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THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: *AL-SKEINI ET AL. V. UNITED KINGDOM* (2011)

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INTRODUCTION

The decade proceeding the 9/11 tragedy has been very unkind to the human rights regime, as many western nations have committed human rights abuses in their mission to combat terrorism. Both the United States and the United Kingdom have been engaged in wars in Iraq and Afghanistan, where they perpetrated terrible crimes and violated important tenants of international law. These violations, ranging from allegations of torture to wrongful deaths, are prohibited by human rights law. In fact, human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) were enacted with the express purpose of eliminating the very atrocities that have been committed in the "war on terror." Unfortunately, the United States and the United Kingdom have maintained that human rights treaties do not apply beyond their territorial borders. The issue of the extraterritorial nature of the treaties is therefore crucially important because the crimes that have been committed by these two nations can only be remedied if the treaties can be interpreted to apply to the territory in question.[1]

On July 7, 2011, the European Court of Human Rights (ECtHR) issued a landmark decision in *Al-Skeini et al. v. The United Kingdom*, overturning the United Kingdom's House of Lords decision and issuing a strong precedent stating that human rights treaties should apply extraterritorially.[2] *Al- Skeini* held that the ECHR applied to six Iraqi civilians who were killed while under the authority and control of the British military during their occupation in 2003.[3] This case is the most recent of court opinions that have affirmed the notion that the object and purpose of a human rights instrument should be taken into heavy consideration when determining the extraterritorial nature of a treaty.

In determining whether human rights treaties apply extraterritorially, it is necessary to analyze important provisions and terms in a particular agreement. However, as illustrated in

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[1] Damira Kamchibekova, *State Responsibility for Extraterritorial Human Rights Violations*, 13 BUFF. HUM. RTS. L. REV. 87, 87 (2007).

[2] Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. Ct. H.R. 589 (2011).

[3] *Id.*

The Vienna Convention on the Law of Treaties (the Vienna Convention), the analysis of a human rights instrument often hinges on semantics. Traditionally, the meaning of a provision was based on the definiteness of the language and the plain meaning of the terms.[4] Recently, however, courts such as the ECtHR have been reluctant to settle with the "ordinary meaning analysis" of treaty interpretation (as suggested in Article 31 of the Vienna Convention) when there are "manifestly absurd" results from adherence to such an approach.[5] Instead, many international courts have embraced the exceptions present in Article 32 of the Vienna Convention, allowing them to bring in subsequent state practice, context, purpose, and *travaux preparatoires*.[6]

Consequently, a complete understanding of the definitions of each word or phrase is essential to a proper analysis. As Joanne Williams points out in her article, *Al-Skeini: A Flawed Interpretation of Bankovic*, jurisdiction and territory are not interchangeable.[7] "Jurisdiction refers to a particular sphere of legal competence, while "territory" refers to a geographical area."[8] While all actions occurring within the state's sovereign territory are within its jurisdiction, it does not follow that actions occurring extraterritorially are therefore outside of the state's jurisdiction.

Most treaties are specific and clear to which geographical areas they apply.[9] They contain provisions of territorial jurisdiction, limiting the treaties' applicability to actions occurring

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[4] Blaine Sloan describes two competing views of treaty interpretation present during the drafting of the Vienna Convention. The United States' theory, led by MacDougal, is largely contextual, with equal weight being given to the plain meaning, alongside the travaux and subsequent state practice. MacDougal's theory of treaty interpretation ultimately lost out to the British method, which favored the plain meaning analysis. Under the British method, supplemental aspects were only brought into the analysis when adhering to the plain meaning left the meaning "ambiguous" or when the result would be "absurd." Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT'L. L. 61, 95 (1989).

[5] Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[6] *Id.*

[7] Joanne Williams, *Al Skeini: A Flawed Interpretation of Bankovic*, 23 WIS. INT'L L.J. 687, 691 (2005).

[8] *Id*.

[9] *See* Antoine Buyse, *Legal Minefield - The Territorial Scope of the European Convention*, 1 INTER-AM. & EUR. HUM. RTS. J. 269 (2008).

within the boundaries of the state. The European Convention, however, does not contain any such provision, and is unclear as to its territorial scope. Moreover, while the ICCPR *does* have a territorial provision, it has not been applied in that fashion. This Note discusses the extraterritorial application of both treaties, and specifically seeks to determine whether their provisions apply to actions of state actors outside of their territories.

Part I of this Note outlines the applicable international law and examines the history of the ECHR and the issue of its extraterritorial application. This section will trace the history of this contentious issue through the past few decades, concentrating in particular on the ECtHR's decision in *Bankovic et al. v. Belgium et al*. Part II will discuss the ECtHR's decision in *Al-Skeini v. United Kingdom*, and the Court's rationale for its holding. Although the decision in *Al-Skeini* did not overturn *Bankovic*, it modified the precedent going forward, and stands as a monumental decision for extraterritorial application of human rights treaties.

Part III weighs the impact of the *Al-Skeini* decision against the continued failure of the United States to apply their human rights instruments extraterritorially. Focusing on the application of the ICCPR to human rights abuses across the world, this Note will outline the United States' troubling perspective. It will close with the suggestion that the United States might be slowly accepting this growing international custom.

I. THE LAW AND HISTORY

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was opened for signature in Rome on November 4, 1950, and entered into force on September 3, 1953.[10] In direct response to the atrocities committed during the Second World War, the nations of Europe enacted a human rights treaty to ensure that horrors, like those committed by the Axis powers, would never again occur.[11]

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[10] PIETER DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2 (3rd ed. 1998).

[11] Nuremberg Trial Proceedings Vol. 1, *Motion Adopted by all Defense Counsel*, The Avalon Project (Nov. 19, 1945), http://avalon.law.yale.edu/imt/v1-30.asp#1. One of the big problems with prosecuting war criminals after the Second World War was that applying the Geneva Conventions retro-

The preamble of the Convention aimed to secure "the universal and effective recognition and observation of human rights," and ensure "fundamental freedoms which are the foundation of justice and peace in the world."[12]

For all the good intentions of the Convention, all treaties have limits on their applicability, and The European Convention was no exception. Within its first Article, it contains a jurisdictional restraint, stating: "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention."[13] This article exists as a gateway to the human rights protections of the treaty. Without satisfying the requirement that a person is "within the jurisdiction" of a High Contracting party-member, the Court cannot evaluate the substantive claims of the alleged victim.

Whether the ECHR may be applied extraterritorially is not a trivial issue, for the Court's determination of this question serves to define the overall purpose of the treaty. The Court faces a tough determination: Is the justification for the Convention "located in the intrinsic nature or inherent dignity of all human beings," or in "the relationship between the Contracting States and this subset of persons [?]"[14] Or, put more simply: Does this human rights treaty, and set of obligations it carries, apply to all persons, or to merely a specific subset of persons? While the issue might seem to revolve around an insignificant disagreement, the implication of valuing a jurisdictional relationship over promoting human rights worldwide is immense.

