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ARTICLES

HUMAN RIGHTS ABROAD

PAUL ARNELL*

INTRODUCTION

The human rights obligations imposed by the Human Rights Act 1998 increasingly relate to territory, persons and events outwith the United Kingdom. Cognisance has recently been taken by courts within the United Kingdom of past or future alleged human rights violations arising beyond its borders in several cases in England¹ and Scotland.² One such case is pending before the House of Lords.³ Analysis of, and judgment upon, the extraterritorial application of United Kingdom human rights law necessarily involves several distinct areas of law including human rights, statutory interpretation and public international law. Human rights and in particular the Human Rights Act 1998 (HRA) and European Convention on Human Rights 1950 (Convention) are, of course, relevant because together they form the basis of the human rights obligations upon United Kingdom public authorities. Statutory interpretation is of concern *inter alia* because of the general presumption against the extraterritorial application of law. Public international law is relevant because the application of law⁴ outside United Kingdom territory is governed by rules of state jurisdiction and may conflict with norms protecting the territorial integrity and sovereignty of other states.⁵

* Department of Law, The Robert Gordon University, Aberdeen, Scotland. The author gratefully acknowledges the comments and suggestions made by the anonymous referees. Any inaccuracies are the author's alone.

¹ Including *Regina (Ullah) v Special Adjudicator*, [2004] UKHL 26, [2004] 2 AC 323, hereinafter *Ullah*; *Regina (Razgar) v Secretary of State for the Home Department (No 2)*, [2004] UKHL 27, [2004] 2 AC 368; hereinafter *Razgar*; *R v Secretary of State for the Foreign and Commonwealth Office, ex parte B and Others*, [2004] EWCA Civ 1344, [2005] QB 643, hereinafter *B and Others*, *R (On the Application of Al Skeini) v The Secretary of State for Defence*, [2006] HRLR 7, in the Court of Appeal and *R (On the Application of Al Skeini) v The Secretary of State for Defence*, [2005] 2 WLR 1401 in the Divisional Court, hereinafter *Al Skeini*, *R (Quark Fishing Ltd) v Foreign Secretary*, [2005] UKHL 57, [2007] 1 AC 100, hereinafter *Quark*, and *R (on the application of Al-Jedda) v Secretary of State for Defence*, [2006] EWCA Civ 327, [2006] 3 WLR 954, hereinafter *Al-Jedda*.

² Notably *Wright v Scottish Ministers (No. 2)*, 2005 1 SC 453, *Al Fayed Petitioner*, [2004] SLT 319, hereinafter *Al Fayed*, and *HMA v Vervuren* [2002] SLT 555.

³ Permission to appeal the Court of Appeal 21 December 2005 decision has been granted to both the appellants and respondents in *Al Skeini*. The petitions of appeal were lodged in March 2006.

⁴ The term "application of law" is largely synonymous with the term "assumption of jurisdiction" but is preferred because of the particular relevance of the word "jurisdiction" for our purposes.

⁵ A contravention of conventional (as opposed to customary) public international law although generally relevant is not necessarily the concern of courts in the United Kingdom as this form of law is distinct from national law and courts in the United Kingdom have traditionally generally eschewed referring to it, for a somewhat striking example see *Kaur v Lord Advocate*, 1980 SC 319. It is clear however that courts in the United Kingdom are increasingly taking account of international law and the law of distinct jurisdictions, and not merely because of s 2(1) of the Human Rights Act 1998. Practise differs within the United Kingdom however, with courts in Scotland taking a somewhat more insular approach in certain circumstances than England and Wales, see P Arnell, "Male Captus Bene Dententus in Scotland" [2004] JR 242.

This article firstly describes and analyses the germane law highlighting the relative weakness of the authorities in the area and the arguments weighing against the extraterritorial application of United Kingdom human rights law found within it. It then brings together the arguments in favour and against the present position and argues that the extraterritorial application of human rights law should be discouraged and restricted.

THE LAW – THE CONVENTIONAL CONTEXT

The immediate subject of this article is the extraterritorial application of the HRA. Discussion of the Convention, however, is also necessary because of the close relationship between it and the HRA, which will be discussed below. Here it is sufficient to note that the jurisprudence of the European Court of Human Rights (ECtHR) has influenced the development of United Kingdom law and that courts within the United Kingdom are now bound to take it into account by the HRA, section 2. A discussion of the territorial application of the Convention is, therefore, the first step in analysing the precise application of the HRA.

The Convention

The logical starting point in an examination of the Convention's spatial application is the provision within it governing the nature of the obligation placed on state parties. Article 1 of the Convention provides: "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention".⁶ The question that arises is what is the definition of "jurisdiction"? Possible meanings include "territory", "residence" and "control". The drafting history of article 1 is illuminating. As discussed in a leading case in the area, *Bankovic v Belgium et al*,⁷ the provision in draft form referred to those residing within the territory of state parties, not to those within their jurisdiction. The *travaux préparatoires* contain the following:

The Assembly draft had extended the benefits of the Convention to "all persons residing within the territories of the signatory State". It seemed to the Committee that the term "residing" might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term "residing" by the words "within their jurisdiction" which are also contained in Article 2 of the Draft Covenant of the United Nations Commission.⁸

Apart from one comment by a representative in the drafting process to the effect that the obligations arising under the Convention apply to all persons within the territory of state parties the *travaux préparatoires* fail to refer to the issue in any more depth.⁹ Therefore whilst "within their jurisdiction" is wider than residence one must turn to the case law of the European Commission and Court of Human Rights for greater clarity.¹⁰

⁶ See generally for the extraterritorial application of human rights F Coomans and, MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004).

⁷ (2001) 11 BHRC 435.

⁸ Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Vol. III (Nijhoff, 1975), p 260.

⁹ *Bankovic*, n7 above at paras 20 and 21.

¹⁰ Article 56 of the Convention also relates to the treaty's spatial application in that it entitles a state party to declare that the Convention is to extend to a territory over which it is responsible. This provision was at issue in *Quark*, n1 above. Interestingly for our purposes it was held in *Quark* that sections 6 and 7 of the Human Rights Act 1998 do not extend to territories where such a declaration has been made.

ECHR Jurisprudence – Extradition and Expulsion Cases

Two types of case relating to the precise meaning of article 1 and the scope of the Convention more generally have arisen.¹¹ The first more longstanding type occurs where an individual within the territory of a state party argues that his extradition or expulsion could lead to a violation of his human rights. These will be called extradition and expulsion cases, although they have also been termed “foreign cases”.¹² The second type arises where it is argued that a state party to the Convention is directly responsible for human rights violations that have taken place outside its territory. These cases will be termed wholly extraterritorial in that both the alleged victim and *situs* of violation are outside the territory of the state at the relevant time. The leading ECtHR extradition and expulsion authority is *Soering v United Kingdom*.¹³ Here it was held that Soering’s extradition from the United Kingdom to West Virginia in the United States of America would breach article 3 of the Convention in that he would be likely to spend a considerable time on death row. The judgment considered the question of jurisdiction because the possible future human rights violation would occur outside the United Kingdom and in a non-state party to the Convention. It is extraterritorial in the sense that judgment in it inevitably involved an “assessment of conditions in the requesting country”.¹⁴ The state party is possibly complicit in a human rights violation in the sense that but for the extradition or expulsion it would not occur. The Court in *Soering* stated:

It would hardly be compatible with the underlying values of the Convention . . . were a contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture . . . Extradition in such circumstances . . . would plainly be contrary to the spirit and intentment of [article 3].¹⁵

There have been subsequent to the decision in *Soering* a number of further ECHR cases relating to extradition and expulsion.¹⁶ These have considered and expanded upon the basic position in *Soering* and also have informed the two recent United Kingdom cases discussed below, *Ullah* and *Razgar*.¹⁷

ECHR Jurisprudence – Wholly Extraterritorial Cases

Within the jurisprudence of the ECtHR there are a number of instances of the second type of case: wholly extraterritorial cases. Overall this body of authority is less than

¹¹ Coomans and Kamminga suggest three types of extraterritorial application of human rights; where a state has effective control over an area, where a state exercises power and authority over persons by abducting or detaining them, and “perhaps in certain other extraterritorial situations such as extraterritorial killings not preceded by arrest”, in Coomans and Kamminga, *op cit*, at pp 3–4.

¹² By Lord Bingham in *Ullah*, n1 above at para 9. Extradition and expulsion have not been differentiated in the case law of the ECtHR for the purposes of jurisdiction. This has been accepted by Lord Steyn in *Ullah*, at para 33.

¹³ (1989) 11 EHRR 439.

¹⁴ *Ibid* at para 91. Emphasis added. See also *Chahal v United Kingdom*, (1997) 23 EHRR 413. Article 3(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, specifically mandates the consideration of circumstances in a foreign state where there are allegations that torture may result from an extradition or expulsion.

¹⁵ *Ibid* at para 89.

¹⁶ Recent ECHR cases include *Mamatkulov v Turkey*, (2005) 41 EHRR 25, *Iorgov v Bulgaria*, (2005) 40 EHRR 7, and *Boudellaa v Bosnia and Herzegovina*, (2002) 13 BHRC 297.

¹⁷ *Soering* was also considered recently in *The Queen on the Application of Rose Gentle and Others v The Prime Minister et al*, [2005] EWHC 3119, where in judicial review proceedings over the refusal to hold an inquiry of the circumstances that led to the invasion of Iraq, Collins J, refusing the application, held the rule in *Soering* arguably applied to both persons subject to extradition and military personnel. He stated “It is arguable that there is no difference in principle since *Soering* was, just as this case is, concerned with the actions of the state in compelling the subject in question to go overseas where he might suffer the relevant breach of his human rights”, at para 19.

clear and consistent and has engendered a not-insignificant body of academic criticism.¹⁸ Whilst it is beyond the scope of this article to analyse this jurisprudence in depth, it is necessary to mention certain cases involving northern Cyprus and a leading (and controversial) authority where both the putative victim and violation were outside the territory of the state parties allegedly responsible. The cases and admissibility decisions concerning Cyprus contain the first clear statements by Convention organs on the extraterritorial application of the Convention. They arose following Turkey's invasion of northern Cyprus in 1974 and *inter alia* relate to the treatment of Greek Cypriots in the north of the island. In a series of admissibility decisions the Commission held that the actions of Turkish state agents in northern Cyprus did engage the responsibility of Turkey. In the *Cyprus v Turkey* ruling in May 1975 the Commission held that state agents "... bring any other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property".¹⁹ In the first instance where the ECtHR itself was concerned with northern Cyprus, *Loizidou v Turkey (Preliminary Objections)*,²⁰ three sets of circumstances were detailed whereby a case could fall within the jurisdiction of a state party even though it related to persons or events outside its territory. These were a pending extradition and expulsion; where acts of state agents produce effects outside that state and where a state's forces or agents exercise effective control over an area outside its territory.²¹ It was held in *Loizidou* that the acts of the northern Cypriot authorities could be attributed to Turkey in light of Turkey's control over them and its military presence on the island. This jurisprudence has recently been said to support a second exception to the territorial nature of jurisdiction – in addition to the extraterritorial actions of state agents bringing a situation within a state's jurisdiction – are acts where it has "effective control of an area" outside its own territory.²² It was against this arguably somewhat expansive approach to jurisdiction that the ECtHR decided *Bankovic*.

