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Chimene Keitner

UC Hastings College of the Law, keitnerc@uchastings.edu

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FRAMING CONSTITUTIONAL RIGHTS

Chimène I. Keitner*

I. INTRODUCTION

In my article *Rights Beyond Borders*,¹ I identify three modes of reasoning about the extraterritorial reach of domestic constitutional and quasi-constitutional rights, which I label country, compact, and conscience. A country approach views domestic rights-based limitations on government action as operating solely within the national territory. A compact approach extends domestic rights-based limitations to government action beyond national borders that affects citizens or other members of the national community. A conscience approach extends domestic rights-based limitations to all government action regardless of where, or towards whom, the government acts. My analysis of cases from the United States, Canada, and the United Kingdom illustrates the persistence of country-based reasoning, and the relative absence of compact-based reasoning in courts outside of the United States.² It also reveals the reluctance of all three countries' courts to use conscience-based reasoning about constitutional rights to constrain government action beyond national borders.³

In this symposium contribution, I further explore ways in which domestic courts have framed certain constitutional provisions as fundamentally tied to territory (country), membership (compact), or the nature of government itself (conscience). I do this by focusing on the stories of five individuals who have sought redress in five countries' courts for alleged domestic rights violations:

Khalfan Khamis Mohamed, a Tanzanian arrested by South African authorities in South Africa and handed over to U.S. authorities for trial in the United States without assurances that the United States would not seek

* Associate Professor of Law, University of California, Hastings College of the Law. My thanks to Fatima Khan for research assistance, and to the *Southwestern Law Review* for organizing this symposium.

1. Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55 (2011).

2. *See id.* at 108.

3. *See id.*

or impose the death penalty;

Mamdouh Habib, an Australian arrested and detained by Pakistani authorities in Pakistan and interrogated by Australian, Pakistani, and U.S. officials in Egypt and Afghanistan before being transferred to Guantanamo Bay;

Baha Mousa, an Iraqi arrested in Iraq by U.K. forces and beaten to death while detained at a U.K. military facility in Basra, Iraq;

Omar Khadr, a Canadian arrested by U.S. forces in Afghanistan and detained in U.S. custody at Guantanamo Bay, where he was also interviewed by Canadian agents; and

Amin Al-Bakri, a Yemeni citizen allegedly abducted by U.S. agents in Thailand, who is currently being held by U.S. authorities at the Parwan (Bagram) Internment Facility in Afghanistan.

These five common law courts (in South Africa, Australia, the United Kingdom, Canada, and the United States) have not adopted a uniform conception of the relationship between domestic rights and territorial borders. That said, they have been most willing to review government action for compliance with domestic rights-based constraints where there is a link between the government and the affected individual based either on territory (country) or membership (compact). A violation of fundamental procedural or substantive values alone (conscience) generally does not suffice to trigger domestic judicial review. In addition to defining the legal significance of *external* borders, cases involving extraterritorial government action help define and constitute *internal* borders between the political and judicial branches, as illustrated by the cases below.⁴

II. SOUTH AFRICA: KHALFAN KHAMIS MOHAMED

Khalfan Khamis Mohamed, a twenty-five-year-old citizen of Tanzania, was arrested in Cape Town, South Africa, on October 5, 1999.⁵ Two days later, South African authorities handed Mohamed over to FBI agents so that he could stand trial in New York City for murder and conspiracy in conjunction with the 1998 bombing of the U.S. embassy in Tanzania.⁶ Mohamed had entered South Africa on a visitor's visa immediately following the embassy bombing and applied for asylum using a false

4. See Chimène I. Keitner, *A Response to Milanovic and Verdier on Rights Beyond Borders*, OPINIO JURIS (Mar. 8, 2011, 2:15 PM) <http://opiniojuris.org/2011/03/08/a-response-to-milanovic-and-verdier-on-rights-beyond-borders/>.

5. *Mohamed & Another v. President of the Republic of S. Afr. & Others* 2001 (3) SA 893 (CC) at 899, 901 (S. Afr.).

