A Sense of Space: Human Rights and the West's Legal Framework

Mark Gibney *

1. INTRODUCTION

Under the dominant human rights paradigm, Western institutions commonly pass judgment on the human rights practices of non-Western states. One reason for this is that Western states generally have "good" human rights records, at least within the confines of their own domestic spheres, while many non-Western states have "poor" human rights records. This much seems both indisputable and uncontroversial. Yet, Western states are also being scrutinized, although what they are being judged on goes far beyond their domestic practices. Rather, what non-Westerners keenly observe is whether or not Western states exhibit a broader commitment to human rights principles.

The goal of this article is not to try to summarize the entirety of relations between Western and non-Western states. This would be impossible to do. Rather, the task is much humbler but perhaps also more telling. What will be examined is the legal framework that Western states – Europe and the

* Prof. Dr. Mark Gibney, Belk Distinguished Professor, University of North Carolina-Asheville (mgibney@unca.edu)
ISJ, Vol. 2, No. 1, Summer 2005, pp. 1-17.

United States – have constructed for themselves in their dealings with those outside their own territorial borders.

With respect to Europe, there is little question that the European Court of Human Rights (ECHR) is the leading human rights adjudicatory body in the world. However, what the ECHR has struggled with recently is whether the European Convention applies to actions carried out by the Contracting States that occur outside the territorial boundaries of "Europe." This, of course, is no theoretical debate. Rather, with the advent of the "war on terrorism," not to mention the war in Iraq where several Contracting States are presently engaged, this issue has very real meaning. What we will see in Part II through an analysis of the Court's *Bankovic* decision is that the ECHR has interpreted "universal" human rights in a decidedly "Western" manner. What the Court has held is that the Convention is "primarily territorial," and thus, the human rights obligations of European states essentially begin – but also end – at Europe's borders. What this also means is that European states can "do" things outside their territorial borders that which is prohibited within Europe itself. Most assuredly, this point will not be lost on non-Europeans.

The United States Supreme Court has answered the question of where human rights protections exist in a slightly different manner. In *Rasul v. Bush*, the Supreme Court rejected the argument made by the Executive branch that U.S. law did not apply in Guantanamo Bay, Cuba, where hundreds of foreign "enemy combatants" are being held. Instead, the Court ruled that the federal habeas statute was applicable. In that way, then, the protections of U.S. law seem to apply extraterritorially while the protections of the European Convention do not.

There are, however, at least two problems with the *Rasul* decision. The first is continued Executive branch intransigence to providing detainees with any protection under U.S. law notwithstanding the Supreme Court's clear

directive in *Rasul* itself. The second is that the factual situation in *Rasul* was so unique that, in all likelihood, the holding in the case will come to be restricted to this one military base, with little (or no) protection afforded under United States law for individuals held by American military forces (or their allies) in virtually every other location on the globe. The point, once again, is that this approach to human rights will have enormous repercussions for the entire human rights enterprise. Or to phrase this in the form of a question: why should non-Western states feel bound by international human rights law when Western states themselves are not – at least in their dealings with non-Westerners?

I. EUROPE

In *Bankovic v. Belgium*,[(1)] the ECHR was faced with the issue whether citizens of Yugoslavia (which was not a State Party to the European Convention) who were either killed or harmed during the course of a NATO bombing raid in Belgrade thereby received any Convention protection. The Court answered this question in the negative. It held that the Convention was "primarily territorial," although the Court also suggested that there might be "special circumstances" when the Convention could be extended to include actions outside of Europe.

A. THE CONVENTION'S ORDINARY MEANING?

The legal question raised by the case was the meaning of the term "within their jurisdiction" under Article 1 of the Convention, which reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In its draft form, Article 1 made reference to all persons "residing in their territories," and subsequently changed this to the present language "within their jurisdiction." However, the Court held that this did not change the territorial scope of Article 1. One of things that the Court premised its conclusion on

was what it termed the "ordinary meaning" of this term, holding that the Convention is a treaty operating:

> in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.[2]

On one level, perhaps, the Court's territorial (or "primarily territorial") reading of the Convention might well constitute the "ordinary meaning" of the European Convention. However, the Court never considered any other "ordinary meaning." One that it might have entertained is this: why would a human rights treaty abruptly end a state's human rights obligations at its territorial borders – and what kind of vision of "human rights" does this represent?