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actively went against all precepts of just law. During the Nuremberg trials, the Nazi defendants claimed that "[t]he present Trial can, therefore, as far as Crimes against Peace shall be avenged, not invoke existing international law, it is rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world." Enacting human rights treaties such as the ECHR ensured this would no longer be an issue.

[12] Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, Apr. 11, 1950, C.E.T.S. No. 194, *available at* http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm [hereinafter ECHR].

[13] *Id.* art. 1. (emphasis added).

[14] Erik Roxtrom, et. al., *The NATO Bombing Case* (Bankovic et al. v. Belgium et al.) *and the Limits of Western Human Rights Protection*, 23 B. U. INT'L L.J. 55, 76 (2005) [hereinafter *NATO Bombing Case*].

A. Early Cases

The Court had dealt with the issue of the extraterritorial application of the ECHR in several cases before *Al- Skeini et al. v. United Kingdom* and *Bankovic et al. v. Belgium et al.*. In 1975, the Court decided *Cyprus v. Turkey*.[15] In that case, Turkey argued that a communication from Cyprus was inadmissible because it related to alleged violations outside of Turkey's (a Contracting state) territory.[16] The Court disagreed with Turkey, holding:

> Taking into account the terms used and the purpose of the Convention as a whole, state responsibility might be incurred by acts of the state that produce effects outside the national territory. The reason for this is that such agents remain under the state's jurisdiction when abroad *and they bring persons and property within this particular "jurisdiction"* to the extent that they exercise authority over them.[17]

The Court clearly accepted the idea that actions by state actors outside of their territories could potentially amount to "jurisdiction."[18]

The Court reiterated the extraterritorial aspect of the Convention's application in the 1995 case *Loizidou v. Turkey*.[19] Loizidou, a Cypriot national, filed an application against Turkey for expelling her from her island home during Turkey's invasion of Cyprus in 1974.[20] After the invasion, many Cypriots attempted to return to their homes, but were denied access by the Turkish military.[21]

The ECtHR, concentrating solely on the question of whether the applicant's complaint could fall within the "jurisdiction" of Turkey, again reaffirmed the principle that Article 1 was not limited to the territory of the Convention's Contracting Parties.[22] Considering the object and purpose of the Convention, as

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[15] Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 4 Eur. Comm'n H.R. Dec. & Rep. 125 (1975) [hereinafter Cyprus v. Turkey]

[16] *Id.* at 485.

[17] *Id.* (emphasis added).

[18] *Id.*

[19] Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser A.) ¶ 61 (1995) (preliminary objections) [hereinafter Loizidou v. Turkey, Preliminary Objections].

[20] *Id.* ¶¶ 10-14.

[21] *Id.*

[22] *NATO Bombing Case*, *supra* note 14, at 78.

required by the second clause in Article 31 of the Vienna Convention, the Court noted: "the responsibility of a Contracting Party may also arise when, as a consequence of military action . . . it exercises *effective control* of an area outside its national territory."[23] Ultimately, the Court found that when a Contracting Party exercised effective control of an area, or people within the area, the Convention's Article 1 jurisdictional requirement was met.[24]

B. Bankovic et al. v. Belgium et al.

In 2001, the ECtHR established new precedent in *Bankovic et al. v. Belgium et al.*[25] This case dealt with the issue of the extraterritorial application of the ECHR involving human rights violations committed solely through military airstrikes. The applicants in *Bankovic*, all citizens of the Federal Republic of Yugoslavia ("FRY"), petitioned the ECtHR to hold the nations of NATO accountable for the many deaths that resulted from the bombing campaign in Serbia.[26]

In 1998, armed conflict erupted between members of the Kosovo Liberation Army, forces of the FRY, the Serbian police, and paramilitary groups.[27] After the breakdown of diplomatic negotiations, human rights violations continued to ensue. On March 24, 1999, NATO announced the beginning of air strikes on the FRY.[28] On April 23, 1999, sixteen people were killed, and sixteen more wounded, when a building housing three television channels and four radio stations was hit by a missile launched from a NATO aircraft.[29] Alleging breaches in Articles 2, 10, and 13 of the ECHR, the appellants sought to invoke the European Convention against the NATO forces.[30]

The Court in *Bankovic* began its analysis, stating that the proper way to evaluate Article 1 is enshrined in Articles 31 and

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[23] Loizidou v. Turkey, Preliminary Objections, ¶ 62. (emphasis added).

[24] *Id.* ¶ 64.

[25] Bankovic et al. v. Belgium et al., 2001-XII Eur. Ct. H.R. 333 [hereinafter Bankovic v. Belgium].

[26] *Id.* ¶ 1.

[27] Williams, *supra* note 7, at 689 (describing the escalation of violence in FRY that led to the NATO attacks.).

[28] *Id.* at 690.

[29] Bankovic v. Belgium, ¶10.

[30] Williams, *supra* note 7, at 690.

32 of the Vienna Convention.[31] Thus, the Court primarily focused on the ordinary meaning of the phrase "within their jurisdiction" in its context, and in the light of the object and purpose of the convention. [32] It held that as to the ordinary meaning of the term in Article 1, "the jurisdictional competence of a State is primarily territorial."[33] While acknowledging that international law does not explicitly "exclude" the application of jurisdiction extraterritorially, the ECtHR noted: "the suggested bases of such jurisdiction are, as a general rule, defined and limited by the sovereign *territorial* rights of the other relevant states."[34]

The Court in *Bankovic* established Article 1 jurisdiction as being primarily territorial, deviating from their previous case law. In previous cases, the Court held that "jurisdiction was not limited to the national territory of the High Contracting Parties."[35] The justices in *Bankovic*, to comply with the early precedent, held that there were *exceptional* circumstances under which the Convention could apply beyond the territory of the Contracting state.[36] Therefore, the Court found that "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[37]

The creation of this category of *exceptional* cases redefined much of the ECtHR's prior precedent. Labeling cases such as *Cyprus v. Turkey* (1975)[38] and *Loizidou v. Turkey* (1995)[39] as

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[31] Bankovic v. Belgium, ¶ 18.

[32] *Id.* ¶ 19.

[33] *Id.* ¶ 59.

[34] *Id.* (emphasis added). The Court cited several authorities for this finding including *The Doctrine of Jurisdiction in International Law*, and *The Doctrine of Jurisdiction in International Law, Twenty Years Later*, by Thomas Mann. Oppenheim notes that "territoriality is the primary basis for jurisdiction," and Brownlie states that "jurisdiction is territorial." Williams, *supra* note 7, at 692. This role that this notion of territorial jurisdiction played in the Court's rationale in *Bankovic* was very contentious. Some scholars believed that the European Convention's view on the term "within its jurisdiction", should be based on its unique object and purpose as a Human Rights Treaty. *See NATO Bombing Case*, *supra* note 14, at 70.