6. *Id.*

name.⁷ On August 30, 1999, an FBI agent identified Mohamed based on his photo and fingerprints while searching through records of asylum-seekers in Cape Town.⁸ When Mohamed went to the refugee receiving office to renew his temporary residence permit, he was arrested by South African immigration authorities.⁹ He was then sent to the United States to stand trial.¹⁰

While on trial in New York, Mohamed sought an order from a South African court compelling the South African government to issue a written diplomatic request to the United States to refrain from seeking, imposing, or carrying out the death penalty.¹¹ He alleged that his surrender to the FBI for trial on capital charges had been a “disguised extradition” in violation of his rights under the South African Constitution and applicable statutes.¹² The South African Constitutional Court agreed.¹³ The Court noted that, following his arrest, Mohamed was interrogated by South African officials and FBI agents while being “denied access to a lawyer and [held] incommunicado.”¹⁴ The Court concluded that Mohamed’s removal to the United States without assurances that the United States would not seek, impose, or carry out the death penalty violated the South African Constitution.¹⁵ In particular, the Court found that:

In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed’s right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.¹⁶

The South African government argued unsuccessfully that there was a distinction between deportation and extradition, and that they had not extradited Mohamed.¹⁷ The Court dismissed this distinction as being “of no

7. *Id.* at 901.

8. *Id.* at 902.

9. *Id.* at 903.

10. *Id.* at 899.

11. *Mohamed*, (3) SA at 900. The High Court denied the motion, and Mohamed appealed to the Constitutional Court. *Id.* Because the South African proceedings were viewed as part of Mohamed’s legal defense in the New York trial, the U.S. government paid Mohamed’s legal fees and costs. *See id.* at 923.

12. *Id.* at 899 (invoking the rights to life, to dignity, and not to be subjected to cruel, inhuman, or degrading punishment).

13. *See id.* at 911.

14. *Id.* at 903-05 (alteration in original).

15. *See id.* at 911-12.

16. *Mohamed*, (3) SA at 914.

17. *See id.* at 917.

relevance,”¹⁸ and held that the government had violated its constitutional obligation “to protect the right to life of everyone in South Africa.”¹⁹ This language is consistent with a country-based approach, because it focuses on the physical presence of the claimant within national boundaries at the time of the alleged rights deprivation. In this case, such an approach proved beneficial to the claimant, because the challenged action (the extradition) took place on South African territory, even though the ultimate harm (the imposition of the death penalty) would have taken place abroad.

The South African government further argued that, even if the transfer was unlawful, the requested remedy of a court order to compel a diplomatic request for assurances would violate the separation of powers.²⁰ The Court disagreed.²¹ Given the urgency of the matter, since Mohamed’s trial was in progress in New York, the Court granted declaratory relief and ordered that its judgment be delivered to the New York court, rather than compelling diplomatic action by the South African government.²²

Mohamed was able to secure the intervention of the South African Constitutional Court even though he was not a South African citizen and had entered the country on false pretenses.²³ That is because the Constitutional Court framed the constitutional guarantee of the right to life as applying to “everyone in South Africa”²⁴—a country-based conception of constitutional rights, based on a territorial model. Even though Mohamed was not on South African territory when he requested relief, his presence in South Africa at the time of the alleged violation entitled him to invoke his constitutional right to life to constrain the actions of the South African government.²⁵ Other countries that prohibit the death penalty as a matter of domestic constitutional law have similarly required assurances as a prerequisite for extradition.²⁶ The *Mohamed* case does not address the question of whether the South African Constitution would constrain the

18. *Id.* at 914.

19. *Id.* (emphasis added).

20. *Id.* at 921.

21. *Id.* at 922. The South African court found that it would not be problematic to order the South African government to make certain diplomatic representations to the United States, but that it would be inappropriate to compel the South African government (the losing party in this case) to pay the United States’ costs. *See id.* at 922-24.

22. *Mohamed*, (3) SA at 922-24.

23. *Id.* at 901.

24. *Id.* at 917.

25. *See id.*

26. *See id.* at 912 (indicating that embassy bombing suspect Mahmoud Mahmud Salim was extradited from Germany to the United States only after the United States provided the requested assurances); *United States v. Burns*, [2001] 1 S.C.R. 285, 289-90 2001 SCC 7 (Can.).

actions of South African agents operating overseas, but it does show the Court's willingness to intervene in a case with transnational dimensions, and to remedy a perceived abuse of authority by the political branches on South African territory.