B. Previous Case Law

Ironically enough, prior to its *Bankovic* decision, the Strasbourg organs had readily given the Convention an extraterritorial reading. In two cases involving Turkey's military occupation of parts of Cyprus (*Cyprus v. Turkey*[3] and *Loizidou v. Turkey*[4]), the Court held that Turkey's actions were governed by the Convention. However, in *Bankovic* the Court attempted to distinguish away these cases on the ground that Turkey had been exercising "effective control" in Cyprus by performing all or some of the public powers normally to be exercised by the Cypriot Government. In the Court's view, the NATO bombing missions did not give rise to this same form of "effective control." Beyond this, the Court also seemed to suggest that the Convention had been given an extraterritorial reading in these cases because Cyprus is a Contracting State and to deny legal protection would be to create what it described as a "legal vacuum."

The Court's treatment of its previous decision in *Soering v. United Kingdom*[5] is also interesting to note. Jens Soering is a German national who

murdered two people in Virginia and who was subsequently arrested in the United Kingdom. Virginia officials sought to extradite him and Soering attempted to fight off extradition on the grounds that by placing him on Virginia's death row (as seemed likely) he would be subjected to conditions that would be in violation of Article 3 of the Convention, which reads: "No one shall be subjected to torture of to inhuman or degrading treatment or punishment." For its part, the British government denied that it would have any Convention responsibilities on the grounds that any human rights violations would take place outside British territory and would be performed by non-British agents.

In a landmark ruling, the Court held that the UK had extraterritorial obligations to protect Soering. Interestingly enough, in *Bankovic* both the applicants and the respondent governments sought to invoke the *Soering* decision. While the Court did not explicitly adopt either position, it attempted to underscore its territorial holding by quoting this language from *Soering*: "Article 1 sets a limit, notably territorial, on the reach of the Convention."

The problem is that *Bankovic* is completely inapposite of *Soering*. In one case (*Soering*) a Contracting State would be in violation of the Convention simply by exposing an individual to the likelihood of harm in another country – and harm that would be carried out by foreign nationals. Contrast this result with *Bankovic* where a Contracting State would not be in violation of the Convention even if state agents purposely committed human rights violations in another country. The point is that *Bankovic* represents a severe retreat from the principle of the extraterritorial application of the European Convention posited in *Soering*.

C. Excessive Demands

One of the Court's concerns was that an opposite ruling in *Bankovic* would open up the Contracting States (but also the Court itself) to a wide array of claims from all over the world. In addressing this matter (so to speak) the Court stated: "The applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1."[(6)]

Of course, the Court has every right (and every reason) to be concerned with its already unmanageable caseload problem. However, a few points need to be made. One is that the petitioners in *Bankovic* were not merely alleging that they had been "adversely affected" by the actions of the Contracting States, but rather, that they were the victims of specific human rights obligations that were explicitly prohibited by the Convention. Beyond this, the applicants were certainly not arguing that the Contracting States were to ensure all Convention rights extraterritorially, only that the States should be responsible for the commission of an act and the consequences that followed from this act.

D. Ignoring the Human Rights Committee Decision in *Lopez v. Uruguay*

In its *Bankovic* decision, the Court noted that Article 1 of the European Convention was mirrored in the "within its territory and subject to its jurisdiction" language of the International Covenant on Civil and Political Rights as well as the "subject to its jurisdiction" language in Article 1 of the Optional Protocol. What this also seems to suggest is that the Court not only views the European Convention as being "primarily territorial," but that it interprets other international conventions as being without extraterritorial effect as well. Thus, in the view of the ECHR, there is very little (if any) "international" law governing the extraterritorial activities of states.

The problem is that the ICCPR has been given the exact opposite reading – by the Human Rights Committee itself. In *Lopez v. Uruguay*,[7] the author of the communication claimed that her husband, a Uruguayan national, had been kidnapped in Argentina by members of the Uruguayan security and intelligence forces and had been secretly detained there before being clandestinely transported back to Uruguay. Uruguay denied these accusations and, in addition, set forth the claim that the communication was inadmissible under the Optional Protocol because the ICCPR did not apply to actions committed outside the territory of the state.

The Human Rights Committee soundly rejected Uruguay's position. Rather, it held that the language "individuals subject to its jurisdiction" in Article 1 of the Optional Protocol is not making reference "to the place where the violations occurred, but rather to the relationship between the individual and the State in relation to a violation of any of rights set forth in the Convention, wherever they occurred."[8] The Committee went on to say that Article 2(1) of the ICCPR, which refers to both "territory" and "jurisdiction," simply imposes a mandate on Contracting States to uphold the Covenant within their national boundaries, but says nothing that would permit states to perpetrate Covenant violations on the territory of other states.[9] And finally, to underscore its support of the extraterritorial application of the ICCPR, the Committee unequivocally expressed the view that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[10]

Notwithstanding this unequivocal holding, the *Bankovic* court never even mentioned *Lopez* by name, and summarily dismissed the importance of the case on the rather incredulous grounds that the applicants "give one example

only." The point is that one unambiguous case – by the U.N. body entrusted with interpreting the ICCPR – should speak volumes.