[35] Williams, *supra* note 7, at 692.

[36] Bankovic v. Belgium, ¶ 74.

[37] *Id.* ¶ 61.

[38] Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975).

exceptions to a general principle lead to the conclusion that there was a bevy of case law under which extraterritorial jurisdiction was deemed inadmissible. As some scholars maintain in their criticisms of the *Bankovic* decision, the Court's findings were mischaracterized and directly misleading, focusing only on their apparent desire to establish that "the scope of the Convention was territorial."[40] Ultimately, whether intentional or not, the *Bankovic* interpretation of jurisdiction varied considerably from the Court's past determinations and narrowed the extraterritorial capacity of Article 1 going forward.

In defining cases of extraterritorial applicability as *exceptional¸* the *Bankovic* case outlined several exceptions to the territorial jurisdiction principle. The first exception centers on the exercise of state authority outside the state territory. The 1999 case *Drozd & Janousek v. France & Spain* best characterized this exception.[41] It held that French and Spanish judges working in Andorran Courts were imputable to their home nations due to the level of influence they held outside of their territory.[42] This exception reflects a modern legal interpretation of jurisdiction that arises when there is "a substantial and genuine connection between the subject-matter of the jurisdiction . . . and the territorial base."[43] While the Court did not ultimately hold France and Spain accountable for their justices' actions, they did state that jurisdiction extended beyond their borders in such circumstances.[44]

Bankovic's second exception to the rule of territorial jurisdiction is often labeled "effective control."[45] First introduced in *Loizidou v. Turkey¸* this exception stands for the proposition that a Contracting Party's culpability may "arise when, as a consequence of military action . . . it exercises effective control of an area outside its national territory."[46] This control element

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[39] Loizidou v. Turkey, App. No. 15318/89, 310 Eur. Ct. H.R. (ser A.) (1995) (Preliminary Objections).

[40] *NATO Bombing Case*, *supra* note 14, at 87.

[41] *See* Drozd and Janousek v. France and Spain, 240 Eur. Ct. H.R. (ser. A) (1992).

[42] *Id*.

[43] Williams, *supra* note 7, at 697.

[44] DIJK ET AL., *supra* note 10, at 10.

[45] *See e.g.* Al-Skeini Ors, R (on the application of) v. Secretary of State for Defence [2005] EWCA (Civ) 1609, [190]-[197], [2007] Q.B. 140 (Eng.) [hereinafter Al-Skeini et al. v. Secretary of State for Defence 1].

[46] Loizidou v. Turkey, Preliminary Objections, ¶ 62.

could be satisfied either by military forces, or by the setup of official organs or facets of local administration. [47] The factors must all be considered on a case-by-case basis.[48] The Court in *Loizidou* did not fully establish what constituted "effective control," but held that it was satisfied by the presence of over 30,000 Turkish troops in Northern Cyprus.[49]

The Court in *Bankovic* did not expand on the definition of "effective control," but rather held that the NATO's aerial bombardment did not "secure effective control over the territory."[50] The Court's holding indicates a necessity for the presence of ground forces in order to secure substantial control of the people and the territory.[51] *Bankovic's* holding, concerning the ability of airstrikes to constitute "effective control," has been criticized as not taking into consideration the Convention's "living" and "breathing" nature.[52] Additionally, since the Court did not fully define this exceptional principle of "effective," *Bankovic* served only to narrow the scope of *Loizidou*, and created confusion moving forward.

The third exception to the doctrine of territorial jurisdiction involved the activities of consular agents acting abroad, or on board vessels "registered in, or flying the flag of, that state."[53] This exception, sometimes referred to as the "consent," or "acquiescence" exception, applies to agents acting in a state with the state's consent.[54] The *Bankovic* Court held that under such conditions, "customary international law and treaty provisions have recognized the extraterritorial exercise of jurisdiction by the relevant State."[55]

The ECtHR's description of the exceptional cases under

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[47] *Id.*

[48] *Id.* at ¶ 61.

[49] Loizidou v. Turkey, 23 Eur. Ct. H.R. 513, ¶ 56 (1996) (judgment on the merits).

[50] Bankovic v. Belgium, ¶ 75.

[51] *See id.*

[52] Williams, *supra* note 7, at 703. Williams discusses the main criticism that several scholars have voiced considering the effective control of a nation or people via airpower. She argues "great accuracy and impact achieved by modern weapons without the need for ground troops makes reliance on the difference between air attack and ground troops unrealistic." Williams, *supra* note 7, at 704.

[53] Bankovic v. Belgium, ¶ 73.

[54] Williams, *supra* note 7, at 707.

[55] Bankovic v. Belgium, ¶ 73.

which Article 1's jurisdiction could be granted extraterritorially was brief and vague. What the Court did make clear was the "exceptional nature" of the cases, and the primarily territorial nature of jurisdiction. Ultimately, the ECtHR decided that the case before them did not fall under any exceptional category. The NATO militaries did not fit under the first exception as there was no exercise of "legal authority" in the FRY. The Court contentiously held that NATO powers did not fit under the second exception of "effective control" because of the aerial nature of the military operation. The military powers were also clearly not operating in the FRY with the consent or acquiescence of the FRY, and therefore, the Court held that this case was not an exceptional circumstance for which the jurisdiction of the European Convention could be invoked.[56]

Another important determination by the ECtHR in *Bankovic* was in refining the scope of the extraterritorial applicability only to countries within the boundaries of the European continent.[57] The Court classified the Convention as a "constitutional instrument of *European* public order,"[58] and held that its role was to monitor engagements between the Contracting Parties.[59] Essentially, the Court did not believe that the benefits of the Convention should apply to non-Contracting States:

> In short, the Convention is a multi-lateral treaty operating… in an essentially regional context and notably in the legal space (*espace jurisdique)* of the Contracting States… The Convention was not designed to be applied throughout the world, even in the respect of the conduct of Contracting States.[60]

Ultimately, the FRY does not fall within this *"espace jurisdique,"* and though the justices recognized a desire to avoid a vacuum or black hole of human rights, they held that this desire should only materialize in areas normally covered by the Convention.[61]

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[56] *Id.* ¶ 71.
[57] *Id.* ¶ 80.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

II. AL-SKEINI ET AL. V. UNITED KINGDOM (2011)

On July 7, 2011 the European Court of Human Rights decided *Al-Skeini et al. v. United Kingdom*, the most recent opinion concerning the extraterritorial nature of jurisdiction within Article 1 of the European Convention.[62] The decade following the *Bankovic* decision that preceded this case has arguably been the most critical decade for human rights treaties since the end of the Second World War. While members of the international community are currently fighting a "war on terror," and two ongoing conflicts in both Afghanistan and Iraq, the question of extraterritorial jurisdiction is of particular importance. Fortunately, in issuing their judgment in *Al-Skeini*, the ECtHR held that the ECHR did apply to the United Kingdom's military forces in Iraq, furthering the custom that human rights treaties will not be hamstrung by strict interpretation or semantic-driven arguments.[63]

A. The Facts

On March 20, 2003, following Iraq's alleged disregard of United Nations Security Council Resolution (1441), the United States, United Kingdom, and several other countries, invaded Iraq.[64] "By April 5, 2003, the British had captured Basrah, and the United States had gained control of Baghdad."[65] After "major combat operations" were deemed complete on May 1, 2003, the British and Americans created the Coalition Provisional Authority (CPA) to "exercise powers of government temporarily."[66] Among the CPA's self-appointed duties were to "provide for the effective administration of Iraq during the period of transitional administration," and to "restore conditions of security and stability."[67] Accordingly, the CPA was divided into re-

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[62] Al-Skeini v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R. 589 (2011).

