* the government did regardless of where the government acted or who the government harmed has not found favor in domestic courts of last resort. Although these courts generally do not treat the extraterritorial exercise of government power as completely unconstrained, they have not accepted the invitation to apply judicially enforceable constraints wherever, and toward whomever, the government acts. Rather, domestic courts have used conscience-based reasoning as a backstop to justify judicial intervention in circumstances that a country or compact approach would not reach, but that threaten the polity's fundamental constitutive principles, including the separation (balance) of powers.

The rest of these conclusions elaborate briefly on these observations. The

313. *See, e.g.*, Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749, 765 (2008) (noting that international "human rights obligations have been interpreted to include substantial extraterritorial application").

primary goals of this study have been to explore how judges in three common law countries have reasoned about rights beyond borders and to identify certain patterns in that reasoning. Below, I offer some additional thoughts about what might account for these patterns and their potential implications.

A. *Explaining Different Approaches*

Country, compact, and conscience approaches to extraterritorial rights reflect different conceptions of legal and political ordering. A country approach emphasizes the role of law in regulating relationships within a particular territory. A compact approach emphasizes the role of law in regulating interactions among members of a particular group. A conscience approach emphasizes the role of law in protecting fundamental human values. A variety of factors could influence which approach, or which combination of approaches, finds favor in a given country's domestic courts at a given point in time and in response to a given set of circumstances.

A country approach literally circumscribes the role of the domestic judiciary in enforcing rights-based limits on extraterritorial government action. Judges from different countries might be receptive to different arguments in favor of this approach. For example, the Canadian Supreme Court has justified a country approach largely on the basis of respect for the territorial sovereignty of foreign governments, which reflects the emphasis that Canada places on being a cooperative member of international society. The U.K. Supreme Court has invoked concerns about legal imperialism, which reflect the long shadow cast by Great Britain's colonial legacy. Even if these rationales are at least partly strategic, rather than sincere, they provide some insight into why these courts have been receptive to different arguments.

Reasons for U.S. courts' adoption of a compact approach could include the special historical significance of the U.S. Constitution in defining the American polity, compared to the more recent legislative adoption of codified rights commitments in Canada and the United Kingdom. The Canadian Charter and the HRA belong to a later generation of domestic rights regimes inspired to a large extent by international human rights instruments.[314] This difference could help explain the notable absence of compact-based reasoning in Canadian and U.K. decisions, although it does less to explain the absence of such reasoning from U.S. cases prior to *Reid v. Covert*. One reason for that absence could be that, as Kal Raustiala has observed, in the numerous cases involving new overseas U.S. territories decided between 1900 and 1922, "the justices appeared concerned with how best to avoid fettering the imperial ambitions the nation possessed or might develop in the future."[315] Even within the United States, a compact approach has not always found favor with judges, especially when it has conflicted with other government policies.

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314. *See, e.g.*, Gardbaum, *supra* note 35, at 237-38 (citing the Charter and the HRA as examples of the "internal constitutionalization of rights" after 1945).

315. RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG, *supra* note 62, at 86. For a brief overview of these cases, known as the Insular Cases, which I have not examined here, see *id.* at 79-87.

The effect of extralegal factors on the attractiveness of different conceptions of domestic rights is most evident in the widespread judicial reluctance to adopt a conscience approach. The U.S. Supreme Court expressed its concern about extralegal consequences in *Johnson v. Eisentrager* when it stated that extending judicially enforceable rights to aliens overseas in situations of armed conflict would "hamper the war effort" by "allow[ing] the very enemies [a field commander] is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."[316] Even so, domestic courts in more recent cases have also been loath to renounce any role for domestic rights regimes (and, thus, for judicial review) in constraining government action overseas. Instead, as in other areas of constitutional law, they have struggled to achieve a principled balance between judicial intervention and restraint.

By way of example, in *United States v. Verdugo-Urquidez*, the U.S. Supreme Court rejected a conscience approach, but it did not adopt a country approach that would have given U.S. agents a freer hand in overseas police operations involving U.S. citizens. During oral argument in *Verdugo*, Justice Kennedy pressed the government lawyer, Lawrence Robbins, to articulate criteria that would define when U.S. officials acting abroad would be constrained by the Constitution:

> *Justice Kennedy*: Does the Constitution control what United States officials do when they're abroad generally? Or never? Or sometimes?
>
> *Robbins*: Well, I think the answer is sometimes, and the answer is it depends. And, of course, it's the very fact that it depends—
>
> *Justice Kennedy*: When and what does it depend on?
>
> *Robbins*: Well, ... [T]he central failing, we believe, of the [Ninth Circuit] court of appeals, is that they thought it never depends. They thought that the Constitution, as it were, provides a sort of universal declaration of rights of man. It applies whenever, wherever and against whomever government authority acts. And we don't believe that . . . .[317]

This exchange illustrates the simultaneous rejection of a conscience-based approach (which Mr. Robbins attributed to the Ninth Circuit) and a reluctance to embrace a country approach that would preclude judicial enforcement of domestic rights beyond national borders in any circumstances.