In October 2001, the federal trial judge in New York sentenced Mohamed and his co-defendants to life in prison.²⁷ Mohamed is currently serving his sentence at a supermax facility in Colorado.²⁸

III. AUSTRALIA: MAMDOUH HABIB

Mamdouh Habib was born in Egypt and emigrated to Australia in the 1980s, where he became a citizen.²⁹ He married and had four children, and worked as a taxi driver and small businessman.³⁰ Habib came to the attention of Australian authorities following a trip to New York City prior to the 1993 World Trade Center bombing.³¹ Australian intelligence officials allege that Habib later trained at two Al Qaeda camps in Afghanistan.³² In July 2001, Habib traveled to Pakistan and was arrested there in the weeks following September 11.³³ According to Habib, he was subsequently interrogated and tortured in Pakistan, Egypt, Afghanistan, and Guantanamo Bay, where he was detained from May 2002 until January 2005.³⁴ In January 2005, at age forty-eight, he was released without charge and flown back to Australia.³⁵

In December 2005, Habib filed suit against officers of the Commonwealth of Australia for "the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhuman treatment by foreign officials

27. *Life Sentence for U.S. Embassy Bombers*, CNN JUST. (Oct. 18, 2001), http://articles.cnn.com/2001-10-18/justice/inv.embassy.bombing.trial_1_mohamed-odeh-kenya-embassy-prabhi?_s=PM:LAW.

28. Adam Blickstein, *World Does Not End as Gitmo Detainee Finally Brought to Face Justice*, THE HUFFINGTON POST (June 9, 2009, 2:21 PM), http://www.huffingtonpost.com/adam-blickstein/world-does-not-end-as-git_b_213259.html.

29. Raymond Bonner, *Detainee Says He Was Tortured While in U.S. Custody*, N.Y. TIMES INT'L (Feb. 13, 2005), http://www.nytimes.com/2005/02/13/international/middleeast/13habib.html?_r=3&pagewanted=1; *Profile: Mamdouh Habib*, BBC NEWS ASIA-PAC., <http://news.bbc.co.uk/2/hi/asia-pacific/4214747.stm> (last updated Dec. 7, 2005, 10:37 GMT).

30. *Profile: Mamdouh Habib*, *supra* note 29.

31. *See id.*

32. Bonner, *supra* note 29.

33. *Profile: Mamdouh Habib*, *supra* note 29.

34. *See* Dana Priest, *Detainee Sent Home to Australia*, WASH. POST, Jan. 29, 2005, at A21, available at <http://www.washingtonpost.com/wp-dyn/articles/A45643-2005Jan28.html>; Bonner, *supra* note 29.

35. *See* Priest, *supra* note 34.

while he was detained in Pakistan, Egypt and Afghanistan and at Guantánamo Bay.”³⁶ Habib alleged that Australian agents had facilitated and participated in his interrogation and that, in so doing, they had acted in their official capacity but beyond the scope of their lawful authority.³⁷ In response, the Commonwealth argued that Habib’s claims against Australian officials were non-justiciable under the common law act of state doctrine because adjudicating the claims would require an Australian court to determine whether foreign officials had also acted unlawfully.³⁸

Habib’s case was heard by a three-judge panel of the Full Court, an intermediate appellate body.³⁹ The panel considered both statutory and constitutional law.⁴⁰ All three justices agreed that the act of state doctrine did not present a bar to Habib’s claims.⁴¹ Justice Perram wrote: “The act of state doctrine – whatever it might be – has no application where it is alleged that Commonwealth officials have acted *beyond the bounds of their authority* under Commonwealth law,” including the Constitution.⁴² Although this part of Justice Perram’s reasoning is consistent with a conscience approach, because it focuses on the Constitution’s role in constraining the authority of Australian agents, other parts of the opinion use compact-based language. For example, Justice Perram quoted authority for the proposition that the High Court’s jurisdiction over officers of the Commonwealth constitutes:

[A]n important component of the Constitution’s guarantee of judicial process in that their effect is to ensure that there is available, *to a relevantly affected citizen*, a Ch[apter] III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority.⁴³

It is unclear whether Justice Perram’s approach would constrain the actions

36. *Habib v. Commonwealth* (2010) 183 F.C.R. 65, para. 2 (Black, C.J.), available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/12.html>.

37. *See id.* para. 2, at 65-66.

38. *See id.* paras. 22-23, at 71 (Perram, J.).

39. On April 26, 2006, the High Court remitted Habib’s case to the Federal Court. *Id.* para. 49, at 81 (Jagot, J.). On March 13, 2009, Justice Perram determined that there was a triable issue as to whether the act of state doctrine applied. With the consent of Mr. Habib, the Commonwealth sought review of this determination by the Full Court of the Federal Court, in the form of a three-judge panel. *Id.* para. 23, at 71-72 (Perram, J.).