Bankovic, a decision of the Grand Chamber of the ECtHR, is a controversial decision that has engendered much debate and criticism. The disagreements surrounding the decision are demonstrated in the arguments advanced to the High Court in *Al Skeini* where Rabinder Singh QC for the claimants argued that the case was "... just one among a long line of Strasbourg authorities" and Christopher Greenwood QC for the Secretary of State stated that it was a watershed and that "[e]ven if earlier cases were not doubted in their outcomes, they were subject to a fresh rationalisation, so that what at an earlier stage may have seemed a matter of broad principle, had to be re-evaluated as narrow exceptions".²³ Furthermore, Loukis Loucaides, Cypriot judge in the ECtHR, recently called the decision "... an example of bad law influenced by the considerations relating to the factual situation".²⁴ Conversely, Dominick McGoldrick termed *Bankovic* a "... hard case which made good law ... consistent with the previous jurisprudence ...".²⁵ It is submitted that this last view is the correct one.

¹⁸ Including L Loucaides, "Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the *Bankovic* case" (2006) 4 EHRLR 391; R Lawson, "Life after *Bankovic*: on the Extraterritorial Application of the European Convention on Human Rights" in Coomans and Kamminga, (eds), *op cit*, at p 83, and M Gondek, "Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?" (2005) 52 NILR349.

¹⁹ *Cyprus v Turkey*, (1982) 4 EHRR 482 at para 8.

²⁰ (1995) 20 EHRR 99.

²¹ *Ibid* at para 62.

²² Argued by Rabinder Singh QC for the claimants in the High Court in *Al Skeini*, n 1 above at para 110.

²³ *Ibid* at paras 114 and 115.

²⁴ Loucaides, *op cit* at p 393.

²⁵ D McGoldrick, "Extraterritorial Application of the International Covenant on Civil and Political Rights" in Commans and Kamminga (eds), *op cit*, at p 41.

Bankovic is in accord with the previous ECtHR jurisprudence and, more importantly for our present purposes, expressly in accord with general public international law.

In *Bankovic* the applicants were survivors and relatives of the deceased of a NATO-led bombing within the former Yugoslavia. They argued that their rights had been infringed and that they came within the jurisdiction of several state parties to the Convention. The Grand Chamber held, in essence, that the Convention's application is normally limited to the territory of state parties but it is exceptionally applicable outwith that territory where a state

... through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.²⁶

Significantly the Court stated that it must "... take into account any relevant rules of international law when examining questions concerning its jurisdiction ... The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms a part".²⁷ The ECtHR then discussed extraterritorial jurisdiction generally and stated that whilst it is not excluded by international law the bases of jurisdiction are "... as a general rule defined and limited by the sovereign territorial rights of the other relevant states".²⁸ It continued

... a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects.²⁹

Following this emphasis upon extant rules of general international law, the ECtHR held that "jurisdiction" "... must be considered to reflect [the] ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".³⁰ It found confirmation of the essentially territorial notion of jurisdiction in the *travaux préparatoires*³¹, as noted above. The ECtHR summarised its view in regard to the application of the Convention in *Bankovic* by stating that

... the Convention is a multi-lateral treaty operating ... in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States ... *The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.*³²

This final sentence explicitly encapsulates the restrictive essence of the case. The judgment relies and focuses upon basic and fundamental rules of public international law, especially the rule protecting the sovereignty and territorial integrity of states and provides strong support for a spatially restrictive interpretation of the Convention.

²⁶ *Bankovic*, n 1 above at para 71.

²⁷ *Ibid* at para 57.

²⁸ *Ibid* at para 59.

²⁹ *Ibid* at para 60.

³⁰ *Ibid* at para 61. In line with this general proposition that the exercise and assumption of extraterritorial jurisdiction needs justification is the *Lotus Case*, PCIJ, Series A, No 10, 1927, heard in the Permanent Court of International Justice, see generally P Arnell, "Criminal Jurisdiction in International Law" [2000] JR 179, and P Arnell, "The Proper Law of the Crime in International Law Revisited" (2000) 9(1) Nott LJ 39.

³¹ *Ibid.* at para 63.

³² *Ibid* at para 80. Emphasis added.

Following *Bankovic* there have been a number of ECtHR decisions that have examined the precise scope of Convention obligations. In essence, these cases have confirmed that there are two sets of circumstances that can give rise to the wholly extraterritorial application of the Convention: where a state's forces or agents have a degree of control over a spatial area outside its territory and where they have a degree of personal authority over an alleged victim. These two circumstances have been termed "effective control of an area" and "state agent authority" respectively.³³ A recent ECtHR example is *Issa v Turkey*³⁴ where both tests of personal authority and effective control of an area were applied in examining possible Turkish jurisdiction outside the territory of the Council of Europe, namely in Iraq. It held:

The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States (see the above-cited *Bankovic* decision, § 80).³⁵

On the facts, the ECtHR held that the applicants had not proved that their relatives, allegedly killed by Turkish soldiers in northern Iraq, were under the personal authority of Turkish soldiers or that the territory in question was under the overall effective control of Turkey.³⁶

THE LAW – THE HUMAN RIGHTS ACT 1998

The Convention and ECtHR jurisprudence provide the context for the HRA's application. The HRA's purpose was to give "further effect to the Convention".³⁷ As seen, the meaning of "within their jurisdiction" in article 1 of the Convention according to the ECtHR is relatively clear. The Convention applies to an act or person where a state party has effective extraterritorial control of the *situs* of the act, where the putative victim is under the personal extraterritorial authority of its agents and, perhaps more obviously, where a person is within its territory subject to extradition or expulsion to a state where a future human rights violation may occur. The question that arises is whether, and if so to what extent, this meaning affects the particular spatial application of the HRA. On the one hand, one might argue that since the HRA, section 2(1) obliges United Kingdom courts to take into account *inter alia* jurisprudence of the ECtHR the application of the HRA would be governed by the rules found in the cases noted above. If this is the case, the HRA would apply in the manner just described. On the other hand the Convention is a multilateral treaty and not part of municipal United Kingdom law. The HRA itself is silent on the issue of its general extent, with article 1 not finding a place in the

³³ By the Court of Appeal in *Al Skeini*, n 1 above at para 50.

³⁴ (2005) 41 EHRR 27. This case is also authority for the position that the Convention can apply outside the territory of state parties to the Convention, see R Wilde, "The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?" [2005] EHRL. 115.

³⁵ *Ibid* at para 74.

³⁶ Further relevant cases include *Öcalan v Turkey*, (2003) 37 EHRR 10 and *Ilaşcu v Moldova*, (2005) 40 EHRR 46.

³⁷ The Long Title of the HRA *inter alia* provides that it is "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights . . .".

Act.³⁸ Rules of statutory interpretation largely militate against its extraterritorial application. Together these factors suggest that the range of application of the Convention and the HRA are not co-extensive. However, in applying the HRA, courts in the United Kingdom have, to date, effectively adopted the ECtHR's approach to jurisdiction. Prior to analysing the germane jurisprudence, it is useful to examine the precise relationship between the HRA and the Convention. This is relevant in part because it sheds light on whether courts in the United Kingdom were, and are, obliged to adopt the ECtHR's approach as a matter of law, or instead, whether there was, and is, scope for divergence in the approaches taken to jurisdiction by United Kingdom courts and the ECtHR.

Academic and judicial debate both fail to provide clear and consistent guidance on the relationship between the Convention and the HRA. Academic debate is centred mostly upon whether the HRA "incorporated" the Convention or gave it "further effect". "Incorporation" here tends to suggest a single set of jurisdictional rules governing both the HRA and the Convention. It implies the transplantation of the Convention (or parts of the Convention) and its attendant rules into United Kingdom municipal law. Given "further effect" on the other hand implies the possibility of distinct rules. This can be understood to mean that (certain) rights guaranteed under the Convention have been adopted and are now guaranteed by HRA and conditioned by the rules (or absence of rules) within the HRA itself. For example, Fenwick writes

The HRA does *not* "incorporate" the Convention rights into substantive domestic law, since it does not provide that they are to have the "force of law", the usual form of words used when international treaties are incorporated into domestic law . . . the rights *are* in a sense incorporated into domestic law when asserted against public authorities or when the issue in question, which relates to a Convention right, falls within the scope of EC law.³⁹

Himsworth appears to agree in stating that the Human Rights Act 1998 does not "in a strong sense" incorporate the Convention and make it part of United Kingdom law.⁴⁰ In contrast is this judicial *dictum* of Lord Scott, who stated

The ECHR is not part of domestic law except to the extent that it has become so under the 1998 Act. The 1998 Act did not entrench the articles of the ECHR so as to bar Parliament from subsequently enacting legislation inconsistent with those articles. Parliament can, if it wishes to do so, enact such legislation.⁴¹

As this authority indicates, there is no uniformity of opinion on the question of the nature of the relationship between the HRA and the Convention. In order to discern the territorial reach of the HRA therefore other, more orthodox methods, are more useful.

A standard rule of statutory construction is the presumption that legislation applies only within the territory of the United Kingdom unless the particular statute specifies otherwise. Bennion writes "[u]nless the contrary intention appears, Parliament is taken

³⁸ The several sections that refer to the HRA's territorial application are discussed below. Lord Drummond Young states that the reason for the absence of article 1 ". . . is obvious; article 1 is the provision that renders the Convention binding on the High Contracting Parties, but it does not of itself confer any specific rights on persons who find themselves within the jurisdiction of any High Contracting Party. Thus it has no place in domestic law", in *Al Fayed*, 2 above at para 5.

³⁹ H Fenwick, *Civil Liberties and Human Rights* (Cavendish, 2002), at pgs 134–135, emphasis hers.