Domestic courts have thus sought a balance between allowing the political branches to conduct overseas operations free from excessive judicial interference, while at the same time maintaining some residual role in monitoring extraterritorial government action. The unwillingness of domestic courts to countenance the possibility of "law-free zones" (or "judicial-review-free zones") is evident in the U.S. Supreme Court's observation that the U.S. government should not be able to deny individuals the right to file a habeas

316. Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

317. RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG, *supra* note 62, at 173 (quoting Transcript of Oral Argument at 9-10, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (No. 88-1353)).

petition simply by moving them from one location to another; the Canadian Supreme Court's determination that the Canadian Charter applies to actions by the Canadian government that violate fundamental human rights; and the preemptive concessions by the U.K. government that the deaths of Baha Mousa and Private Smith should have been followed by public inquiries, albeit on narrower grounds than the claimants advanced.

The result in future cases is likely to depend largely on whether courts feel that the political branches are adequately monitoring their own extraterritorial activities, or whether courts perceive that the political branches are attempting to create "law-free" zones rather than responding to legitimate and largely preexisting situational constraints. This dynamic was evident in the D.C. Circuit's opinion in *Al-Maqaleh v. Gates*, which held that detainees at Bagram Air Force Base in Afghanistan do not enjoy the constitutional protection of the Suspension Clause. The court explicitly found that the petitioners' suggestion that the Executive could choose to detain them in an "active conflict zone" in order to avoid judicial review "is not what happened here,"[318] but that such "manipulation by the Executive might constitute an additional factor in some case in which it is in fact present."[319]

Domestic courts have generally been more circumspect about curbing the activities of political branches when they act abroad than at home.[320] Whether or not one thinks such circumspection is problematic depends on one's degree of confidence in the political branches to conform their own activities to applicable legal standards. For example, Jack Goldsmith has observed in the context of the *Al-Aulaqi* targeted killing case that "[t]he absence of judicial review of the president's targeting decisions does not mean that those decisions are lawless"[321] and that those who take a different position ignore or underestimate the president's duty of "self-compliance with law."[322] In the cases studied here, judges appear just as reluctant to concede their own irrelevance as they are to interfere with decisions that they are ill equipped to second-guess. Balancing these impulses can be especially challenging for judges in common law systems, who are tasked with articulating principled rationales for the recognition or nonrecognition of judicially enforceable rights that will then be applied in other contexts.

The three categories identified here capture basic elements of the reasoning common law judges have used as they grapple with these difficult decisions. Each identifies a distinctive core focus of judicial inquiry into the extraterritorial application of domestic rights. This framework provides a

318. Al Maqaleh v. Gates, 605 F.3d 84, 98 (D.C. Cir. 2010).

319. *Id.* at 99.

320. I mean this as a matter of judicial disposition, not doctrinal compulsion. For a rigorous historical analysis of the foreign affairs power in U.S. jurisprudence, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

321. Jack Goldsmith, *Al-Aulaqi: Confounding Legal Compliance with Judicial Review*, LAWFARE (Sept. 29, 2010, 6:14 AM), http://www.lawfareblog.com/2010/09/al-aulaqi-confounding-legal-compliance-with-judicial-review/.

322. *Id.*

vocabulary for describing judicial decisions and helps identify certain patterns: the persistence of country-based reasoning; the presence of compact-based reasoning in U.S. jurisprudence, but its relative absence from Canadian and U.K. decisions; and the lack of judicial adoption of conscience-based reasoning except as a backstop to perceived violations by the political branches of domestic separation of powers principles and fundamental human rights.

The question then becomes whether current jurisprudence is normatively satisfying, or whether it leaves gaps that need to be filled. In my view, at a minimum, the U.S. Supreme Court should give greater weight to the exclusive control of U.S. authorities over U.S. military bases, even within foreign territory. The Canadian Supreme Court should revisit *Hape* in light of its extradition jurisprudence and anchor judicially enforceable constraints on the activities of Canadian agents more firmly in the Charter, especially when those agents act vis-à-vis Canadian citizens. The U.K. Supreme Court should incorporate elements of compact-based reasoning into its analysis of jurisdiction under the HRA, especially where U.K. troops are concerned. That said, I would stop short of endorsing a conscience approach that is not sensitive to the exigencies of conducting extraterritorial law enforcement or military operations, or that subjects the political branches to excessive legal uncertainty. In an ideal world, rather than using international rights violations as a trigger for the application of domestic law (as in *Khadr I*), I would strengthen the ability of domestic courts to enforce a limited set of clearly defined fundamental human rights guarantees.