40. *See id.* para. 121, at 98 (Jagot, J.).

41. *See id.*, paras. 1, 4, at 65-66 (Black, C.J.); *see also Habib*, 183 F.C.R. para. 37, at 77 (Perram, J.).

42. *Id.* para. 24, at 72 (Perram, J.) (emphasis added).

43. *Id.* para. 26, at 73 (quoting *Deputy Comm’r of Taxation v Richard Walter Pty Ltd.* (1995) 183 C.L.R. 204-205 (Austl.)) (emphasis added) (alteration in original).

of Commonwealth officials vis-à-vis *non-citizens* overseas under the Australian Constitution—in other words, whether it is more consistent with a compact or a conscience approach.⁴⁴

Habib's arguments for justiciability were bolstered by the fact that the Australian agents' alleged conduct also violated Australian statutory prohibitions that explicitly applied extraterritorially. Justice Jagot agreed with Habib's argument that "the consequence of the Commonwealth's submission is that Commonwealth officials could not be held accountable in any court for their alleged breaches of Australian laws having extra-territorial effect."⁴⁵ She rejected this result, particularly in a case involving an Australian citizen.⁴⁶

In 2007, Habib ran unsuccessfully for an Australian provincial parliament seat, while his suit was still pending.⁴⁷ He has continued to avail himself of the courts, including by bringing a defamation case against a Sydney newspaper that cast doubt on his allegations of torture.⁴⁸ The Australian government still refuses to issue Habib a passport.⁴⁹

IV. UNITED KINGDOM: BAHA MOUSA

Baha Mousa was a twenty-six-year-old receptionist at Ibn al-Haitham hotel in Basra.⁵⁰ His father, Daoud Mousa, was a police colonel appointed by the British authorities in Iraq.⁵¹ On September 14, 2003, British forces raided the hotel where Baha Mousa worked.⁵² The troops detained Baha

44. *See id.* para. 115, at 96 (Jagot, J.) (emphasizing that the case involved a claim by an Australian citizen against the Commonwealth of Australia).

45. *Id.* para. 114, at 96.

46. *See id.* at paras. 114-115, at 96-97.

47. *See* Simon Benson & Joe Hildebrand, *NSW Election Winner Iemma – I'll Have A Beer*, THE DAILY TELEGRAPH (Mar. 24, 2007, 12:00 AM), <http://www.dailytelegraph.com.au/news/nsw-election-winner-iemma-ill-have-a-beer/story-e6freuy9-111113212204>; Raymond Bonner, *Ex-Captive in Guantánamo Makes Run for Office in Australia*, N.Y. TIMES ASIA PAC. (Mar. 21, 2007), http://www.nytimes.com/2007/03/21/world/asia/21habib.html?_r=1.

48. Jamelle Wells, *Mamdouh Habib Awarded \$5k in Defamation Case*, ABC NEWS (Aug. 19, 2010, 2:49 PM), <http://www.abc.net.au/news/stories/2010/08/19/2987708.htm>.

49. Sally Neighbor, *Mamdouh Habib is Still a Danger: ASIO*, THE AUSTRALIAN (Aug. 27, 2010, 12:00 AM), <http://www.theaustralian.com.au/national-affairs/mamdouh-habib-is-still-a-danger-asio/story-fn59nix-1225910627318>.

50. Angela Balakrishnan, *Background: The Killing of Baha Mousa*, GUARDIAN.CO.UK (July 10, 2008, 17:28 BST), <http://www.guardian.co.uk/world/2008/jul/10/iraq.military1>.

51. *Id.*; Robert Fisk, *The Story of Baha Mousa*, THE INDEP. (July 12, 2009), <http://www.independent.co.uk/opinion/commentators/fisk/robert-fisk-the-story-of-baha-mousa-1742762.html>.

52. *Al-Skeini v. Sec'y of State for Def.*, [2007] UKHL 26, [2008] A.C. [6] (Lord Bingham of Cornhill) (appeal taken from Eng.).