⁴⁰ C Himsworth, "Devolving Rights Seriously" in A Boyle (ed), *Human Rights and Scots Law* (Hart, 2002) at p 22. Miller writes "[s]trictly speaking . . . the Human Rights Act does not "incorporate" the ECHR but is an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights", in A Miller, (ed), *Human Rights a Modern Agenda* (T and T Clark Publishing, 2000), at p 8.

⁴¹ *A (FC) and others (FC) v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68 at para 144. Further judicial authority will be referred to below.

to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom”.⁴² In *R v West Yorkshire, ex p Smith*, Donaldson LJ stated that “. . . every parliamentary draftsman writes on paper which bears the legend, albeit in invisible ink, ‘this Act shall not have an extra-territorial effect, save to the extent that it expressly so provides’”.⁴³ There is no express stipulation in the HRA that leads to the conclusion that the contrary applies. It does not contain general express provision on its spatial or personal application. Indeed the provision within it militates against any general extraterritorial application. There are two specific references to the scope of application of the HRA, section 22(6) which states that the Act extends to Northern Ireland and section 22(7) which provides “[s]ection 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends”. Also relevant is section 11, which *inter alia* states that “(a) A person’s reliance on a Convention right does not restrict – (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom”.⁴⁴ Following this specific provision and in the light of the rule of interpretation above, it is reasonable to conclude that the HRA applies on an intra-territorial basis only. However, courts in the United Kingdom have overcome the presumption in favour of the territorial application of the HRA.

There are four factors that led to United Kingdom courts adopting the same approach to jurisdiction as the ECtHR. Firstly, courts are bound to take into account the jurisprudence of the ECtHR and Commission in interpreting Convention rights. As was noted in *Ullah* by Lord Bingham “. . . the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law”.⁴⁵ Secondly, the HRA, section 3(1) provides that “[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. This includes the HRA itself. In *Al Skeini*, the Divisional Court could “. . . see no reason why section 3(1) should not apply to the Act itself and to the question of its scope”.⁴⁶ Thirdly, there is the presumption that legislation giving effect to international treaty obligations will be compatible with those obligations.⁴⁷ Fourthly, there is the rule of statutory interpretation that provides that the object and purpose of an Act should be taken into account in determining its meaning.⁴⁸ Together these factors have led to the same set of rules governing the range of application of the HRA as the Convention. Lord Nicholls has recently stated:

⁴² F Bennion, *Statutory Interpretation: A Code*, 4th ed (Butterworths, 2002) at p 82. Of course this is just a presumption, and one that is increasingly explicitly overcome. There is, particularly in the area of the criminal law, increasing extraterritorial application of statutory provision. Prominent examples include s 134 of the Criminal Justice Act 1988 prescribing torture, offences relating to so-called “sex-tourism” under the Sexual Offences Act 2003 and a number of terrorist and bribery-related crimes under the Anti-terrorism, Crime and Security Act 2001.

⁴³ [1983] QB 335 at 358.

⁴⁴ Ss 11 and 22 were referred to by counsel for the Secretary of State in *B and Others*, n 1 above at para 69, as evidence against the application of the HRA to the facts in that case. It is discussed below.

⁴⁵ N 1 above at para 20.

⁴⁶ N 1 above at para 291.

⁴⁷ *Solomon v Commissioners of Customs and Excise*, [1967] 2 QB 116, [1966] 3 All ER 871, and with specific reference to the Convention itself see *T. Petitioner*, [1996] SCLR 897.

⁴⁸ *Murray v Inland Revenue*, 1918 SC (HL) 111. Indeed, there are “special considerations” in regard to the interpretation of statutes incorporating or giving effect to conventions within United Kingdom law, resulting in it being “absurd to interpret [conventions] differently from the courts of other countries which are also parties to the treaty or convention” and “. . . the court should adopt the European method of looking at the design and purpose of the legislation and interpreting the legislation to have the desired effect or in a manner less constrained by technical rules of English or Scottish law or by legal precedent but on broad principles of general application”. D M Walker, *The Scottish Legal System*, 8th ed (W Green, 2001), at p 431, footnotes omitted.

... the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg.⁴⁹

As will be seen in the analysis of recent United Kingdom jurisprudence below, the rules governing the particular application of the HRA are those developed by the ECtHR.

THE LAW – RECENT UNITED KINGDOM JURISPRUDENCE

Extradition and Expulsion Cases

A number of recent United Kingdom cases have considered the application of human rights law abroad. They have related to both extradition and expulsion and wholly extraterritorial situations. This recent jurisprudence is important for three reasons. Firstly, it establishes that the HRA does indeed apply abroad. Secondly, it highlights that the precise relationship between the HRA and the Convention remains unclear and that a more restrictive approach to jurisdiction under the HRA is not precluded. Thirdly, it is important because it contains several cogent reasons in favour of a narrower approach to jurisdiction than that taken by the ECtHR. In regard to extradition and expulsion cases the rule established in *Soering* has recently been considered by the House of Lords in *Ullah* and *Razgar*, and by the Court of Session in *Wright v Scottish Ministers*. The issue in all these cases was whether articles additional to article 3, prohibiting torture and inhuman and degrading treatment and punishment, could be invoked to prevent an extradition or expulsion. In *Ullah*, article 9, which protects freedom of thought, conscience and religion, was considered.⁵⁰ Lord Bingham firstly examined the possibility that any article other than article 3 could found the basis of an argument against extradition or expulsion. He accepted the importance of the right to life, stating “[g]iven the special importance attached to the right to life by modern human rights instruments it would perhaps be surprising if article 3 could be relied on and article 2 could not”.⁵¹ Then, after referring to ECtHR case law, Lord Bingham accepted the possibility that articles 4, 5, 6 and 8 could apply in extradition and expulsion cases.⁵² As regards article 9, he concluded:

I find it hard to think that a person could successfully resist expulsion in reliance on article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on article 3. But I would not rule out such a possibility in principle unless the Strasbourg court has clearly done so, and I am not sure it has.⁵³

A similar threshold rule as that used in cases based on article 3 was held to be applicable here. A “stringent test” should be adopted by courts that required the

⁴⁹ *Quark*, n 1 above at para 34. Sedley LJ in the Court of Appeal stated in this regard “... I consider the Act to be not only presumptively but designedly coextensive with the Convention ...”, *Al Skeini*, n1 above at para 189.

⁵⁰ Article 9 provides: “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

⁵¹ *Ullah*, n 1 above at para 15.

⁵² *Ibid* at paras 16–18. The opinion of the Court on article 8 was split, with Lord Walker and Baroness Hale disagreeing with the view that it could be invoked in extradition and expulsion cases. This was the issue in *Razgar*, discussed below.

⁵³ *Ibid* at para 21.

applicant to show strong grounds for believing that, if expelled, he or she faced a real risk of being subjected to a violation of the right in question.⁵⁴ In the light of the facts, Lord Bingham held that the appellants fell far short of satisfying this test.

Importantly for our present purposes, in addition to accepting that an increased number of articles can found the basis of an argument against an extradition or expulsion, Lord Bingham discussed the relationship between ECtHR jurisprudence and United Kingdom courts. He stated:

In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court . . . From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.⁵⁵

This statement confirms that it is possible for United Kingdom courts to eschew the jurisdictional approach taken by the ECtHR. Its case law is “not strictly binding”, it merely has to be “taken into account”. It will be argued below there are indeed strong reasons for diluting the effect of Strasbourg case law where it has been extraterritorially applied. Interestingly, Lord Carswell, agreeing with the majority, stated when considering exceptions to the primarily territorial nature of the Convention that:

One might indeed have preferred, if the matter was *res integra*, to see the exception expressed in terms of general humanitarian considerations, which could be applied flexibly throughout the states which are parties to the Convention, rather than being tied to specific articles of the Convention. The risk in defining it by reference to the latter is that courts of law will tend to fit expulsion cases into a Procrustean bed of legal categories.⁵⁶

This, it is submitted, is a wholly reasonable suggestion. A flexible humanitarian yet restrictive approach that takes into account a number of disparate factors is indeed preferable. Lord Carswell implied that relevant factors were state sovereignty and the interests protected by expelling or extraditing certain individuals, noting

It is to be hoped that the courts which have to apply the principles will be able to retain a substantial degree of flexibility in order to fulfil the humanitarian objectives of the Convention in such cases, while upholding the proper rights of states to decline to admit aliens.⁵⁷

He additionally highlighted the importance of not imposing alien standards of human rights protection on third states:

The primary focus of the Convention is territorial, but, as examination of the Strasbourg jurisprudence shows, it cannot now be said that persons seeking asylum in a member state of the Council of Europe are unable to invoke any of the provisions of the Convention when resisting an expulsion decision. *I do regard it as important, however, that member states should not attempt to impose Convention standards on other countries by decisions which have the effect of requiring adherence to those standards in those countries*.⁵⁸

⁵⁴ *Ibid* at para 24. Lord Carswell states the law provides that the breach must be “flagrant”, which denotes the right being completely denied or nullified in the requesting state, at para 69.

⁵⁵ *Ibid* at para 20, reference omitted.

⁵⁶ *Ibid* at para 66.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at para 63. Emphasis added.

This point is significant and supports the arguments proffered below against the extraterritorial application of human rights law. *Ullah*, then, whilst authority for the HRA applying extraterritorially in extradition and expulsion cases also explicitly admits the possibility of divergent approaches between the HRA and the Convention and contains certain *dicta* in support of a more restrictive approach being applied to the HRA.

Razgar, like *Ullah*, follows the ECtHR's approach while also containing *dicta* which can be used in support of a less expansive approach to jurisdiction. As noted, the issue in *Razgar* was whether article 8 could form the basis of an argument against extradition and expulsion in a case where the removal did not also violate article 3.⁵⁹ The Court, by three to two, held that article 8 could be invoked on its own. Lord Bingham stated:

... the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong ... an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state.⁶⁰

Following the decision on principle the Court held by a majority on the facts that it was not possible to hold as manifestly unfounded the argument that *Razgar*'s removal would infringe his article 8 rights.⁶¹ However, Lord Bingham stressed that:

... removal cannot be resisted merely on the ground that medical treatment or facilities are better or more accessible in the removing country than in that to which the applicant is to be removed ... It would indeed frustrate the proper and necessary object of immigration control in the more advanced member states of the Council of Europe if illegal entrants requiring medical treatment could not, save in exceptional cases, be removed to the less developed countries of the world where comparable medical facilities were not available.⁶²

Baroness Hale, dissenting, highlighted the fact that difficult decisions needed to be made in these circumstances:

... this is a field in which harsh decisions sometimes have to be made. People have to be returned to situations which we would find appalling. The United Kingdom is not required to keep people here who have no right to be here unless to expel them would be a breach of its international obligations. It does the cause of human rights no favours to stretch those obligations further than they can properly go.⁶³

⁵⁹ Article 8 provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

⁶⁰ *Razgar*, n 1 above at para 10.