[63] *Id.*

[64] *Id.* ¶ 10. Resolution 1441 sought to afford Iraq a final opportunity to comply with its disarmament obligations and submit itself to future inspections.

[65] *Id.*

[66] U.N. Security Council, *Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council,* U.N. Doc. S/2003/538 (May 8, 2003).

[67] PAUL BREMER, COALITION PROVISIONAL AUTHORITY REGULATION NO. 1,

gional areas—including CPA South, which was under the responsibility and control of the United Kingdom.[68]

The petitioners in *Al-Skeini* were relatives of six Iraqi citizens killed in southern Iraq, a territory under which the United Kingdom had temporary authority. The petitioners alleged that their relatives fell into the jurisdiction of the United Kingdom, a Contracting State of the ECHR; along with a breach in Article 2 of the Convention resulting from the lack of effective investigation into the questionable deaths of their relatives.[69] These six deaths occurred between May 8, 2003 and November 10, 2003, after major military operations were deemed completed and the CPA had been established.[70]

One applicant in *Al-Skeini* was the father of Ahmen Jabbar Kareem Ali, a 15-year-old boy who was killed in Iraq on May 8, 2003.[71] According to the applicant, upon hearing that British soldiers had arrested some Iraqi youths, and after his child had not returned home as expected, he went looking for his son.[72] The applicant was informed by another young Iraqi that he and the missing boy had been "arrested by British soldiers the previous day, beaten up, and forced into the waters of the Shatt Al-Arab."[73] The British police were notified, but having spent several days waiting and searching, the applicant found his son's body in the Shatt Al-Arab on May 10, 2003.[74]

The victim's father brought the body immediately to the British police, who told him to go to a hospital, which was not equipped to conduct a post mortem inspection.[75] After burying his son, in accordance with Islamic practice, the applicant returned to the British police station to ask for an investigation, but was informed that it "was not the business of 'the British police' to deal with such matters."[76] In a trial process that the applicant found "confusing," "intimidating," and "biased in fa-

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CPA/REG/16 MAY 2003/01 (May 16, 2003).

[68] Al-Skeini v. United Kingdom, ¶ 13.

[69] *Id.* ¶ 3.

[70] *Id.* ¶¶ 34-71.

[71] *Id.* ¶ 55 (Ali's father was referred to as the "fifth" applicant in the court opinion.).

[72] *Id.* ¶ 56.

[73] *Id.*

[74] *Id.*

[75] *Id.* ¶ 57.

[76] *Id,* ¶ 58.

vor of the accused," the defendants were acquitted as a result of the applicant's evidence being "inconsistent and unreliable."[77]

Another applicant claimed his 23 year-old brother Hazim Al-Skeini, was killed by British soldiers just before midnight on August 4, 2003, in Basra.[78] According to the applicant, various members of his family were gathering at his house for a funeral ceremony on the evening of his brother's death.[79] As he was welcoming guests to his home, the applicant saw Al-Skeini gunned down by British soldiers as he was walking towards the house.[80] The applicant contends that his brother was unarmed and roughly ten meters away from the soldiers when he was shot, and that he "had no idea why the soldiers opened fire."[81]

According to the British, the patrol approached on foot and heard gunfire from different points.[82] They saw the applicant's brother on the dark street, believed him to be pointing a gun in their direction, and opened fire on him.[83] The sergeant of the patrol gave no verbal warning before firing, but believed that his life and those of the other soldiers in the patrol "were at immediate risk."[84] The head Brigadier was satisfied that the actions of the sergeant fell within the Rules of Engagement, and did not order any further investigation. [85]

The circumstances surrounding the other four deaths were similar in nature to the aforementioned occurrences.[86] They all

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[77] *Id.* ¶ 60.

[78] *Id.* ¶ 34 (Al-Skeini's brother was referred to as the "first" applicant.).

[79] *Id.*

[80] *Id.* ¶ 35.

[81] *Id.*

[82] *Id.* ¶ 36.

[83] *Id.*

[84] *Id.*

[85] *Id.* ¶ 37.

[86] The "second" applicant was the widow of Muhammad Salim, who was killed shortly after midnight on November 6, 2003. As part of a raid, British soldiers broke down the door of a house. One of the soldiers came face-to face-with the second applicant's husband in the hallway of the house and shot him. There was "no time" to give a verbal warning. Company Commander felt the incident fell within the Rules of Engagement and did not require any further investigation. *Id.* ¶¶ 39-42. The "third" applicant was the widower of Hannan Mahaibas Sadde Shmailawi, who was killed on November 10, 2003, while sitting for dinner with her family. The applicant, his wife, and family were sitting around the dinner table when "there was a sudden burst of machine gun-fire." His wife was struck by bullets in the head and ankles and died at a hospital shortly after the attack. The British claimed that the applicant's wife was shot during a fight between a British patrol and group of "un-

contained questionable activities by British military personnel and a lack of due process in investigating the deaths. However, regardless of the substantive nature of the petitioners' allegations regarding the deaths of their relatives, questions on the merits become moot if the ECHR cannot be applied extraterritorially. Without issuing perspective on the merits of the individual cases,[87] we can accept as true the assertion that there is at least a genuine issue of alleged human rights violations involved. Accordingly, the query becomes whether the petitioners fall "within the jurisdiction" of the United Kingdom in order to let their pleas be heard.