Mousa and his colleagues and took them to the British military base at Darul Dhyafa.⁵³ Mousa was beaten by British troops and sustained ninety-three separate injuries that culminated in his death.⁵⁴ His father identified his body.⁵⁵

Mousa's surviving family members brought a claim in the High Court of London seeking to challenge the U.K. Secretary of State for Defence's refusal to order an independent inquiry into the circumstances of his maltreatment and death.⁵⁶ The case reached the U.K. House of Lords in 2007.⁵⁷ By that time, the Secretary of State had accepted the lower courts' finding that Mousa's death fell within the scope of the European Convention on Human Rights because Mousa died in a British military detention unit.⁵⁸ This concession was a necessary but not a sufficient condition for finding that his death also fell within the scope of the U.K. Human Rights Act (HRA), which has been interpreted as providing a right to a public inquiry where a public authority violates a Convention right.⁵⁹ The Secretary of State argued before the House of Lords that the HRA does not apply extraterritorially, even to Baha Mousa's case.⁶⁰

Lord Bingham found that "the statutory presumption of territorial application [is] a strong one, which has not been rebutted."⁶¹ He would therefore have refused the remedy of a public inquiry, directing the applicants instead to seek redress under applicable U.K. criminal laws, from the International Criminal Court, or by bringing an action in tort.⁶² Lord Rodger, by contrast, took a different approach. He reasoned:

[W]here a public authority has power to operate outside of the United Kingdom and does so legitimately – for example, with the consent of the other state – in the absence of any indication to the contrary, when construing any relevant legislation, it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home.⁶³

That said, Lord Rodger emphasized that "[h]owever reprehensible, however contrary to any common understanding of respect for 'human rights', the

53. Balakrishnan, *supra* note 50.

54. *Id.*

55. *Id.*

56. *Al-Skeini*, [2007] UKHL, 2008 A.C. [1] (Lord Bingham).

57. *Al-Skeini*, [2007] UKHL 26, [2008] A.C. 153.

58. *Id.* [2], [6] (Lord Bingham).

59. *See id.* [3]; *id.* [35] (Lord Rodger of Earlsferry).

60. *Id.* [4] (Lord Bingham).

61. *Id.* [24] (alteration in original).

62. *See Al-Skeini*, [2007] UKHL, [2008] A.C. [26] (Lord Bingham).

63. *Id.* [53] (Lord Rodger) (alteration in original).

alleged conduct of the British forces might have been,” it would only carry legal consequences under the Convention if there was a “link” between the victim and the contracting state, and the deceased was “within the jurisdiction of the United Kingdom at the time.”⁶⁴ He found, based on existing European Court of Human Rights case law, that such a link did exist in Baha Mousa’s case, but not in the case of other Iraqis harmed by British troops outside the military base.⁶⁵

Having found that Baha Mousa’s family was entitled to a public inquiry, the House of Lords next had to identify the legal foundation for this entitlement. The options were either “the narrow basis (found by the Divisional Court) that detention in a British military facility, operated with the consent of the Iraqi sovereign authorities, falls within the same exceptional category as embassies and consulates,” or “the wider basis (found by the Court of Appeal) that Mr. Mousa, from the moment of his arrest, ‘came within the control and authority of the UK,’” or possibly “a wider basis still.”⁶⁶

Lord Brown was willing to construe the reach of the HRA as being coextensive with the reach of the European Convention because, under his reading of Strasbourg case law, there were only a few “narrow categories of exception”⁶⁷ to the principle of territorial jurisdiction. He would therefore have applied the HRA to Baha Mousa based solely on the embassy analogy, and not on a broader principle of extraterritoriality.⁶⁸ The House of Lords’ approach in *Al-Skeini* reflects country-based reasoning, because it treats the military facility as an enclave of British territory within Iraq.

During the resulting public inquiry in Baha Mousa’s case,⁶⁹ documents were revealed that showed Mousa had been hooded for almost twenty-four of his thirty-six hours in detention, even though hooding had been banned by the British government in 1972 after an investigation into interrogation techniques in Northern Ireland.⁷⁰ Seven soldiers were court-martialed in

64. *Id.* [64] (alteration in original).

65. *See id.* [81], [84].

66. *Id.* [107] (Lord Brown of Eaton-under-Heywood).

67. *Id.* [150].

68. *See Al-Skeini*, [2007] UKHL, [2008] A.C. [132] (Lord Brown); *see also id.* [97], [99] (Lord Carswell).

69. This inquiry is being held pursuant to a finding by the Divisional Court on remand that a previous investigation had been inadequate. The completed report will be made available on a website dedicated to the Baha Mousa public inquiry. *See News from the Inquiry*, THE BAHAMOUSAINQUIRY, <http://www.bahamousainquiry.org/> (last visited Feb. 23, 2011).