E. State Practice

The Court also claimed to be influenced by state practice, holding that there was no indication that the Contracting States felt bound by the provisions in their extraterritorial actions.

> Although there have been a number of military missions involving Contacting States acting extra-territorially since their ratification of the Convention (inter alia, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention.(11)

Continuing

> The existing derogations were lodged by Turkey and the United Kingdom in respect of certain internal conflicts (in south-east Turkey and Northern Ireland, respectively) and the Court does not find any basis upon which to accept the applicants' suggestion that Article 15 covers all "war" and "public emergency" situations generally, whether obtaining inside or outside the territory of the Contracting State. Indeed, Article 15 itself is to be read subject to the "jurisdiction" limitation enumerated in Article 1 of the Convention.(12)

In it arriving at this conclusion, the Court ignores at least three things. The first is that, while important, state practice itself cannot prove dispositive in interpreting the Convention. The second is that the Court's categorization of internal war (where derogation is needed) and international war (where, in its view, it is not) immediately collapses when it is considered that the United Kingdom did not derogate during the Falkland Islands war, although

the British government certainly viewed this as constituting an "internal" war. Finally, the Court completely ignores the multitude of political reasons why the Contracting States might not have made any derogations pursuant to Article 15 of the Convention while engaging in extraterritorial military actions. The Kosovo case serves as a case in point in that the NATO governments were not willing to acknowledge that they were engaged in an inter-state conflict, although they most certainly were. The point is that there are many political reasons why states do not derogate and their failure to do so should not be interpreted as reason to exonerate them from Convention responsibility.

F. Subsequent Case Law

Although *Bankovic* seemed to indicate that the Convention would only be applied extraterritorially in cases where a Contracting State had exercised "effective control" over another Contracting State by means of military occupation, the Court veered off into the opposite direction in its subsequent ruling in *Ocalan v. Turkey*.[13] This case revolved around the arrest of the former PKK leader (Ocalan) by Turkish officials operating in Kenya and the question was whether this arrest on foreign soil was enough to invoke Convention protection. The Court ruled in the affirmative:

> The Court considers the circumstances of the present case are distinguishable from those in the aforementioned Bankovic and Others case, notably in that the applicant was physically forced to return to Turkey by Turkish authorities and was subject to their authority and control following his arrest and return to Turkey.[14]

Putting these cases together, what the Court has done is to announce a general rule that the Convention does not apply outside of Europe, but it has then proceeded to create a "macro-level" exception (*Cyprus v. Turkey* and *Loizidou v. Turkey*) in cases of military occupation and then a "micro-level" exception (*Ocalan*) in a case involving an extraterritorial arrest. Inexplicably enough, however, what apparently falls between these two lines of cases, thereby not giving rise to Convention protection, is a case (*Bankovic*) where

the requisite level of "control" was not met when bombs were dropped from the sky, thereby killing or injuring civilian populations.

In sum, in *Bankovic* the ECHR has shown a great reluctance to apply the European Convention to the extraterritorial activities of the Contracting States. Are British actions in Basra guided by the protections of the Convention? If not, what about a prison in Basra that is exclusively under the control of British military forces? Beyond this, through its unique reading of other international human rights law instruments – the International Convention on Civil and Political Rights in particular – the Court seems to remove much of the "international" from international law. The point is that this is a strained (and strange) reading of international law and we will return to some of the implications that flow from this version of human rights.

II. UNITED STATES

In response to the September 11, 2001 attacks, the United States waged a war in Afghanistan to remove the Taliban from power. During the course of this fighting, but continuing afterwards as well, hundreds of "enemy combatants" were sent to the U.S. military base at Guantanamo Bay, Cuba. Although a majority of the Guantanamo Bay detainees came from Afghanistan, it is also noteworthy that some were taken into custody from as far away as Gambia, Zambia, Bosnia and Thailand. In addition, some detainees were foreign nationals of countries allied with the United States, including Australia and Great Britain.