B. The Holding

The British courts first heard *Al-Skeini* in March of 2004, when the Divisional Court held that in line with *Bankovic*, jurisdiction under Article 1 of the Convention was territorial.[88]

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known gunman." Colonel came to the conclusion that the incident fell within the Rules of Engagement and did not require any further investigation. *Id.* ¶¶ 43-46. The "fourth" applicant was the brother of Waleed Sayay Muzban, who was shot and killed on the night of August 24, 2003. The victim was driving a minibus with curtains drawn over its windows. The bus was stopped by a British patrol, and when the driver reacted "aggressively" to the British officers and sped off, British officers shot out the tires of the bus. The officers then contend that the victim appeared to be reaching for a weapon and yelling to people in the back of the bus. The officers then fired five rounds into the bus, killing the fourth applicant's brother. There were no weapons found or people in the back of the bus. The Brigadier concluded the officer's actions fell within the Rules of Engagement and needed no further investigation. *Id.* ¶¶ 47-51. The "sixth" applicant is the father of Baha Mousa, who was 26 when he died in the custody of the British Army, three days after an arrest by soldiers on September 14, 2003. He was told his son had been killed in custody at the British military base in Basrah. When identifying the body, he found his son's "body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away." One witness stated that the Iraqi detainees were "hooded, forced to maintain stress position, denied food and water, and kicked and beaten." While seven soldiers were charged with criminal offenses in connection with Baha Mousa's death, the charges were dropped against four of them and two others were acquitted. *Id*. ¶¶ 63-68.

[87] The specific details regarding the deaths of the six petitioners' relatives vary on a case to case basis. Some are more egregious than others. In some of the cases, the human rights violation might simply have been the failure of the British military to conduct sufficient investigation, making the injustice primarily procedural. In those cases, the actions of the British soldiers *may* have been reasonable. But this determination of fact must be accorded the proper process.

[88] Al-Skeini v. United Kingdom, ¶ 74.

The Court of Appeals affirmed this view and further opined that the "effective control" exception was not applicable because "the combination of terrorist activity, the volatile situation, and the ineffectiveness of Iraqi security forces meant that the security situation remained on a knife-edge for much of the tour."[89] The House of Lords again affirmed this case in 2007, regarding *Bankovic* as "watershed authority," and holding that application of the effective control principle beyond the Council of Europe would be "contrary to the inescapable logic of the Court's case law."[90]

The European Court of Human Rights accepted the petitioners' application in 2007, and decided to hear the case.[91] It is important to note that prior to the discussion of whether jurisdiction of the European Convention should be applied extraterritorially, the ECtHR introduced a number of relevant international legal materials demonstrating a liberal view of human rights treaty interpretation in favor of supporting the object and purpose of the treaties themselves.[92] This type of international case law was notably absent from the *Bankovic* decision, and foreshadowed the Court's intent to interpret Article 1 in a way to ensure the universal protection of human rights.

In particular, the Court cited the International Court of Justice's (ICJ) advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*.[93] In this case, the Court applied the International Covenant on Civil and Political Rights extraterritorially, even though the language in Article 2, paragraph 1 states that a subject must be "within its territory and subject to its jurisdiction."[94] The advisory opinion noted that the provisions of the Covenant apply extraterritorially "for all conduct by the State party's authorities or agents in those territories that affect the enjoyment

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[89] Al-Skeini et al. v. Secretary of State for Defence 1, ¶ 122. The Court held that the sixth applicant's son fell under the exception of Bankovic by his death occurring in a British military prison, operating in Iraq with the consent of the Iraqi authorities.

[90] Al- Skeini et al. v. Secretary of State for Defence [2007] UKHL 26, [127], [2008] A.C. 153.

[91] Al-Skeini v. United Kingdom, ¶ 1.

[92] *Id.* ¶¶ 89-94.

[93] *Id.* ¶ 90 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9, 2004) [hereinafter Israeli Wall Case].

[94] Israeli Wall Case, ¶ 108.

of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law."[95] Though the ICJ was interpreting the ICCPR, this opinion influenced the ECtHR, because it applied the treaty extraterritorially and placed a heavy reliance on its object and purpose.

Consistent with *Bankovic*, the *Al- Skeini* Court ruled that a state's jurisdiction is primarily territorial.[96] Similarly, the Court held that its case law has recognized a number of exceptional circumstances capable of warranting jurisdiction beyond the borders of the Contracting State.[97] The first exception created jurisdiction when the acts of diplomatic and consular agents exert authority and control over others outside of the territory of the State.[98]

The *Al- Skeini* Court recognized a second "consent" or "acquiescence" exception, arising when "in accordance with custom, treaty, or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another state."[99] Next, the Court held that the use of force by a State's agents operating outside its territory may bring the *individual* brought under the State's control into Article 1 jurisdiction.[100] To illustrate this case, the ECtHR cited *Ocalan v. Turkey*, where the Court held that after the petitioner was handed over to Turkish officials, he was "effectively under Turkish authority," allowing him to qualify for Article 1 jurisdiction.[101] The essential characteristic of this exception was that the power and control is over the *person* in question.

The Court next discussed *Bankovic*'s "effective control" exception. While the Justices had further defined the previous exceptions, they had stayed more or less true to the *Bankovic* precedent. However, with "effective control," the Court expanded on its narrow interpretation in *Bankovic*, and provided some additional factors to consider when determining whether this

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[95] *Id.* ¶ 110.

[96] Al- Skeini v. United Kingdom, ¶ 131.

[97] *Id.* ¶ 132.

[98] *Id.* ¶ 134.

[99] *Id.* ¶ 135.

[100] *Id.* ¶ 136.

[101] *Id.* (citing Issa and Others v. Turkey, App. No. 55721/07 Eur. Ct. H.R. (1996); Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08 (2010)).

qualification was met.[102] The Court stated that when determining whether the standard is met, "the Court will primarily have reference to the strength of the State's military presence in the area."[103] The ECtHR also noted, however, that "other indicators" may be relevant, such as how much the State's "military, economic and political support" for the local administration gives the occupying State control over the region.[104] The "effective control" test appears to be much more inclusive in this case than as portrayed in *Bankovic*.

Al- Skeini also disagreed with *Bankovic*'s notion of a Conventional legal space ("*espace jurisdique"*). While the Court noted that the convention is an "instrument of *European* public order," and that the Convention applies solely within its "legal space," it also noted that the Convention does *not* imply that Article 1 jurisdiction can never exist extraterritorially.[105] The Convention may dictate where jurisdiction applies, however, that does not necessarily indicate that the absence of extraterritorial jurisdiction, outside of the Council of Europe, cannot exist. *Al- Skeini's* interpretation, while potentially creative, harmonizes much more cleanly with the object and purpose of the European Convention as a human rights treaty.

Applying the facts of the *Al-Skeini* cases, the Court found that the situation in Iraq constituted "exceptional circumstances."[106] According to the ECtHR, the United Kingdom, through its soldiers, engaged in "security operations," and "exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for purposes of Article 1 of the Convention."[107] Therefore the Court in *Al-Skeini* both invoked the third and fourth exception, where persons and areas came under the "effective control" of British military.