⁶¹ Lord Walker dissented in part due to the "wide and imprecise" language used in interpreting article 8, at para 34. In analysing the situation in Germany, he stated "... neither the truism of human imperfection, nor the evidence (taken at its highest) of conditions in Germany, leads to the conclusion that the respondent's treatment in Germany would probably be so much worse than his present condition as to amount to a flagrant infringement of his human rights – an infringement so serious as would ... result in the rights in question being completely denied or nullified", at para 37. Lord Walker's dissent will be further mentioned below.

⁶² *Ibid* at para 4.

⁶³ *Ibid* at para 65. Baroness Hale terms this type of case a "health case" in that arguments against extradition or expulsion focus on the possible disparity in treatment available between the United Kingdom and the state to which the person is perhaps to be sent.

Although they disagreed in this case, both Lord Bingham and Baroness Hale strongly emphasised the fact that there are real and practical factors in support of a narrow approach to the extraterritorial application of human rights law in extradition and expulsion cases. These factors, including the policies behind immigration control and the coherence and defensibility of human rights themselves, lend support to a restrictive approach being taken to the HRA's spatial applicability.

A Scottish case similar to *Razgar* is *Wright v Scottish Ministers*.⁶⁴ Here Wright's argument against extradition to Estonia on the basis of article 8 was dismissed. It was held that whilst his case was tenable in law it was not established in fact. The high threshold needed to establish such an argument was emphasised by the Court of Session, with passages in both *Ullah* and *Razgar* being cited with approval.⁶⁵ Significantly the court, in discussion of the proportionality of the interference with Wright's article 8 rights against the interests served by extradition, stressed the need to construe extradition treaties liberally: "... the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would 'hinder the working and narrow the operation of most salutary international arrangements'".⁶⁶ The court later discussed the purpose of extradition:

The object of extradition is to return a person who is properly accused or has been convicted of an extradition crime in a foreign country to face trial or to serve his sentence there . . . The extradition process is only available for return to friendly foreign states with whom this country has entered into either a multi or a bilateral treaty obligation involving mutually agreed and reciprocal commitments. Mr Perry, on behalf of the claimant, accepts that there is a strong public interest in our respecting such treaty obligations. Such international co-operation is all the more important in modern times, when cross-border problems are becoming ever more common, and the need to provide international solutions for them is ever clearer.⁶⁷

The court reached the following conclusion on the proportionality argument:

. . . we have not been persuaded that the mere possibility of prosecution of the claimer in Scotland, presumably under sec 20 of the 1971 Act, can be seen as rendering the claimer's extradition, with the consequent interference with his Art 8 rights, as not "necessary in a democratic society . . . for the prevention of disorder or crime", within the meaning of Art 8(2) of the European Convention on Human Rights.⁶⁸

The focus of the court upon the purpose and nature of extradition supports the arguments proffered below based on state sovereignty and territorial integrity. Indeed, all three of the recent cases discussed contain cogent arguments in favour of a limited approach to jurisdiction in extradition and expulsion cases. Admittedly they also provide authority for articles additional to article 3, namely articles 2, 4, 5, 6, 8, and 9 being able to found the basis of an argument against an extradition or expulsion. They also, however, stipulate a high and relatively difficult to establish threshold that must be overcome to argue a case successfully on the basis of one of these articles.⁶⁹

⁶⁴ N 2 above.

⁶⁵ *Ibid* at paras 53–54.

⁶⁶ *Ibid* at para 59, citing *R v Ashford Remand Centre, ex p Postlethwaite*, [1988] 1 AC 924, at 946, *per* Lord Bridge.

⁶⁷ *Ibid* at para 64, citing *R v Secretary of State for the Home Department, ex p Warren*, [2003] EWHC Admin 1177, at para 40, *per* Hale LJ.

⁶⁸ *Ibid* at para 70.

⁶⁹ An interesting case, with facts converse to these extradition and expulsion cases is *HMA v Vervuren*, n 2 above. Here it was argued that a criminal trial in Scotland should not proceed *inter alia* because of a human rights violation occurring during the course of Vervuren's rendition to Scotland from Portugal. The human rights argument was dismissed see further Arnell, n 5 above.

Wholly Extraterritorial Cases

Recent wholly extraterritorial cases considered by courts in England and Scotland, like extradition and expulsion cases, do three things: confirm that the HRA has been applied extraterritorially using the tests developed by the ECtHR; establish that this need not have been the case as a matter of law and provide reasons for the adoption of a narrower approach to jurisdiction. As noted above, the Convention has been held by the ECtHR to apply where both the alleged victim and violation are outwith the territory of the relevant state party and outwith the Council of Europe. This type of wholly extraterritorial application of human rights law has been adopted by United Kingdom courts. A leading case here is *Al Skeini*⁷⁰ where the Court of Appeal held that the HRA applied to a prison in Iraq under United Kingdom control during the period between the cessation of combat operations and the assumption of power by the Iraqi interim government. It had been conceded by the Crown that the United Kingdom was exercising extraterritorial jurisdiction over the prison for the purposes of the Convention. The question for the Court of Appeal was whether the HRA itself applied.⁷¹ Brooke LJ stated that the HRA "... can be naturally interpreted as impliedly having extra-territorial effect in the very limited number of cases in which the state has exercised extra-territorial jurisdiction on [state agent authority] principles".⁷² Specifically, the Court of Appeal overturned the High Court's ruling that the failure to investigate the death of the applicant's son in the prison sufficiently contravened article 2 of the Convention on the basis of new evidence of ongoing investigations. However, like the High Court, the Court of Appeal dismissed the claims of the five other applicants because it did not accept that the United Kingdom was exercising article 1 jurisdiction over the Iraqi territory outside the prison where they died. A distinction was drawn between the wider territory, where an "effective control of an area" test was applied and the prison, where a "state agent authority" test was held to be applicable.⁷³

Brooke LJ usefully discussed both ways in which a person or event could be brought with the jurisdiction of the United Kingdom under the Convention: state agent authority (abbreviated in the judgment as SAA) and effective control of an area (ECA).⁷⁴ In holding that jurisdiction existed over events in the United Kingdom controlled prison, he stated "[i]n my judgment, Mr Mousa came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops".⁷⁵ He continued, as regards SAA, he continued

It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and effectively restrict someone's liberty he is under their control. This did not happen in any of these five cases [in the general area of United Kingdom controlled southern Iraq].⁷⁶

⁷⁰ N 1 above.

⁷¹ As Sedley LJ stated "... the Crown accepts that such an establishment is analogous to a diplomatic legation: not an extension of British territory but a United Kingdom enclave within another state, and so within the *espace juridique* of the Convention", *ibid* at para 185.

⁷² *Ibid* at para 147. The High Court, whose substantive decision in regard to the application of the Convention and Human Rights Act 1998 was upheld by the Court of Appeal, equated the prison with consular and diplomatic premises noting that they both had a "discrete quasi-territorial quality", *ibid* at para 270.

⁷³ A more recent and related case is that of *Al-Jedda*, n 1 above, where the Court of Appeal held, following *Al Skeini*, that whilst the HRA and Convention could apply to persons detained by British forces in Iraq (as the claimant was) the operation of Security Council Resolution 1546, S/Res/1546 (2004), *inter alia* endorsing the formation of an interim Iraqi government, qualified the application of the law and therefore limited his human rights, at para 80. *Al-Jedda* therefore could not rely on article 5(1).

⁷⁴ Sedley LJ stated that the sole criterion is effective control: "[h]ere I would accept that while ECA and SAA have proved useful exegetic tools in analysing the decisions of the ECtHR, they do not represent discrete jurisprudential classes each of which attracts state liability. The single criterion is effective control", *ibid* at para 191.

⁷⁵ *Ibid* at para 109.

⁷⁶ *Ibid* at para 111.

Brooke LJ then turned to ECA authority and considered whether the concept is distinct from “occupation” as defined by international humanitarian law. He concluded “. . . whatever may have been the position under the Hague Regulations, the question this court has to address is whether British troops were in effective control of Basrah City for ECA purposes”.⁷⁷ He then distinguished the situation in Iraq with those that had been examined in Strasbourg jurisprudence in northern Cyprus and the Russian-occupied part of Moldova.⁷⁸ He concluded “[i]n my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time”.⁷⁹

Having held that, under the Convention, the prison – but not the wider area of southern Iraq – was within the jurisdiction of the United Kingdom, Brooke LJ examined the position under the HRA. He concluded that “. . . the HRA has extra-territorial effect in those cases where a public authority is found to have exercised extra-territorial jurisdiction on the application of SAA principles”.⁸⁰ Significantly, in coming to this conclusion, he relied upon dicta in *B and Others* and *Quark* as being strongly persuasive authority.⁸¹ Richards LJ also relied on this authority, stating “. . . I agree with Brooke LJ that the right course is to follow the dicta in *B and Quark* and leave it to the House of Lords to decide whether those dicta are wrong”.⁸² The Court of Appeal in *Al Skeini* was, of course, not bound to follow these judgments. As the facts of *B and Others* and *Quark* were materially distinct from those in *Al Skeini*, it is suggested that this should not have happened.⁸³ In addition to the decision in *Al Skeini* being premised on dicta in cases not directly in point; it is significant for the discussion it contains of the relationship between the Convention and the HRA. In this regard, Brooke LJ stated that the scope of the HRA need not be co-extensive with the Convention:

. . . this country was not obliged to incorporate the ECHR into its national law, either in whole or in part. The HRA would still be compatible with (or consonant with) the UK’s international obligations under the ECHR even if it were not co-extensive with the ECHR in its territorial scope. Furthermore, the House of Lords has recently made it clear that a person may have rights enforceable in Strasbourg and not in the UK if those rights accrued before the HRA came into force (see *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807 at [25] and [68]): the extent of the rights under national law depends on the language of the national statute (see *McKerr* at [63]).⁸⁴

This is important and in line with the extradition and expulsion authorities discussed above. It confirms that it would be lawful for courts in the United Kingdom to apply the HRA in a more limited way than that taken by the ECtHR in applying the Convention.