70. Richard Norton-Taylor, *Former Minister Admits Misinforming MPs over Treatment of Baha Mousa*, GUARDIAN.CO.UK (June 2, 2010, 14:54 BST), <http://www.guardian.co.uk/world/2010/jun/02/minister-misinform-mps-baha-mousa>.

2007 on charges related to Baha Mousa's death, but only one soldier pleaded guilty to inhumane treatment; the others were acquitted.⁷¹ On March 27, 2008, Des Browne, the Secretary of State for Defence, issued a statement acknowledging that British troops had violated article 2 (right to life) and article 3 (prohibition of torture) of the European Convention on Human Rights in their treatment of Iraqis, including Baha Mousa.⁷² In July 2008, the U.K. government agreed to pay a total of £2.83 million in compensation to Baha Mousa's family and to nine other Iraqis who had been detained by British troops and held in British and U.S. facilities for up to six months before being released without charge.⁷³

V. CANADA: OMAR KHADR

Omar Khadr was born in Canada to a Palestinian mother and an Egyptian father.⁷⁴ His father, Ahmed Said Khadr, was a radical Muslim who previously fought with the Mujahadeen against the Russians in Afghanistan alongside Osama bin Laden.⁷⁵ As a child, Omar Khadr went to summer training camps run by bin Laden, which his older brother Abdurrahman has described as "like, for kids here [in Canada] to go to a hockey camp."⁷⁶ His father was killed in an attack on a compound on the Pakistani side of the border in Waziristan in October 2003, during an offensive designed to ferret out bin Laden.⁷⁷

On July 27, 2002, fifteen-year-old Khadr was inside a compound in Afghanistan with an al Qaeda cell, for whom he had been acting as a

71. *Iraqis to Get £3m in MoD Damages*, BBC NEWS, http://news.bbc.co.uk/2/hi/uk_news/7500204.stm (last updated July 10, 2008, 19:30 GMT).

72. 474 PARL. DEB., H.C. (6th ser.) (2008) 14WS-15WS (U.K.), available at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080327/wmstext/80327m0001.htm>.

73. Duncan Gardham, *MOD in £3m Abuse Pay-Out to Baha Mousa and Nine Other Iraqi 'Torture' Victims*, THE TELEGRAPH (July 10, 2008, 5:53 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/2281567/MOD-in-3m-abuse-pay-out-to-Baha-Mousa-and-nine-other-Iraqi-torture-victims.html>.

74. Andrea Prasow, *The Trial That Wasn't: The Sentencing of Omar Khadar*, THE HUFFINGTON POST (Nov. 4, 2010, 11:50 PM), available at http://www.huffingtonpost.com/andrea-prasow/the-trial-that-wasnt-the_b_779310.html?ref=tw; see *Al-Qaeda Family: A Family Divided*, CBC NEWS ONLINE (Mar. 3, 2004), <http://www.cbc.ca/news/background/khadr/alqaedafamily2.html> [hereinafter *A Family Divided*].

75. *60 Minutes: Omar Khadr: The Youngest Terrorist?* (CBS television broadcast Nov. 18, 2007), http://www.cbsnews.com/stories/2007/11/16/60minutes/main3516048_page2.shtml [hereinafter *The Youngest Terrorist*]; see also *A Family Divided*, *supra* note 74.

76. *The Youngest Terrorist*, *supra* note 75.

77. *Al-Qaeda Family: The Firefight at Waziristan*, CBC NEWS ONLINE (Nov. 8, 2005), <http://www.cbc.ca/news/background/khadr/waziristan.html> [hereinafter *The Firefight at Waziristan*].

translator.⁷⁸ U.S. forces attacked the compound, killing almost all the men inside. At the conclusion of the firefight, Sergeant First Class Christopher Speer was killed by a grenade allegedly thrown by somebody inside the compound.⁷⁹ Because Khadr was the sole survivor, prosecutors allege that he threw the fatal grenade.⁸⁰

Varying accounts of the firefight have emerged in the eight years since Khadr was taken into custody. The United States maintains that he intentionally threw the grenade instead of surrendering.⁸¹ Other documents indicate that an adult fighter was still alive at the conclusion of the firefight, whereas Khadr was buried under rubble, and therefore could not have thrown the grenade.⁸² Khadr was shot twice in the back and suffered two huge exit wounds in his chest, in addition to being blinded in one eye.⁸³ He was airlifted to Bagram Air Base, where he alleges that he was interrogated forty-two times in ninety days.⁸⁴ His chief interrogator, Sergeant Joshua Claus, was subsequently court-martialed and discharged from the army after a badly beaten prisoner died at Bagram in December 2002.⁸⁵

Khadr was transferred to Guantanamo in October 2002, where more than 600 suspected al Qaeda fighters were being held.⁸⁶ In February 2003, Canadian Security Intelligence Services agents interviewed Khadr at Guantanamo.⁸⁷ In September 2004, he was designated an “enemy combatant” by a Combatant Status Review Tribunal.⁸⁸ On April 24, 2007,

78. Prasow, *supra* note 74.

79. *Id.*

80. *Captured Khadr Nearly Executed: Documents*, THE STAR (Mar. 19, 2008), <http://www.thestar.com/News/World/article/347974>.