Although U.S. Secretary of Defense Donald Rumsfeld had initially promised that at least some of the Guantanamo Bay detainees would be provided hearings before a military commission, in fact, no hearings were held. Thus, those detained were never charged with war crimes, were not informed of the bases upon which they were detained, were not permitted

access to counsel, were not given any opportunity to challenge their "enemy combatant" status, were held virtually incommunicado – at the same time that many (if not all) were subjected to systematic torture.

A. RASUL V. BUSH

A challenge to these policies was commenced on February 19, 2002 in a case (*Rasul v. Bush*) that was eventually decided by the U.S. Supreme Court in the summer of 2004.[(15)] The Executive branch maintained the position that U.S. law was inapplicable to Guantanamo Bay on the grounds that the military base is outside the territorial boundaries of the United States. In a landmark decision (perhaps), the Supreme Court soundly rejected the government's position, holding that the federal habeas corpus statute could be invoked by the Guantanamo Bay detainees who instituted the action.[(16)] In arriving at its decision, the Court distinguished the present case from *Johnson v. Eistranger*,[(17)] a case that arose following World War II where the Court had rejected a habeas claim brought by a group of German nationals who had been captured in China and then transferred to a military prison in Germany.

> The Guantanamo Bay detainees are not nationals of countries at war with the United States, and they deny that they have been engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[(18)]

For the *Rasul* majority, not only were the Guantanamo Bay detainees different from the German petitioners in Eistranger, so was the place of detention. In that regard, the Court emphasized that the United States exercised "complete jurisdiction and control" over the military base at Guantanamo Bay, Cuba. In his concurring opinion, Justice Kennedy pushed

this point even further, stating that "Guantanamo Bay is in every practical respect a United States territory."[19]

B. In re Guantanamo Detainee Cases[20]

Notwithstanding the Supreme Court's historic ruling in *Rasul*, the Executive branch has continued to operate under its own interpretation of the law. In a novel reading of the case, the Bush administration claimed that the decision only provided the Guantanamo Bay detainees with the right to allege in a United States District Court under the habeas statute that they are being detained in violation of the Constitution and other federal law, but that the case was silent on the question whether the detainees actually possess any underlying substantive rights. Federal district court Judge Joyce Hens Green soundly rejected this position and held that there was no reason to make any kind of distinction between the ability to file a habeas claim and the ability to receive protection under the habeas statute.

However, what needs to be underscored is that this is merely a district court holding. Whether the U.S. government appeals this decision remains to be seen. What is equally unclear is whether the Executive branch will abide by the district court's ruling.

C. Omar Abu Ali et al. v. Ashcroft[21]

This case, recently decided in the U.S. District Court in the District of Columbia, raises a similar kind of issue concerning the extraterritorial application of the federal habeas statute. The petitioner, Omar Abu Ali, is a U.S. citizen who had been arrested along with three of his friends while studying at a university in Saudi Arabia. Although his cohorts were subsequently shipped to the United States, Omar Abu Ali was detained in a Saudi prison. His claim is that his interrogation (and torture) had been carried out under the direction of FBI agents stationed in Saudi Arabia.

Similar to its position in *Rasul*, the Executive has taken the position that notwithstanding his U.S. citizenship and the involvement of federal agents, Omar Abu Ali cannot receive any of the protections under U.S. law since his

detention is outside the territorial borders of the United States. The court rejected this view:

> This position is as striking as it is sweeping. The full contours of the position would permit the United States, at its discretion and without judicial review, to arrest a citizen of the United States and transfer her to the custody of allies overseas in order to avoid constitutional scrutiny; to arrest a citizen of the United States through the intermediary of a foreign ally and ask the ally to hold the citizen at a foreign location indefinitely at the direction of the United States; or even to deliver American citizens to foreign governments to obtain information through the use of torture. In short, the United States is in effect arguing for nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him.

Similar to *In re Guantanamo Detainee Cases*, *Omar Abu Ali v. Ashcroft* is a district court holding. Thus, it is not clear how an appellate court or the U.S. Supreme Court itself would decide the matter. However, what *is* clear is that the Bush administration refuses to give *Rasul* a broad reading. This, of course, is another way of saying that the Executive branch has completely subverted the Supreme Court's *Rasul* decision.

III. HUMAN RIGHTS LIMITATIONS -- SELF IMPOSED

What we have seen above is that Western states have displayed enormous resistance in extending legal protections to their extraterritorial actions. In *Bankovic v. Belgium*, the European Court of Human Rights essentially limited the protections of the Convention to the territorial boundaries of Europe. At the same time, however, the Court showed absolutely no inclination in restricting the right or the ability of the Contracting States to carry out whatever activities they wished to pursue outside of Europe. Thus, the ability to act outside Europe goes unquestioned, while at the same time

the protections of the European Convention remain safely (and conveniently) at home.