B and Others,⁸⁵ although not wholly extraterritorial in the sense of *Al Skeini*, is a second relevant recent case in this area. Here the Court of Appeal held that the actions

⁷⁷ *Ibid* at para 121.

⁷⁸ The latter being at issue in *Ilascu v Moldova*, n 36 above. In discussing effective control, Lord Sedley stated “[t]he decisions of the European Court of Human Rights do not speak with a single voice on the question whether such a level of presence and activity engages the responsibility of a member state on foreign soil”, *ibid* at para 193.

⁷⁹ *Ibid* at para 125.

⁸⁰ *Ibid* at para 148.

⁸¹ *Ibid* at para 147.

⁸² *Ibid* at para 211.

⁸³ *B and Others* is discussed below and it will be recalled that *Quark* concerned the applicability of the HRA in territories where an article 56 declaration had been made.

⁸⁴ *Ibid* at para 145.

⁸⁵ N 1 above.

of United Kingdom consular officials in their offices in Melbourne, Australia, did not breach the Convention. The facts in this case were that two children who had been detained in the Woomera detention centre had found their way into the consulate. They argued that if handed back to the Australian authorities their rights would be infringed. On the facts, the court held against the applicants, stating that the treatment that the applicants would receive was not serious enough to warrant the United Kingdom's disregarding its obligation under the Vienna Convention on Consular Relations 1963⁸⁶ to return the two to the Australian authorities. Significantly the court analysed the case acting under the assumption that the situation in the consulate was within the jurisdiction of the United Kingdom under article 1.⁸⁷ As a result the court's subsequent decision that the HRA did apply in the same manner as the Convention itself was *obiter*, as Brooke and Sedley LJ noted in *Al Skeini* above. Therefore, there remains to be a definitive judicial statement that the HRA applies in the same way as the Convention in wholly extraterritorial cases. Also germane here is the court's view of the relationship between the Convention and the HRA. It cited with approval from the speech of Lord Hoffmann in *McKerr*:

Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.⁸⁸

This, like *Al Skeini*, confirms that the HRA may be applied differently to the Convention. It is not the Convention or Strasbourg jurisprudence that is determinative of the scope of the HRA. It is the HRA itself as interpreted under the relevant rules of United Kingdom law.

The final instance of wholly extraterritorial authority to be discussed is the Scottish case of *Al Fayed*.⁸⁹ Here the application of human rights law on a wholly extraterritorial basis was considered and rejected. Lord Drummond Young in the Outer House of the Court of Session dismissed a petition for judicial review of the Lord Advocate's refusal to hold a public inquiry into the circumstances of Dodi Al Fayed's death in Paris in August 1997 on the basis of Mohamed Al Fayed's residence in Scotland. He held that the Convention normally only extends to events that occur within a state party's territory and that there was no reason why Al Fayed's right to a public investigation under article 2 should be enforceable in any other jurisdiction than France. He stated

The death of the petitioner's son occurred in France. It follows that any obligations under the Convention in relation to that death are primarily those of France, and the obligations of the United Kingdom under the Convention do not extend to the investigation of such a death.⁹⁰

⁸⁶ (1963) 596 UNTS 261.

⁸⁷ The court stated "[w]e are content to assume (without reaching a positive conclusion on the point) that while in the Consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1. Whether the conduct of Mr Court and Mr Mudie in fact infringed the Convention is a question that we shall consider when we come to the third of the issues raised by this appeal", n 1 above at para 66.

⁸⁸ *Ibid* at para 74, from *In re McKerr*, [2004] 1 UKHL 12 at para 63.

⁸⁹ N 2 above.

⁹⁰ *Ibid* at para 4.

In emphasising the importance of territory Lord Drummond Young stated:

The European Convention on Human Rights was concluded against a background of customary international law, and the obligations that it imposes on High Contracting Parties must be construed in the light of that background. Under international law, the jurisdiction exercised by a state is primarily territorial. While exceptions exist, notably in relation to ships and aircraft and diplomatic and consular premises, the primary rule is that a state is entitled to exercise jurisdiction over all persons and things within its own territory.⁹¹

This, it will be recalled, mirrors the position in *Bankovic* in its emphasis on extant international law and the importance of territory. While *Al Fayed* is distinguishable from *Al Skeini* and *B and Others, inter alia* because the locus of the alleged violation was within the territory of another party to the Convention, it is relevant for its emphasis upon the importance of general international law and territorial jurisdiction and as such for supporting arguments in favour of a restrictive approach to HRA jurisdiction.

CRITICISM OF THE LAW

State Sovereignty and Territorial Integrity

The extraterritorial application of the HRA described and analysed above is subject to criticism on a number of grounds. The arguments against, and for, the extraterritorial application of human rights law apply to all states, not just the United Kingdom.⁹² As such the discussion below will not specifically address United Kingdom law and practice, but will be couched in general terms. Militating against the extraterritorial application of human rights are a number of factors that can be classed under the broad heads of state sovereignty and territorial integrity; neo-imperialism; universalism; extant *fora*; effectiveness; *realpolitik* issues and the conferral of legitimacy. Of the factors weighing against the extraterritorial application of human rights perhaps the most cogent is that it conflicts with one of the most fundamental rules of international law, the norm protecting the sovereignty and territorial integrity of all states. Amongst the many iterations of this rule is the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which *inter alia* provides as a principle "... the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter". It continues:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.⁹³

The application of human rights law in an extraterritorial way undermines this rule. As was emphasised in the jurisprudence above, in particular in *Bankovic* and

⁹¹ *Ibid* at para 8. Lord Drummond Young also stated that practical difficulties stood in the way of the extraterritorial application on human rights, these are noted below.

⁹² The United Kingdom is, of course, not alone in engaging in the practice. It occurs both within and outside the Council of Europe. This fact in itself weighs against the application of the law in this way as it creates the possibility of two or indeed more sets of (possibly incongruent) human rights laws applying to a single incident.

⁹³ UN General Assembly Resolution 2625 (XXV), 24 October 1970, 25 UN GAOR, Supp (No 28), UN Dec A/5217 (1970), at 121.

Al Fayed, the importance of extant conventional and customary international law and the protection it affords to territory cannot be overlooked.

The norm protecting state sovereignty and territorial integrity is infringed by both forms of the extraterritorial application of human rights law. The application of law in a wholly extraterritorial sense violates it because it entails a court taking cognisance of an event that has taken place within the territory of another sovereign state.⁹⁴ Clearly and necessarily this entails an intervention or interference within the internal affairs of that state. Under it, persons and activities within the territorial area of that third state are subjected to the application of extraneous law.⁹⁵ The ability of that third state to act exclusively, or not act, in regard to the situation is frustrated. That the wholly extraterritorial application of human rights law must follow the exercise of extraterritorial effective spatial control or state agent authority does not negate this fact. Indeed in one sense it can be seen to compound that interference by adding to the exercise of executive control attempted judicial regulation. Extradition and expulsion cases also conflict with the rule protecting state sovereignty and territorial integrity. As noted above, they necessarily involve an “assessment of conditions in the requesting country”.⁹⁶ “Assessment”, it is submitted, is reasonably deemed a form of interference. Additionally, assessment is in certain cases followed by an attempt to affect the actions of assessed state by attaching conditions to the extradition or expulsion such as the non-application of a specific punishment in the event of conviction. Here there is a further interference. In order to prevent infringement of the rule protecting state sovereignty and territorial integrity by both forms of extraterritorial application of human rights law, alleged human rights violations arising through the operation of justice, governance or other circumstances in a particular state should exclusively be addressed by the legal or political system of that state itself, the *situs* of the violation, not the courts of a third state. This applies even where that third state may be in some sense involved in the situation. If the territorial state is not able to act at the time of the alleged violation then it should be allowed to exclusively act (or decide not to act) when it is able to do so. International law not only protects state sovereignty and territorial integrity but also mandates the equality of all states. No one state is, or should be, an arbiter of another. Where the territorial state’s actions are thought to be deficient extraneous extant international mechanisms and procedures designed for exactly such circumstances, discussed below, can become engaged to address the situation. Although perhaps trite to note, state jurisdiction has been, and remains, predominantly and pre-eminently territorial.

Neo-imperialism

A second argument against the extraterritorial application of human rights is that it can be used and perceived as a form of neo-imperialism. This arises from the possibility that the extraterritorial application of law can be employed as a tool, either directly or indirectly, to impose upon or within a third state a foreign policy. Directly this takes place through the overt imposition of a rule or set of rules. Illustrating this phenomenon most graphically is not human rights but rather competition law, where

⁹⁴ As will be noted below, here the extraterritorial application of law can serve to legitimise previous illegality.

⁹⁵ Of course municipal law is occasionally applied to persons and circumstances in third states. This normally occurs in the area of private law or exceptionally in regard to diplomatic and consular premises and activities and more generally in the area of criminal law. Similar arguments against the extraterritorial application of criminal law can be made as those against the application of human rights law extraterritorially, with greatest force in regard to non-nationals and residents. See further below.

⁹⁶ *Soering*, n 13 above at para 91.

objections and disputes have arisen.⁹⁷ As just noted however, attempts to affect the human rights-related policy of a requesting state in regard to the non-imposition of capital punishment on the grounds of human rights have occurred in certain extradition and expulsion cases. Indirectly, human rights-related policy can be imposed upon a third state through wholly extraterritorial cases where judgment is made upon the factual situation or legal system in it. Highlighting this rather starkly is Brooke LJ's statement made in the context of a discussion of the level of effective control exercised by the United Kingdom in southern Iraq

And it is in any event very much open to question whether an effort by an occupying power in a predominately Muslim country to inculcate what the ECtHR has described as "the common spiritual heritage of the member states of Europe" during its temporary sojourn in that country would have been consistent with the Coalition's goal, which was to transfer responsibility to representative Iraqi authorities as early as possible.⁹⁸

Setting aside the numerous other issues relating to the invasion of Iraq, the inculcation of one state's or region's "spiritual heritage" within a third state is objectively tantamount to an aspect of neo-imperialism. This point regarding wholly extraterritorial cases is, of course, not restricted to Iraq, but applies wherever a foreign human rights law is imposed within a third state. It is clear that both types of extraterritorial application of human rights law can be seen as aspects of a neo-imperialistic policy and can be either be pursued with the intent to affect law or governance in a third state or occur unintentionally as a by-product of extraterritorial state action. It should be noted however that the weight and scope of this argument turns, in part at least, on the nature of the human right in question. This issue forms the basis of the next argument against the extraterritorial application of human rights law.