81. *Guantanamo Bay's Youngest Militant Omar Khadr Jailed*, BBC NEWS US & CANADA (Oct. 31, 2010, 6:59 PM), <http://www.bbc.co.uk/news/world-us-canada-11662961> [hereinafter *Guantanamo Bay's Youngest Militant*].

82. Michelle Shephard, *Omar Khadr 'Innocent' in Death of US Soldier*, THE STAR (Oct. 28, 2009), <http://www.thestar.com/specialsections/omarkhadr/article/717885>; see also *The U.S. vs Omar Khadr* (CBC television broadcast Feb. 21, 2010), <http://www.cbc.ca/documentaries/doczone/2008/omarkadr/> (suggesting that Speer was killed by friendly fire).

83. *Captured Khadr Nearly Executed: Documents*, *supra* note 80; Prasow, *supra* note 74.

84. Amy Husser & Mark Iype, *Timeline: The Long Journey of Omar Khadr*, THE GAZETTE (Oct. 31, 2010), <http://www.montrealgazette.com/news/Timeline+long+journey+Omar+Khadr/375539/story.html>.

85. *Captured Khadr Nearly Executed: Documents*, *supra* note 80.

86. Husser & Iype, *supra* note 84.

87. *2003 Interviews with Omar Khadr – Media Coverage*, CANADIAN SECURITY INTELLIGENCE SERVICE (July 21, 2008), <http://www.csis-scrcs.gc.ca/nwsrm/nwsrlss/prss20080721-eng.asp>.

88. Omar Ahmed Khadr, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/omar-ahmed-khadr/> (last visited Feb. 26, 2011).

the Convening Authority referred charges against him for murder, attempted murder, conspiracy, providing material support for terrorism, and spying on U.S. forces in Afghanistan.⁸⁹ On November 13, 2009, U.S. Attorney General Holder and Defense Secretary Robert M. Gates announced that Khadr would be tried by a military commission.⁹⁰

The Canadian government has been largely unsympathetic to Khadr's requests for assistance.⁹¹ Canadian media have dubbed the Khadr's "The First Family of Terrorism."⁹² His mother, Maha, told interviewers in February 2004 that she was proud of Omar for his alleged acts; his sister, Zaynab, elaborated:

He'd been bombarded for hours. Three of his friends who were with him had been killed. . . . What do you expect him to do, come up with his hands in the air? I mean it's a war. They're shooting at him. Why can't he shoot at you? If you killed three, why can't he kill one?⁹³

The Canadian courts have been more supportive of Khadr's claims. In 2008, the Canadian Supreme Court held that Khadr was entitled under section 7 of the Canadian Charter of Rights and Freedoms to an order compelling the Minister of Justice to disclose all documents in the possession of the Crown relevant to Khadr's trial by a U.S. military commission, including documents relating to interviews conducted by Canadian agents at Guantanamo in 2003.⁹⁴ The Minister had argued, based on recent Supreme Court precedent, that "the *Charter* does not apply outside Canada and hence did not govern the actions of Canadian officials at Guantanamo Bay."⁹⁵ The Court instead concluded that "[t]he principles

89. *Id.*

90. See *Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees*, THE UNITED STATES DEPARTMENT OF JUSTICE (Nov. 13, 2009), <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>; *Khadr to Face U.S. Military Commission*, CBC NEWS (Nov. 13, 2009), <http://www.cbc.ca/news/canada/story/2009/11/13/omar-khadr-supreme-court-hearing.html>.