B. *The Role of International Rights*

Patterns of judicial reasoning exhibit a certain degree of path dependence, but they are not immutable. Just as shifts in substantive law might be attributable to both internal and external factors (such as the Canadian Supreme Court's revised stance on extradition to face the death penalty), so too might decisions about the extraterritorial reach of domestic rights.

Developments in regional and international jurisprudence are among the external factors nudging domestic courts toward more expansive interpretations of the geographic reach of domestic rights. The interaction between domestic and international rights is most apparent in the HRA, which explicitly creates domestic entitlements based on European Convention rights. Consequently, although U.K. courts interpreting the HRA are not directly bound by Strasbourg case law, they inevitably reference those decisions and seek to reconcile them with domestic interpretations. Expansive interpretations of Convention rights by the ECHR can contribute to domestic pressure within the United Kingdom for more generous interpretations of the HRA, as well as provide individuals with a competing forum for pursuing rights-based claims.

Other domestic courts might also come under pressure to "ratchet up" domestic guarantees in the face of more robust (if less readily enforceable) international protections. For example, in *Khadr I*, the Canadian Supreme Court explicitly invoked international human rights violations as the trigger for applying the Canadian Charter. In the oral argument before the ECHR in *Al-*

Skeini v. The United Kingdom, James Eadie QC emphasized on behalf of the United Kingdom that international law constrains extraterritorial government action, even if the European Convention does not apply.[323] Although references to international law might seem largely strategic absent a *Khadr*-type trigger mechanism, they provide public affirmation that domestic constitutional provisions are not the only source of applicable constraints.

International law would have provided a response to Justice Stevens's question to Deputy Solicitor General Edwin Kneedler during oral argument in *Clark v. Martinez*, a case involving the potentially indefinite detention of immigrants who had not been "admitted" to the United States.[324] Justice Stevens asked:

> Just going to your constitutional position, it's clear that a person who's not been admitted and has been paroled could be excluded forthwith, summarily, and so forth because he's never been admitted. But does that person have any protection under the Constitution? Could we shoot him?[325]

Mr. Kneedler indicated that the United States could not shoot the person, but he could not articulate *why* this was so.[326] Had Mr. Eadie been arguing this case, he would likely have responded that international law applies. In this picture, broadly speaking, domestic rights constrain government action within the polity, and international rights constrain government action beyond the polity. To the extent that individuals rely on judicial enforcement to give effect to their rights, such a scheme would require greater domestic judicial authority and willingness to enforce certain fundamental human rights based on international, rather than domestic, law.

International human rights seem particularly well suited to a conscience approach, and thus to extraterritorial application, because they are based explicitly on the intrinsic dignity and worth of individual human beings regardless of geographic location or national membership. That said, one could predict that many of the practical considerations that drive restrictive interpretations of domestic rights would also tend to limit the interpretation and application of international rights by domestic courts, notwithstanding the relatively broader interpretations reached by international bodies.[327]

Individuals are situated within multiple layers of legal protection by domestic, regional, and international instruments, and governments are

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323. *See* Oral Argument at 00:13-00:17, 2:36-2:38, Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R. June 9, 2010), *available at* http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20100609-1/lang/; *see also* Al-Skeini v. Sec'y of State for Def., [2007] UKHL 26, [26], [2008] 1 A.C. 153, [26] (Lord Bingham) (appeal taken from Eng.) (enumerating international legal constraints).

324. 543 U.S. 371 (2005).

325. *See* Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 716-17 (2010) (quoting Transcript of Oral Argument at 23-25, Clark v. Martinez, 543 U.S. 371 (2005) (No. 03-878)).

326. *Id.*

327. *Cf.* Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1878 (2003) (observing that "[u]nlike the [U.N.] Committee [on Economic, Social and Cultural Rights], the constitutional court [of South Africa] does have the power to order the government to spend money, and it would be responsible for diverting public resources from other projects" if it construed social and economic rights broadly).

correspondingly subject to multiple layers of potential constraints. Although these protections and constraints are not uniformly judicially enforceable, individuals are increasingly able to choose among them in advancing claims against governments in the court of public opinion, if not in actual court. If international human rights bodies issue too many opinions that are vastly more expansive than those of national courts, they are likely to lose adherents, even among states that are otherwise dedicated to compliance with international law. Conversely, if domestic courts focus excessively on the constraining role of borders, this could have the paradoxical effect of fostering developments that privilege and entrench international, rather than domestic, rights in legal discourse and, eventually, in legal and political institutions.