Universalism

The disputed, or at least unsettled, issue of the universality of human rights provides further context for arguments against the extraterritorial application of human rights law. The question of universalism centres upon the question whether human rights have global application and meaning. If they do, then the arguments based on sovereignty and neo-imperialism above are clearly weakened.⁹⁹ Here the only contentious issue is the unorthodox nature of the procedure by which universal human rights are protected, not their protection *per se*. On the other hand, if human rights are not universal but vary in application and meaning according to territory, culture *etcetera* then there is the real risk that the extraterritorial application of human rights law would entail the imposition of foreign and inappropriate rules. Otto points out the inherent danger:

In contemporary debates, the "universalists", who are primarily Northern states, predict that even the slightest "dilution" of universalism will give the green light to tyrannical governments, torturers, and mutilators of women. The universalist position completely

⁹⁷ In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation (Nos 1 and 2)*, [1978] AC 547, Viscount Dilhorne stated "[f]or many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other states, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty", at p 631. A recent case has arisen where the United States is seeking extradition from Poland of a United Kingdom resident for allegedly contravening its trade restrictions, see *The Times*, 10 April 2007.

⁹⁸ *Al Skeini*, n 1 above at para 127.

⁹⁹ There is a huge literature on universality, see for example J Donnelly, *Universal Human Rights in Theory and Practise* (Cornell University Press, 1989) and E Brems, *Human Rights: Universality and Diversity* (Kluwer Law International, 2001).

denies that the existing universal standards may themselves be culturally specific and allied to dominant regimes of power. As political philosopher Daniel Bell observes, “even some of the most thoughtful proponents of human rights in the West do not admit the possibility that every society need not settle on exactly the same conception of vital human interests”. At the same time, “cultural relativist” counterarguments from Southern states entrench an intense polarization of views. The relativist position advances alternative claims to universal Truth that have their foundation in non-European cultural traditions and rejects the current human rights paradigm as oppressive for developing states with different cultures.¹⁰⁰

It is between those states and regions that emphasise a different conception of human rights that the dangers inherent in the extraterritorial application of human rights law are most readily apparent, such as between Africa and Europe. From an African perspective, it has been written

Human rights, if they are to be truly universal must be multi-cultural: “the European student should study the African Charter in order to better understand African perspectives and conceptions of human rights as an important constituent part of a universal concept of human rights”. As Cobbah argues, “western and non-Western scholars should seek to overcome their gaping chauvinism and help admit other world-views into the international discourse”.¹⁰¹

Whilst it is beyond the scope of this article to enter into the universality debate, there is no doubt variety in the human rights protected and emphasised by various instruments and in their interpretation in states and regions.¹⁰² This variation and lack of practical universality ensures that it cannot be certain that the rights protected in one territory are, or should be, protected in another. And in line with the arguments above, the protection of a right by a state acting extraterritorially that legitimately does not have a place in the domestic law of the *situs* of the alleged violation interferes with that state’s sovereignty and territorial integrity and can be perceived as an act of neo-imperialism.

Extant Fora

The existence of *fora* and mechanisms designed to address situations where states are thought to be unable or unwilling to protect or redress alleged human rights violations within their territory weighs against the extraterritorial application of human rights law. There are a number of such regional and international *fora* and mechanisms such as that under the European Convention of Human Rights; the United Nations Committee on Torture; the United Nations Human Rights Committee; the International Committee of the Red Cross as well as numerous non-governmental organisations such as Amnesty International. In regard to the European regional intergovernmental system Lord Drummond Young has stated:

... the structure of the Convention as a whole indicates that it is built around the principle of the exclusive territorial jurisdiction of each High Contracting Party. This appears from the provisions of the Convention that deal with breaches of their obligations by High Contracting Parties. The scheme of the Convention is that any complaint about such a

¹⁰⁰ D Otto, “Rethinking the ‘Universality’ of Human Rights Law” 1997 CHRLR 1 at p 8, footnotes omitted.

¹⁰¹ R Murray, “International Human Rights: Neglect of Perspectives from African Institutions” (2006) 55 ICLQ 193 at p 197, footnotes omitted.

¹⁰² As an example, the particular and expansive interpretation of article 8 of the Convention by the ECtHR is not widely shared. An instance of which is found in *Berrehab v The Netherlands*, (1988) EHRR (Series A) 138, where the Court held that a Moroccan national, the former husband of a Dutch national, was entitled to remain in The Netherlands in an exercise of his right to family life in order to maintain contact with his daughter.

breach must be taken not to the authorities of another state but to a supranational authority, the European Court of Human Rights.¹⁰³

Clearly, one of the reasons for the creation of regional mechanisms was to address situations where territorial states are unwilling or unable to act, at all or sufficiently. In such cases an individual within a participating state could, in certain circumstances, argue before the regional authority that that state was acting in contravention of the applicable treaty. Further, under some regional regimes there is the opportunity for inter-state complaints. Under the Convention this is governed by article 33 (individual petition is provided for by article 34).¹⁰⁴ The possibility of inter-state complaints particularly weakens arguments in favour of the extraterritorial application of human rights by state parties *vis-à-vis* other state parties. Surely, the use of an agreed system is the desirable course. This would prevent both accusations and the possibility of bias. The unilateral extraterritorial application of law by states parties subverts the essence of these schemes in regard to both inter-state and individual complaints.

In addition to regional systems are international intergovernmental mechanisms that act to vitiate the need for, and utility of, unilateral state action. The Committee Against Torture, created under article 17 of the Torture Convention, is one such mechanism. The Committee engages in three types of activity: scrutiny of state party reports and, where accepted by the relevant state party; consideration of inter-state (article 21) and individual complaints (article 22). Through the report of a state allegedly responsible for torture under an inter-state or individual complaint the Committee Against Torture becomes seized of the situation. This, to a certain extent at least, obviates the need for municipal legal systems to take cognisance of the issue.¹⁰⁵ Similar to the Committee Against Torture but broader in scope is the Human Rights Committee established by article 28 of the International Covenant for the Protection of Civil and Political Rights 1966. It also scrutinises state reports, and where accepted by state parties, examines inter-state complaints (article 41) and individual petitions (First Optional Protocol).¹⁰⁶ The Committee Against Torture and the Human Rights Committee are, of course, institutions specifically designed to address human rights violations. That they do so relatively successfully at an intergovernmental level, to a certain extent at least, vitiates the need for the unilateral extraterritorial application of human rights law. Indeed, the extraterritorial application of law by individual states can be inimical to intergovernmental attempts to address and protect human rights. This is because it may give rise to a perception that unilateral action is the preferable manner to address human rights violations that are not, or can not, be addressed by the government of the *situs* of the violation. This in turn could weaken arguments in favour of enhancing the effectiveness of these intergovernmental mechanisms. It is submitted that concerted co-ordination with, and assistance to, these institutions is what is required rather than the usurping of their functions by individual states unilaterally.

¹⁰³ *Al Fayed*, n 2 above at para 20.

¹⁰⁴ Article 33 provides "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party".

¹⁰⁵ The efficacy of the Committee Against Torture is limited in that it does not deliver binding judgments and that only those states that are party to the Torture Convention and have accepted the possibility of art 21 and art 22 complaints are subjected to this procedure. See generally A Dormenvil, "UN Committee against Torture: Practice and Perspectives" (1990) 8 NQHR 26. It is worth noting that art 7(1)(f) of the Statute of the International Criminal Court prescribes as a crime against humanity the act of torture. To fall within the definition the act *inter alia* must be committed as part of a widespread or systematic attack directed against any civilian population. As such, and indeed it being concerned with criminal sanctions not human rights protection, it is only tangentially an alternate forum to municipal courts acting extraterritorially.

¹⁰⁶ See generally S Joseph, *et al*, *The International Covenant on Civil and Political Rights: Cases and Material and Commentary* (Clarendon Press, 2000).

The work of other international and non-governmental organisations also militates against the application of human rights law extraterritorially by individual states. Perhaps pre-eminent here for our purposes is the International Committee of the Red Cross (ICRC).¹⁰⁷ Germane examples of its relatively recent activities are its visits to detainees in Cuba, Afghanistan and Iraq.¹⁰⁸ As the work of the ICRC often takes place in areas of conflict where municipal law may not be applied at the time, its activities usefully address concerns behind certain arguments in favour of extraterritorial jurisdiction. Admittedly it does not adjudicate possible human rights violations. It does, however, work to ameliorate conditions that could give rise to further violations. At a non-governmental level there are a large number of organisations that are relevant, such as Amnesty International.¹⁰⁹ Being non-governmental, this and similar organisations are not constrained by political or diplomatic considerations. They can investigate and publicise human rights violations without engendering accusations of neo-imperialism or political bias. Indeed it is preferable, for reasons of apparent and actual objectivity, that all three types of organisation – intergovernmental, hybrid and non-governmental – identify acts where human rights violations are alleged or suspected. The existence and activities of these organisations largely counter the argument that the extraterritorial application of law is needed because human rights abuses occur in a legal and political vacuum. A final, albeit controversial, mechanism that should be noted and may be employed to address extraterritorial human rights violations are memoranda of understanding governing the treatment of extradited or expelled persons. These agreements address the reasons why the law is applied abroad in extradition and expulsion cases, namely the concern over possible future treatment. The United Kingdom government in its current efforts to address terrorism has concluded two of these agreements, with Jordan on 10 August 2005 and with Libya on 18 October 2005.¹¹⁰ These memoranda provide that persons returned to these states from the United Kingdom will be treated in a humane manner in accordance with internationally accepted treatment.¹¹¹

Questionable Effectiveness

Concerns over the effectiveness of the extraterritorial application of human rights law augment the arguments above and support a restrictive approach to the law being applied in this way. Effectiveness is conceived in terms of achieving actual human rights protection and redress for violations, including the prevention of violations through the operation of an immediate and enforceable deterrent and the provision of some form of satisfactory and public redress to victims of violations. As regards wholly extraterritorial cases, it is debatable whether the application of human rights abroad generally prevents or redresses violations in a meaningful way.¹¹² As with national cases (but without the domestic press coverage and level of political scrutiny) the

¹⁰⁷ The ICRC describes itself as neither an intergovernmental organisation nor a non-governmental organisation but rather a hybrid in that it is a private association under Swiss law yet given a mandate and recognised by public international law, at <http://www.icrc.org/eng>.