Though the ECtHR's decision in *Al-Skeini* is extremely recent, and has not yet been held to the scrutiny of peer review, one criticism it has faced was from one of its concurring justic-

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[102] Al-Skeini v. United Kingdom, ¶ 138-39.
[103] *Id.* ¶ 139.
[104] *Id.*
[105] *Id.* ¶ 141-42.
[106] *Id.* ¶ 149.
[107] *Id.*

es. Justice Bonello argued that the Court did not go far enough in establishing a bright line rule in protecting human rights interests.[108] Bonello was unwilling to accept what he views to be an *"a la carte"* respect for human rights,[109] stating: "[a]ny state that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not . . . belong to the comity of nations for which the supremacy of human rights is both mission and clarion call."[110] More succinctly, Justice Bonello believed the United Kingdom was arguing that the Convention was "ratified . . . with the deliberate intent of regulating conduct of its armed forces according to latitude. Gentlemen at home, hoodlums elsewhere."[111]

Regardless of Bonello's concurrence, the ruling in *Al-Skeini* is an encouraging sign for the extraterritorial applicability of the ECHR. Not only did this case expand upon the notion of "effective control," but it also eliminated the *espace jurisdique* argument, which, under *Bankovic*, prohibited the application of the European Convention beyond Europe's borders. *Al-Skeini* speaks to the object and purpose of the Convention as a human rights treaty needing to be enforced universally as such.

Court decisions like *Al-Skeini et al. v. United Kingdom* have strengthened the notion of customary law that States are bound by human rights treaties and obligations not only within their territories, but beyond their borders and throughout the world. Fortunately, there appears to be a growing tradition of international courts liberally applying jurisdictional requirements in order to secure the object and purpose of these human rights treaties. This encouraging sign indicates that these courts are more focused on promoting human rights and eliminating legal vacuums and black holes where nations can perpetrate human rights violations without any accountability.

III. THE UNITED STATES AND THE "WAR ON TERROR"

In the decade after the 9/11 terrorist attacks, the United States has taken several steps backwards in international human rights law. Certainly, the United States has never been a

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[108] Al-Skeini v. United Kingdom, (Bonello, G., concurring, ¶ 18).
[109] *Id.*
[110] *Id.*
[111] *Id.*

leading proponent of the international human rights regime, often displaying a "s[k]eptical" and "stand-offish" attitude towards embracing human rights provisions.[112] However, the aggressive counterterrorism strategies employed by the United States in response to Al- Qaeda's attacks on U.S. soil arouse serious human rights concerns.[113] The failure of the United States, the world's only superpower, to uphold basic human rights interests have endangered the legitimacy of the human rights regime, and should be addressed by binding forums of international law.

From allegations of torture, cruel, inhumane and degrading treatment, to the unlawful detention of prisoners without their due process habeas corpus rights, the United States has been at the center of human rights inquiry. As many of the abuses have been perpetrated beyond the territory of the United States, the issue of whether human rights instruments apply extraterritorially is especially pertinent. Unfortunately, the United States' apparent willingness to disregard basic notions of human rights throughout the world has created the human rights vacuums and legal black holes that court decisions such as *Al-Skeini* sought to avoid.

A. The Facts

Though there are human rights issues present within the territory of the United States, the most egregious of alleged human rights abuses by United States authorities have occurred outside its borders. In the months after September 11, 2001, the United States began "Operation Enduring Freedom," in which it waged war on the Taliban and Al-Qeada in Afghanistan.[114] During the Operation, thousands of Afghan civilians were killed, and U.S. forces sent hundreds of prisoners to be held in the Guantanamo Bay detention center.[115] Furthermore, during this time, it was alleged that the United States committed human rights atrocities during the "Dasht-i-Leili Massacre"

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[112] Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 242 (2003).

[113] *Id.*

[114] Marjorie Cohn, *Human Rights in the Wake of 9/11: Human Rights: Casualty of the War on Terror*, 25 T. JEFFERSON L. REV. 317, 319 (2003).

[115] *Id.* at 319-21.

in Afghanistan.[116] The massacre refers to the deaths of hundreds (or possibly thousands) of Taliban prisoners during their transportation from Kunduz to Sheberghan prison in Afghanistan by U.S. and Junbish-i Milli soldiers.[117] According to the 2002 documentary, *Afghan Massacre: The Convoy of Death*"[118], prisoners in the transport "suffocated in closed containers that lacked any ventilation," while those that survived were "dumped in the desert, shot and left to be eaten by dogs."[119] Based on witness accounts, the film claims that United States military personnel participated in prisoner executions of some who survived the transport.[120]

The United States has also been accused of engaging in inhumane treatment of their detainees abroad. Of the prisoners kept in Guantanamo Bay, "many [were] blindfolded, thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep."[121] The United Nations report condemning the treatment of prisoners in Guantanamo Bay included "stress positions" for hours, and the use of the detainee's fears, namely dogs, as mechanisms used to intimidate and coerce information.[122]

Moreover, the United States government secretly sent many terrorist suspects to be questioned in countries such as Egypt, Jordan, and Morocco that have a reputation for utilizing brutal means of interrogation. [123] Consequently, the United States would not have to take responsibility for any alleged human rights abuses occurring during questioning or detention.[124] By outsourcing torture to other nations, while engaging in interrogative strategies as severe as "waterboarding,"[125] the

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[116] AFGHAN MASSACRE: THE CONVOY OF DEATH (Atlantic Celtic Films 2002).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Cohn, *supra* note 114, at 327.

[122] Economic and Social Council, *Situation of detainees at Guantánamo Bay, Report of the Chairperson,* U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006).

[123] Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

[124] *Id.*

[125] Dan Froomkin, *Bush Glib Waterboarding Admission Sparks Outrage*, HUFFINGTON POST, June 3, 2010, http://www.huffingtonpost.com/2010/06/03/

United States has clearly committed widespread atrocities beyond its borders.

While the crimes committed by United States forces across the globe violated several human rights agreements, including the Convention Against Torture (CAT), the United Nations Charter, and the Third and Fourth Geneva Convention,[126] this analysis will focus on whether the abuses violate the International Covenant on Civil and Political Rights (ICCPR) due to its territorial restriction on jurisdiction.

B. The Problem

While the ECtHR's decision in *Al-Skeini* reflects a growing international custom indicating a willingness to favor the object and purpose of human rights treaties over their "territorial" limitations, the United States has neglected to take part in it. Unfortunately, the practices of the United States during the recent human rights revolution reflects a willingness to sign and ratify only the treaties that already comply with their own domestic law. [127] When the provisions of a human rights treaty do not comply with their already existing law, the United States Congress has traditionally ratified it with provisions, objecting to the contents that may infringe on existing domestic law.[128] The practice of the United States in regards to its' ratification of the International Covenant on Civil and Political Rights (ICCPR) is particularly illustrative.

The ICCPR opened for signature in 1966 and was entered into force in 1976.[129] The treaty was enacted by the Human Rights Commission, which created it alongside the International Bill of Rights in furtherance of an effort to devise mechanisms for the "implementation and protection of fundamental

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bushs-glib-waterboarding_n_599893.html.