On the surface at least, the U.S. Supreme Court and a few federal district court judges have displayed a different vision of the space of legal protection. In *Rasul v. Bush*, the Supreme Court held that the federal habeas corpus statute did have an extraterritorial effect – at least with respect to the United States military base in Cuba. At the beginning of his sharp dissent in *Rasul*, Justice Scalia writes: "The Court today holds that the habeas statute... extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts."(22) Later on, Scalia terms the majority opinion as "breathtaking," and he says of it: "It permits an alien captured in a foreign theater of active combat to bring a [habeas statute] petition against the Secretary of Defense. Over the course of the last century, the United States has hald millions of alien prisoners abroad."(23)

Justice Scalia's doomsday scenario notwithstanding, it is not likely that *Rasul* has done any such thing. The reason for this is that the decision was heavily influenced by the fact that the U.S. government has not only maintained exclusive control over Guantanamo Bay in the past, but it has the ability to do so in the future as well.

The problem with this decision – at least from a human rights perspective – is that it does not seem likely that American legal protection will be extended to any other place in the world – and that includes the infamous Abu Ghraib prison in Iraq. The reason for this is that nowhere else does the U.S. government exert anywhere the degree of "sovereignty" that it does in Guantanamo Bay, Cuba.

Beyond this, what subsequent courts might also focus on is that while the petitioners in *Rasul* were foreign nationals not at war with the United States

(thus differentiating them from the petitioners in *Eisentrager*), many other detainees in the "war on terrorism" will be from countries that are "warring" with the United States. Finally, although *Omar Abu Ali* is a noteworthy decision in that it extended human rights protection to a Saudi prison, what makes this case of very limited precedential value in terms of human rights protection is the fact that the petitioner is a U.S. citizen. Perhaps this will not prove dispositive in subsequent case law but that does not seem at all likely. In short, whatever legal protections *Rasul* seemed to provide might prove to be limited and ephemeral at best.

The final point relates to some of the larger implications that follow from this approach to human rights. We began this essay by noting the dominant dichotomy whereby Western states see themselves as human rights defenders, in contrast to so many non-Western states, which are viewed as human rights offenders. Yet, what should emerge from this essay is a questioning of this dichotomy. While it will be conceded that a substantial majority of Western states have strong human rights records within their own domestic sphere, their human rights practices in the world have been less than impressive. What is just as important and perhaps more telling is the legal framework that Western states have created for themselves. By way of summary, Western states follow one set of legal standards within their domestic realm, but they have allowed themselves to follow a completely different set of standards – arguably no standards at all – in their dealings with those outside their territorial boundaries. The point is that this dichotomy has not been lost on non-Western states or non-Western people. ❖

NOTES:

1. The full title is Vlastimir and Borka Bankovic, Zivana Stojanovic, Mirjana Stoimenovski, Dragana Joksimovic and Dragan Sukovic v. Belgium, The Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, App. No. 52207/99, Eur. Ct. H.R. (2001) (Decision on Admissibilty)

2. Bankovic, par.80 (emphasis in original).

3. Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001.

4. Loizidou v. Turkey, judgment of 23 March 1995 (preliminary objections), Series A no. 310, Loizidou v. Turkey, judgments 18 December 1996 (Merits).

5. Soering v. United Kingdom, judgment of 7 July 1989, Series A no. 161.

6. Bankovic, par. 75.

7. Sergio Euben Lopez Burgos v. Uruguay, Communication no. R. 12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

8. Lopez, par. 12.2.

9. Lopez, par. 12.3.

10. Lopez, par 12.3.

11. Bankovic, par. 62.

12. Bankovic, par. 62 (emphasis in original).

13. Ocalan v. Turkey, App. No. 46221/99, ECHR (2003) (merits).

14. Ocalan, par. 93.

15. Rasul v. Bush, 124 S. Ct. 2686 (2004).

16. 28 U.S.C. Sec. 2241. The statute reads in part: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction.”

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

18. Rasul, at 2693.

19. Rasul, at 2700.

20. 2005 U.S. Dist. LEXIS 1236 (Jan. 31, 2005).

21. 2004 U.S. Dist. LEXIS 25239 (Dec. 16, 2004).

22. Rasul, at 2701.

23. Rasul, at 2706.