¹⁰⁸ R Wilde, "Legal 'Black Hole': Extraterritorial station action and international treaty law on civil and political rights" (2005) 26(3) MJIL739 at p 765. Wilde cites an International Committee of the Red Cross publication, "US Detention Related to the Events of 11 September and its Aftermath-the Role of the ICRC", 14 May 2004.

¹⁰⁹ Amnesty International's website is found at <http://www.amnesty.org/>.

¹¹⁰ See *The Guardian* 19 October 2005.

¹¹¹ Pannick argues that the rendition of terrorist suspects abroad will not be successful in that courts will not be swayed by the existence of the memoranda, see D Pannick, "Britain Sending Terrorism Suspects Abroad? It's Not Going to Happen" *The Times* 27 September 2005. This appears not to be the case in that the Special Immigration Appeals Commission upheld the Home Secretary's decision to deport Abu Qatata to Jordan 26 February 2007, see <http://news.bbc.co.uk/1/hi/uk/6396447.stm>.

¹¹² Wilde states "... one should not be too sanguine as to the value of international human rights law to provide meaningful and effective review of extraterritorial state action", n 108 above at p 784.

application of human rights law abroad in wholly extraterritorial cases can entail the acceptance by a state of judicial self-scrutiny. It is clear that executive state action giving rise to effective extraterritorial control and state agent authority is exceptional and would be likely to entail danger to the security of its nationals. States engaged in such behaviour are likely to view human rights considerations as secondary. It is reasonable to assume instead that that state's priorities would be the success of the extraterritorial mission and the safety of its nationals. It is preferable that the territorial state apply its law instead of having the state acting extraterritorially putatively conditioning and scrutinising its own behaviour. As above, if this is not possible then other extant fora can take cognisance of the issue. As regards extradition and expulsion cases, questions can also be raised about the effectiveness of the application of human rights abroad. Admittedly, in certain specific instances, such as *United States v Burns*¹¹³ and *Soering*,¹¹⁴ the extraterritorial application of law was arguably effective in the sense that it led to assurances by the prosecuting authorities in the United States that the accused person(s) would not be subjected to a death sentence if convicted. In other cases, such as *Ullah* and *Wright v Scottish Ministers*, the "stringent test" set by the courts meant that the litigation did not prevent the extradition or expulsion and so was not effective in that sense. It is here necessary to consider the impact of an "effective" extradition or expulsion case on other rules of law and state practice. A case such as *Soering*, for example, resulted in an interference with the sovereignty of the United States of America.¹¹⁵ The law applied in this way may also create an incentive for states to turn to irregular methods of rendition.¹¹⁶

Realpolitik Considerations – State Security

Two related *realpolitik* considerations support the intraterritorial application of human rights law. The two aspects of a state's national interest adversely affected by the application of the law in this way are its security and the danger that it becomes a haven for suspected and convicted criminals. As regards the former, the extraterritorial application of law may affect a state's security by limiting its ability to protect itself. The "war on terror" and engagement in Iraq, some argue, merit a new approach to international relations as well as a re-evaluation of existing law and legal protections. Tony Blair stated in a speech on 5 March 2004, in the context of the changing threats to the United Kingdom:

The characterisation of the threat is where the difference lies. Here is where I feel so passionately that we are in mortal danger of mistaking the nature of the new world in which we live. Everything about our world is changing: its economy, its technology, its culture, its way of living. If the 20th century scripted our conventional way of thinking, the 21st century is unconventional in almost every respect. This is true also of our security. The threat we face is not conventional. It is a challenge of a different nature from anything the world has faced before. It is to the world's security, what globalisation is to the world's economy.¹¹⁷

Of course, it is impossible to state with any degree of certainty whether the global situation is as Blair suggests.¹¹⁸ If, for the purposes of argument, one assumes that it

¹¹³ [2001] SCC 7, decided in the Canadian Supreme Court.

¹¹⁴ N 13 above.

¹¹⁵ Of course capital punishment *per se* is not prescribed by international law.

¹¹⁶ In regard to the latter, the law in certain jurisdiction including Scotland and the United States does not discourage irregular renditions. For Scotland see *HMA v Vervuren*, n 2 above and the United States *United States v Alvarez-Machain*, (1992) 119 LEd 441.

¹¹⁷ Cited at <http://www.number-10.gov.uk/output/Page5461.asp>.

¹¹⁸ This is a very controversial topic, and one outside the bounds of this article. For a recent work in the area see R Ashby Wilson (ed), *Human Rights in the "War on Terror"* (Cambridge University Press, 2005).

is, then it is perhaps not unreasonable that the spatial application of human rights law be revisited and limited. This would be justifiable upon the grounds that it is objectively more likely that those subjected to extradition or expulsion and perhaps also those in the theatre of extraterritorial state activity abroad are involved in actions inimical to the security of either the territorial state or a third state than other persons. Admittedly, it is by no means certain that these persons are in fact involved in harmful activity. And indeed the “new threat” Blair identifies may not in fact be real. However, since a line must be drawn at the margins of the application of municipal law at some point, it is submitted that it is reasonable and logical to draw it more narrowly than widely.

Realpolitik Considerations – Safe Havens

The possibility of states becoming havens for those suspected and convicted of serious crime supports the argument against the extraterritorial application of human rights law. This applies in particular but not exclusively to extradition and expulsion cases. It can occur, for example, where persons migrate to a particular state so as to escape the legal system of the territory where they have committed a crime. In *Soering* the ECtHR stated in this regard:

What amounts to “inhuman or degrading treatment or punishment” depends on all the circumstances of the case . . . Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.¹¹⁹

Similar concerns have been expressed in Canada where suspects from the United States of America have entered the country, at least in part, to escape the possibility of capital punishment. Following the decision to extradite the two accused in *United States v Burns*, the then Canadian Minister of Justice, Alan Rock, stated “. . . that Canada cannot be allowed to become a safe haven for criminals, no matter what their nationality, who seek to escape the penalty of the State in which they chose to commit a crime”.¹²⁰ Clearly it is not in the interests of any state to become a safe haven for criminals. Those persons involved in serious crime would be attracted to those states and would bring with them the attendant possibility of recidivism.¹²¹ This argument also exists where human rights are applied in a wholly extraterritorial sense. Here persons may choose to subject themselves to a state’s extraterritorial spatial control or stage agent authority in order to avail themselves of protection they might otherwise not have. Whilst the safe haven in this scenario is extraterritorial, similar concerns as to possible recidivism and cost apply in territorial safe havens.

¹¹⁹ N 13 above at para 89.

¹²⁰ 12 July 1996, cited at <http://www.justice.gc.ca/en/news/nr/1996/burns.html>.

¹²¹ In addition to the possible danger posed is the financial cost where such persons are apprehended and subjected to legal proceedings. In certain cases there could also be medical expenses arising from the treatment of persons whose extradition or expulsion is pending. More generally, the inefficient use of resources is germane where there may be two investigations into a single incident. Lord Drummond Young in *Al Fayed* stated that such a possibility weighed against the application of Scots law in that case, n 2 above at para 15.

Conferral of Legitimacy

The final factor in opposition to the extraterritorial application of human rights law is that it may confer a degree of unwarranted legitimacy upon situations and states. This point applies mainly to wholly extraterritorial cases. It is to the effect that the application of a state's law may lead to the presupposition that the extraterritorial activity necessary for the law to be applied in this way in the first instance was itself lawful or, at least, in some sense acceptable. The application of law may in a sense regularise the *status quo ante* and deflect scrutiny from the legality of the extraterritorial spatial or personal effective control. In this regard the question has been posed "... does subjecting extraterritorial action to legal regulation merely provide greater legitimacy to extraterritorial action without actually placing such action under any meaningful constraint?"¹²² It is certainly arguable that the application of a state's municipal law (albeit extraterritorially) suggests that the extraterritorial spatial or personal control was in a sense regular. If the action was not lawful it seems reasonable to assume that a state's municipal law might not apply in its domestic courts in the circumstances. Of course, this point is not unreasonably countered by the suggestion that (regardless of a past illegality or irregularity) law, including that state's municipal law, should be applied in order to prevent and redress human rights abuses arising from the activity. Overall, however, it is submitted that there is merit in the conferral of legitimacy point. The application of human rights law abroad may deflect attention from the more important issue of the previous illegal or irregular behaviour. This argument can also be made as regards extradition and expulsion cases. Legitimacy can be seen to be given here, for example, where a court considers the prison conditions in a third state in which the legality of the government of that state itself is in question. A focus on a particular aspect of a state's government or machinery may lead to an inference of general legitimacy.¹²³ Again, as above, this can be countered by the argument, that in spite of debate over the legality or regularity of a government, individuals should not be deprived of their human rights. In this case, however, one could argue that concerns over the legality or legitimacy of a government should prevent consideration of an extradition or expulsion in the first instance.

DEFENCE OF THE LAW

The Rule of Law

There are, of course, arguments and factors supporting the extraterritorial application of human rights law. These include the rule of law; the need to cover lacunae in human rights protection and non-discrimination. The rule of law argument applies to wholly extraterritorial cases and is to the effect that the law should apply equally to all persons including the government.¹²⁴ It can be understood to mean that the law should apply to territory and persons under the effective control of a state's forces or agents wherever they act.¹²⁵ The applicability of law should not, it can be argued, be

¹²² R Wilde, n 108 above at p 780. He goes on implicitly to answer the question in the negative.

¹²³ See generally on illegitimacy B Roth, *Government Illegitimacy in International Law* (Oxford University Press, 2001).

¹²⁴ This is the second of the three facets of the rule of law expounded by Dicey, see AV Dicey, *Introduction to the Law of the Constitution*, 10th ed (Macmillan, 1959).