[126] Cohn, *supra* note 114, at 317. The United States has objected to the assertion that any of these Agreements have been violated by US practice in the "war on terror," for many reasons which will not be discussed in this paper.

[127] Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L. L. 347 (2000).

[128] *Id.* at 349.

[129] Connor Colette, *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. INT'L L.J. 509, 511 (2008).

human rights."[130] The United States signed the treaty on October 5, 1977, but did not ratify it until June 8, 1992.[131] The ratification came with several reservations, and thus failed to give full effect to the breadth of the ICCPR.[132] While treaty reservations are permissible under Article 19 of the Vienna Convention, many of the United States' reservations have been publically criticized as being contrary to the object and purpose of the ICCPR.[133]

As it ratified the ICCPR in 1977, the United States declared that the provisions of the Covenant were non-self executing, thereby asserting that the Treaty's Articles did not amount to a legal obligation.[134] Declaring a treaty's provisions as non-self executing does not strip it of its power in itself, but once the Justice Department failed to implement the treaty via its own domestic legislation, it became essentially non-binding.[135] Additionally, the United States retained the right to execute its minors, and indicated that cruel, degrading, and inhumane treatment would only be interpreted in accordance with the United States Constitution.[136] In effect, this gave the treaty little to no weight, making the ratification of the ICCPR

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[130] *Id.* The other Human Rights treaty that was created by the Human Rights Commission was the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Though the ICCPR has run into several legitimacy problems, the ICESCR has dealt with even greater problems as the language in its provisions are generally seen to be more vague and non-self-executing. *Id.* at 5.

[131] International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#top [hereinafter ICCPR Database]. As of 11/12/11, there are 167 parties to the treaty.

[132] *Id.*

[133] While Article 19 of the Vienna Convention permits a state to attach reservations when they sign, ratify, accept, or approve of a treaty, Article 19(c) does not allow reservations when the reservation is "incompatible with the object and purpose of the treaty." Vienna Convention, supra note 5, Art. 19(c). In response to the United States' persistent objection to Article 6(5) which prohibits capital punishment for minors, eleven European states filed objections declaring the reservation to be invalid on the basis that it went directly against the aims and purposes of the ICCPR. Inter-American Commission of Human Rights ¶ 62.

[134] ICCPR Database, supra note 131.

[135] Roth, supra note 127, at 349. By stating the ICCPR is non-self executing, and failing to domesticate the terms within the Articles of the Covenant, the United States effectively stripped the covenant of all its intended power.

[136] ICCPR Database, *supra* note 131.

a "purely cosmetic gesture."[137] As a result, the United States can claim to be part of a major human rights system while doing nothing to give life to the rights it embodies.

Still, by far the biggest failure of the United States to fully embrace the nature of the ICCPR lies in its assertion that the treaty's provisions do not apply extraterritorially. Similar to the European Convention, the ICCPR contains an article limiting its jurisdictional applicability. Article 2(1) states that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind . . . "[138] By limiting the Covenant's application to "within its territory and subject to its jurisdiction,"[139] the scope of its authority is potentially diminished. The United States has claimed that based on the plain and ordinary meaning of its text, "this Article establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party's sovereign authority."[140]

Supporting their "plain and ordinary meaning" interpretation of Article 2(1), the United States brought in the *travaux preparatoire* of Eleanor Roosevelt, who was the US representative for the Commission on Human Rights in 1950, when Article 2 was being drafted.[141] Roosevelt's *travaux* indicated that the United States was concerned with being held accountable for actions occurring within then occupied Germany, and therefore proposed the language within its territory *and* subject to its jurisdiction.[142] From this, the United States alleges that it is clear that the treaty should not apply extraterritorially.

Ironically, the United States' argument relies almost completely on the Vienna Convention on the Law of Treaties, an

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[137] Roth, *supra* note 127, at 349.

[138] International Covenant on Civil and Political Rights art. 2, Oct. 5, 1977, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

[139] *Id.*

[140] REPLY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE FIVE UNCHR SPECIAL RAPPORTEURS ON DETAINEES IN GUANTANAMO BAY, CUBA, 45 I.L.M. 742 (2006) [hereinafter US Reply].

[141] *Id.* at 27.

[142] *Id.*

agreement it has failed to ratify.[143] The United States recognized that it never ratified the Convention, yet stated that it is "often consulted as a guide to general principles of treaty interpretation."[144] This assertion appears to treat the Convention as international custom, a source of authority not often invoked by the United States when dealing with human rights treaties.

A closer look at international custom concerning the extraterritorial nature of human rights treaties, and more specifically, the ICCPR, shows that the "plain and ordinary meaning" approach is not sufficient. The United States' position disregards the fact that in the past half-century since the enactment of the ICCPR, the world has witnessed a human rights revolution.[145] Consistently with modern international custom, it would not be "tenable for the US to continue to maintain that its human rights obligations stay at home while its armed forces go abroad."[146]

In 1980, the Human Rights Committee (HRC) held in a case in Uruguay, that the Convention should not be interpreted so as to apply to all individuals under its jurisdiction regardless of whether they are under their territory.[147] Dealing with a case in which the plaintiff was abducted within Uruguay, and subsequently taken outside its borders to be tortured, the Committee stated that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[148] The HRC recognized that it would be "unconscionable" to interpret Article 2(1) as requiring both "within the territory" *and* "subject to its jurisdiction,"[149] and adopted a much more teleological interpretation of the Ar-

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[143] The United States has often held that when it does not ratify a Treaty, it cannot be bound by its provisions. (Ex: Convention on the Rights of the Child) It is interesting that they now invoke a treaty they have not ratified as their method of interpreting the ICCPR.

[144] US Reply, *supra* note 140, at 25.

[145] THOMAS MCDONNELL, THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM 56 (2011).

[146] *Id.*

[147] Sergio Euben Lopez Burgos v. Uruguay, Comm., No. R.12/52, U.N. Doc. Supp. No. 40 A/36/40, at 176 (July 29, 1981), *available at* http://www1.umn.edu/humanrts/undocs/session36/12-52.htm.

[148] *Id.* ¶ 12.3.

[149] *Id.*

ticle.

In a 2004 advisory opinion of the International Court of Justice (ICJ), concerning Israel's building of a wall in occupied Palestine, the ICJ held that while the ICCPR's jurisdiction was "primarily territorial," there were circumstances under which it could be exercised outside of the national territory.[150] The Court further held that, "considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."[151] Regarding the intent of the framers in drafting the language of Article 2(1), the Court stated: "the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."[152]

Both the 1980 HRC decision and the 2004 ICJ advisory opinion represent the international custom that has developed contrary to the United States' stance on the ICCPR's extraterritorial capacity. The United States, however, has continued to claim that the treaty does not apply extraterritorially, failing to mention actions it induced outside its borders in its periodic reports to the Human Rights Committee.[153] Though the HRC has obtained information on the controversial situations in Guantanamo Bay, Iraq, and Afghanistan through "shadow reports" submitted by nongovernmental organizations,[154] the Committee's recommendations have had little effect on United States foreign policy. The HRC lacked any substantial binding authority before the First Optional Protocol, which gave the Committee the power to issue "authoritative determinations."[155] The United States, however, has not ratified the Op-

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[150] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9).