¹²⁵ The rule of law has a fairly long pedigree in international law. It is referred to in, for example, the United Nations Declaration of Human Rights 1948, GA Res 217A (III), GAOR, 3rd Sess. Part 1 at p 71, and the preamble to the European Convention on Human Rights 1950. It is not entirely clear whether these provisions relate to the rule of law at an international or municipal level. See NS Marsh, "The Rule of Law as a Supranational Concept" in AG Guest, (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) p 240. Highly sceptical of the concept at an international level is Koskenniemi who states that the "... vision of a Rule of Law between states ... is yet another reformulation of the liberal impulse to escape politics ..." in M Koskenniemi, "The Politics of International Law" (1990) 1 EJI 4 at p 6.

negated purely by reason of the *situs* of the actions of the officials in question. Arguments to this effect underline recent criticisms of the actions of the United States government and certain other states over so-called rendition flights.¹²⁶ Two important practical questions arise when one considers the rule of law in extraterritorial circumstances: what law should apply and in which forum should it be applied? In regard to the former question there are three possibilities: the law of the state acting extraterritorially; the law of the *situs* of the actual or future violation¹²⁷ and public international law. The applicability of the law of the state acting extraterritorially, as discussed above, contravenes rules of public international law protecting state sovereignty and territorial integrity and may give rise to accusations of neo-imperialism. These same rules support the view that it is the law of the *situs* of the actual or future violation which is most legitimately applied. Territorial state jurisdiction should normally prevail. As regards general public international law and customary human rights norms in particular, this *corpus* of law will generally apply in addition to applicable municipal law. The central issue is in what forum it should be applied, if at all.

In regard to the *fora* that should adjudicate possible human rights violations there are, again, three options: courts of the state acting extraterritorially; those of the *situs* of the alleged extraterritorial violation and internationally constituted courts or tribunals. As regards the two possible sets of municipal courts, it is preferable, for the reasons mentioned above (state sovereignty and territorial integrity) that the courts of the *situs* of the act take cognisance of the alleged violation. That states generally do not apply foreign public law adds support to this point; on the assumption that it is the law of the *situs* of the alleged violation that should be applied.¹²⁸ Indeed, it is very unlikely that one state would apply the human rights norms of another state in its own domestic courts. It follows that the doctrine of the rule of law militates in favour of the courts of the state of the *situs* of the actual or future violation applying domestic law either immediately following the alleged violation or when they are able to do so. If this is not possible, then the next preferable option is for internationally constituted courts or tribunals to apply either the law of the *situs* or public international law. As discussed above in regard to extant *fora*, this is preferable *inter alia* to guarantee as far as possible the objectivity of the process. Overall, then, the rule of law lends weight to arguments in favour of the application of human rights law abroad in an ambiguous way. It firstly favours the application of law to all persons and governments. This applies to situations where effective control of territory and persons is exercised on an extraterritorial basis by a state's forces and agents. Law must apply regardless of the *situs* of the activity. If this does not happen states may be encouraged to act extraterritorially and thus escape legal restriction. However the doctrine also militates against the application of the law of the state acting extraterritorially because of extant rules of international law outlined above. There is here a clash between the rule of law-mandated desire to apply law including, perhaps, foreign municipal law and the rules that prescribe interference and intervention within the domestic jurisdiction of all states. This conflict is remedied by prioritising firstly the rule of territorial law and

¹²⁶ The European Parliament recently approved a report condemning those European states complicit in the activity by allowing aircraft involved in the operation to land in their territory, see *The Guardian* 15 February 2007. Of course, various other actions of the United States in its "war on terror" have also engendered similar criticism.

¹²⁷ This assumes, of course, that the extraterritorial human rights violation will take place in an area governed, notionally at least, by a body of municipal law. This is not always the case, for example it may occur on a stateless vessel on the high seas.

¹²⁸ States generally refuse to apply the penal and revenue law of other states, see E Crawford, *International Private Law* (Sweet and Maxwell, 1998) at pp 25–32.

secondly, if this is not possible, the rule of applicable regional or international human rights law through established mechanisms.

Gaps in Human Rights Protection

A second argument in favour of the extraterritorial application of human rights law follows the first in that it relates to the applicability of law. It is more specific, however, in that it suggests that the law be applied to remedy a gap, or perhaps more controversially a deficiency, in human rights protection. As regards wholly extraterritorial cases, the *lacuna* in human rights protection is caused by a state's forces or agents exercising territorial or personal control outwith its territory and thereby preventing or limiting the application of the law of the *situs* (again, as above, this assumes that law is in fact applied in the *situs*).¹²⁹ Clearly, where the law of the *situs* is rendered practically inapplicable by extraterritorial control, it is reasonable that some form of regulation should fill the void. Indeed, here the need may be greater than otherwise because of the increased probability of human rights abuses as the state actors operating abroad may not feel constrained by law.¹³⁰ The extraterritorial application of human rights may serve a useful purpose in conditioning the behaviour of state representatives abroad by attaching to control a concomitant responsibility. Indeed it may perhaps thereby prevent extraterritorial activity in the first place, thus acting to protect state sovereignty and territorial integrity. As discussed above however, it is suggested that the extraterritorial application of law is, at best, a secondary option. Action usurping national regulation will, in most cases, conflict with the norms protecting state sovereignty territorial integrity and as such be unlawful. As noted above, the extraterritorial application of human rights may perhaps deflect and indeed compound this illegality.

As regards extradition and expulsion cases, the extraterritorial application of human rights law can act to fill a gap in human rights protection and remedy perceived deficiencies in a third state's human rights law and practice. In the former case, a state will examine the law in the requesting or destination state and discover an absence of relevant human rights protection and then afford the individual subject to removal protections that he or she otherwise would not have had. This is done by attaching conditions to the extradition or expulsion or, indeed, by a refusal to proceed with the rendition. Here protection is given where none existed. In the latter case, a state will assess and deem insufficient or deficient existing protection in a third state and either condition the extradition or expulsion or refuse to proceed with it. Of course, the distinction between a gap and a deficiency in the law is not always evident. Examinations of the nature of protection, if any, are made by the states extraditing or expelling the person. This, in itself, weighs against the extraterritorial application of law, especially in the light of the debate over universalism. However, it is clear that the extraterritorial application of law in extradition and expulsion cases can fill a gap in human rights protection. Certainly, as regards widely agreed basic and fundamental human rights, such as the right to be free from torture, it is to be supported. More generally however, for a number of the reasons discussed above including, again, state sovereignty and territorial integrity but also universalism and extant *fora*, it is desirable that it is used rarely and in limited circumstances only.

¹²⁹ Of course the application of one state's human rights law abroad may result in the granting of protection and redress where none existed previously or the granting of protection and redress in regard to a different set of rights.

¹³⁰ Wilde states "... the risk of human rights violations committed by the States involved may well be higher in these extraterritorial contexts than in the State's own territories", n 108 above at p 756.

Discrimination

A third argument in favour of the extraterritorial application of human rights is based on non-discrimination.¹³¹ It provides that a failure to apply human rights law in wholly extraterritorial cases leads to differing levels of protection being afforded to those under a state's control within and outside its territory. Undoubtedly this is true. Where a state protects human rights internally then the non-application of human rights law in areas or in regard to persons under its effective control outside its territory inevitably results in differential treatment. Clearly, discrimination in the application of human rights protection upon no objectively justifiable basis is undesirable. This finds expression in the non-discrimination provision in the Convention. Article 14 of the Convention provides

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The question that arises here is whether the *situs* of the alleged violation is a justifiable basis for discrimination in application. The list of grounds, whilst not exhaustive, does not expressly include territory. This exclusion is perhaps understandable because human rights are, of course, generally protected on an intraterritorial basis only. However, discrimination on the basis of the *situs* of the alleged violation does exist and, indeed, is practically inevitable. As regards the territories related to United Kingdom, there exists discrimination in that the HRA does not apply in its 14 Overseas Territories.¹³² More generally, discrimination in wholly extraterritorial cases is inevitable, because it is, in practice, impossible for states to ensure that the full range of human rights protected within their territory – particularly the positive obligations upon them – are met where they exercise effective control over an area or personal control over an individual outside their territory. The resources and infrastructure necessary to support a complete and developed system of human rights protection cannot be exported. The most effective way to minimise discrimination in the application of human rights law is, of course, not to apply human rights law abroad but to limit the number of circumstances and occasions where extraterritorial control is exercised.

An argument based on non-discrimination can also be made in favour of the extraterritorial application of human rights in extradition and expulsion cases. Persons who face trial or confinement abroad are, of course, subjected to different treatment from those who are not extradited or expelled. This discrimination is different from that in wholly extraterritorial cases, however, as it is a third state which is responsible for the trial or confinement. The only avenue available to obviate discrimination in extradition and expulsion cases is not to extradite or expel the individual and instead to try or confine him or her within that state. This is something that is not unreasonable, certainly in the case of nationals and residents of the extraditing or expelling state.¹³³

¹³¹ It has been written that case law supports three policy arguments in favour of human rights applying to extraterritorial state action: a failure to apply results in a double standard of legality, discrimination in protection on the basis of nationality and a vacuum in protection where the sovereign is prevented from acting, in Wilde, n 108 above at pp 796–797. The first two of these can be considered together under the heading discrimination. The last has been discussed above.

¹³² See *Quark*, n 1 above. Admittedly the difference between a United Kingdom Overseas Territory and, say, a United Kingdom run prison in Iraq is marked.

¹³³ For a discussion of the factors in favour of nationality based jurisdiction see P Arnell, “The Case for Nationality Based Jurisdiction”, (2001) 50 ICLQ 955.

CONCLUSION

Human rights law has been applied in both wholly extraterritorial and extradition and expulsion cases. Analysis of recent United Kingdom case law highlighted that the authority in favour of extraterritorial application, although extant, is relatively weak. It is only in regard to extradition and expulsion cases where a possible violation of article 3 is at issue that the authority is clearly and strongly in favour. This relatively weak authority, coupled with the weight of the arguments against the application of law in this way within the cases themselves and existing more generally, supports the conclusion that only very exceptionally should human rights law be applied on an extraterritorial basis. No state, including of course the United Kingdom, can be a global enforcer of human rights. United Kingdom, ECtHR and other municipal and international authorities must continue to emphasise, as certain of them have, the basic underlying fact that the globe is comprised of sovereign and territorially distinct states. Not only should law generally not be applied extraterritorially but perhaps of even more import, personal and spatial extraterritorial control must also be discouraged. A cessation of such activity would to a certain extent obviate the perceived need for the extraterritorial application of law in the first instance. Additionally, all states must be encouraged to strengthen the rule of law and human rights protection within their territories. It also must be assumed that all states contain legitimate, effective and adequate legal systems. Where this assumption is not objectively reasonable then the existing international, regional and non-governmental organisations charged with protecting human rights must be engaged to address the issue. Particularly and presently, it is to be hoped at the time of writing that the House of Lords takes a restrictive and narrow approach to the question of the application of the HRA in *Al Skeini* and that the generally limited success of applicants in extradition and expulsion cases continues.

[Editorial note: *Al Skeini* reached the House of Lords as [2007] UKHL 26 on 13 June 2007, the majority of the appeals being dismissed and the remaining case being remitted back to the Divisional Court.]