[151] *Id.*

[152] *Id.* Regarding the framer's Travaux, "They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence." *Id.* (citation omitted).

[153] Colette, *supra* 129, at 515.

[154] *Id.* at 512.

[155] See Human Rights Comm., General Comment No 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶¶ 13-14, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008).

tional Protocol, and has never officially recognized the treaty as binding law.[156]

While the United States is technically a party to the International Covenant on Civil and Political Rights, its State practice has indicated a more 'a la carte' compliance with the rights the treaty enshrines. This Nation's disregard for the treaty led one respected scholar to claim that "rarely has a treaty been so abused."[157] Until the United States can take steps to truly abide by the ICCPR, its ratification will continue to be purely 'cosmetic,' furthering the United States perspective that treaties should only be ratified to further "codify existing U.S. practice," while doing nothing to compel the further protection of human rights.[158]

IV. CONCLUSION

The Court's decision in *Al-Skeini et al. v. United Kingdom* was yet another example of a growing international custom indicating that human rights treaties *should* be applied extraterritorially. In light of the human rights revolution the world has witnessed over the past half-century, this case stands as a positive reinforcement of an evolving conventional norm. Human rights treaties should be applied consistent with their object and purpose and not hamstrung by the confines of territorial restriction. The Preamble of the European Convention stated a goal to ensure the universal recognition of human rights.[159] To contradict this notion would be to defy the very purpose of the treaty. The Court in *Al-Skeini* recognized this principle and issued a decision consistent with modern international law.

Sadly, the United States' continued unwillingness to apply the human rights regime throughout the world greatly weakens the progress of the entire international community in developing a strong international custom. Even more discouraging is the near purposeful nature of the United States' disregard of international law. While the United Kingdom raised Article 1 defenses in the *Al-Skeini* case, it has accepted

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[156] ICCPR Database, *supra* note 131.

[157] JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 375 (2d ed. 2003).

[158] Roth, *supra* note 127, at 349-50.

[159] Convention for the Protection of Human Rights and Fundamental Freedoms preamble, Apr. 11, 1950, C.E.T.S. No. 194, 213 U.N.T.S. 222.

culpability for its actions in Iraq, and acknowledged the ECtHR's decision. The United States, however, has not hid its willingness to perpetrate human rights violations, leading one CIA official to state that "[i]f you don't violate someone's human rights some of the time, you probably aren't doing your job," [160] and former Vice President Dick Cheney to state that waterboarding was a "no-brainer."[161] This whimsical attitude towards human rights violations is especially worrisome.

Unfortunately, the actions of the United States have diminished much of what the human rights regime can accomplish against other severe violators. As a violator itself, the United States has lost its influence in advocating for human rights interests elsewhere. In 2002, Amnesty International said that the administration had "lost the moral authority to criticize human rights abuses abroad, because of its own denial of human rights to foreigners detained since September 11."[162] Human Rights Watch agreed by stating that the message sent by the United States is that of which "human rights are dispensable in the name of fighting terrorism."[163] The unfortunate result has been a copy-cat approach where many already repressive governments have used the "war on terror" to justify abusive military campaigns on their domestic political opponents.[164] While by no means is the United States the biggest human rights abuser, Human Rights Watch stated that "Washington has so much power today that when it flouts human rights standards, it damages human rights causes worldwide."[165]

In recent years, however, the United States has taken steps that may indicate there has been a 'turning of the tide' in its treatment of international human rights agreements. Secretary of State Hillary Clinton recently stated "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including our-

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[160] Priest & Gellman, *supra* note 123.

[161] Froomkin, *supra* note 125.

[162] Cohn, *supra* note 114, at 364.

[163] Joel Brinkley, *Report Says U.S. Human Rights Abuses Have Eroded Support for Efforts Against Terrorism,* N.Y. TIMES, Jan. 15, 2003, http://www.nytimes.com/2003/01/15/world/threats-responses-accusations-report-says-us-human-rights-abuses-have-eroded.html.

[164] Cohn, *supra* note 114, at 364 (citing Brinkley, *supra* note 163).

[165] Brinkley, *supra* note 163.

selves."[166] Clinton further claimed that human rights are "rights that apply everywhere, to everyone."[167] Additionally, President Barack Obama noted in an address to the United Nations General Council Assembly in 2009, that "[t]he world must stand together to demonstrate that international law is not an empty promise, and that Treaties will be enforced."[168] While these statements mean nothing without corresponding action, the current administration's beliefs are much more amenable to complying with norms of international law than those of its predecessor.

The encouraging attitude of the Obama administration may indicate that the United States has begun to hold itself accountable for its actions abroad. Recently, Harold Hongiy Koh, Legal Advisor to the U.S. Department of State commented that the relationship between the International Criminal Court (ICC) had changed from "hostility to positive engagement."[169] The United States had previously held it would not join the ICC.

Additionally, the United States Supreme Court has shown a willingness to apply international law to its domestic practice in its decisions in *Roper v. Simmons*,[170] which abolished the juvenile death penalty, and *Hamdan v. Rumsfeld*,[171] which held that military commissions established to try detainees at Guantanamo Bay violate the Geneva Conventions. This State practice demonstrates that, at the very least, the United States is realizing the presence of international law within their judicial decisions.

Though the United States may be making progress to-

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[166] Jordan Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TUL. J. INT'L & COMP. L. 151, 157 (2010).

[167] *Id.*

[168] Barack Obama, President of the United States, Address to the United Nations General Assembly: Responsibility for Our Common Future (Sept. 23, 2009) (transcript available at http://usun.state.gov/briefing/statements /2009/september/129519.htm).

[169] Harold Hongjy Koh, Legal Advisor to the United States Dep't of State & Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Special Briefing on the U.S. Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference (Jun. 15, 2010) (transcript available at http://geneva.usmission.gov/2010/06/15/u-s-engagement-with-the-icc/).

[170] Roper v. Simmons, 543 U.S. 551 (2005).

[171] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

wards respecting treaties such as the ICCPR, it must understand the significance of its global footprint as it relates to international custom in the human rights regime. The *Al-Skeini* decision declares that the human rights regime applies universally, but the United States has yet to affirm that decision by applying the ICCPR to their state practice. The interests of human rights are bigger than "American Exceptionalism," and the United States should begin to take them seriously. Until this occurs, the human rights vacuums and legal black holes will continue to exist across the world, and the interests of those harmed will suffer.