91. See Stephanie Dearing, *Canadian Government Says No to Repatriation of Omar Khadr*, DIGITAL JOURNAL (June 28, 2009), <http://www.digitaljournal.com/article/274923>; see also Janice Tibbetts, *Khadr Was Not a 'Child Soldier': Harper*, OTTAWA CITIZEN (Jan. 23, 2009), http://webcache.googleusercontent.com/search?q=cache:qMnvd8xac_wJ:www.ottawacitizen.com/news/khadr%2Bchild%2Bsoldier%2Bharper/1211864/story.html+%22Janice+Tibbetts%22+%22Child%22&cd=25&hl=en&ct=clnk&gl=us&client=firefox-a&source=www.google.com (accessed through the cached memory on Google's server); Allan Woods & Michelle Shephard, *Omar Khadr Case Cost Ottawa \$1.3 Million*, THE STAR.COM (Oct. 29, 2009), <http://www.thestar.com/specialsections/article/718051>.

92. Tibbetts, *supra* note 91; see also *The Youngest Terrorist*, *supra* note 75; *A Family Divided*, *supra* note 74.

93. *The Firefight at Waziristan*, *supra* note 77.

94. *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28, paras. 1-2 (Can.).

95. *Id.* para. 1.

of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international human rights obligations."⁹⁶ The Court held:

Consequently, the *Charter* applies, and Canada is under a s. 7 duty of disclosure. The content of this duty is defined by the nature of Canada's participation in the process that violated Canada's international human rights obligations. In the present circumstances, this duty requires Canada to disclose to Mr. Khadr records of the interviews conducted by Canadian officials with him, and information given to U.S. authorities as a direct consequence of conducting the interviews, subject to claims for privilege and public interest immunity.⁹⁷

The Court emphasized the exceptional nature of its finding: "If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the *Charter* has no application and Mr. Khadr's application for disclosure cannot succeed."⁹⁸ Here, however, "[s]ection] 7 imposes a duty on Canada to provide disclosure of materials in its possession arising from its participation in the foreign process that is contrary to international law and jeopardizes the liberty of a Canadian citizen."⁹⁹

Khadr also sought recourse in Canadian courts when confronted with the Canadian government's refusal to request his repatriation from Guantanamo.¹⁰⁰ In a second decision, the Supreme Court agreed that Canadian agents had violated Khadr's right under section 7 of the Charter not to be deprived of life, liberty and security of the person except in accordance with principles of fundamental justice, and that these "past acts" continued to violate Khadr's "present liberties."¹⁰¹ However, the court concluded that "the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s[ection] 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."¹⁰² The court reiterated the basic principle that "[i]nternational customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian

96. *Id.* para. 2.

97. *Id.* para. 3.

98. *Id.* para. 19 (citing *R v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 (Can.)).

99. *Id.* para. 31.

100. *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, 2010 SCC 3, para. 8 (Can.).

101. *Id.* paras. 31, 48.

102. *Id.* para. 39.

officials operating outside of Canada,”¹⁰³ even where those actions affect Canadian citizens. However, “[i]nterrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.”¹⁰⁴

The Canadian Supreme Court’s two decisions in cases brought on Khadr’s behalf come the closest to conscience-based reasoning, because they hold Canadian agents to a certain baseline of permitted behavior even beyond national borders. However, it is unlikely that Khadr would have been as successful in the Canadian courts had he not been a Canadian citizen, suggesting that compact-based considerations also played a role in the Court’s willingness to intervene on his behalf. Moreover, the threshold for triggering the extraterritorial application of the Canadian Charter under this framework is a violation of international human rights law—not, in the first instance, a violation of Canadian law.

On October 25, 2010, Khadr entered a guilty plea before a U.S. military commission in exchange for an eight-year sentence, with one year to be served at Guantanamo and the rest in Canada.¹⁰⁵

VI. UNITED STATES: AMIN AL-BAKRI

Amin Al-Bakri is a forty-one-year old Yemeni citizen who was born in Saudi Arabia.¹⁰⁶ He is married and has three children, and operated a business dealing in gemstones and shrimp. On December 30, 2002, Al-Bakri checked out of his hotel in Bangkok, Thailand, where he was on a business trip. He never boarded his flight back to Yemen. Six months after his disappearance, his family received a note in his handwriting sent from the Bagram detention facility in Afghanistan, via the International Committee of the Red Cross. During those six months, Al-Bakri was allegedly held in U.S. run secret prisons or “black sites,” and was allegedly subjected to serious abuse, requiring at least one unsuccessful knee

103. *Id.* para. 14 (citing *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26 (Can.)).

104. *Id.* para. 25.

105. *Guantanamo Bay’s Youngest Militant*, *supra* note 81; see also Adam Levine, *Canada Says It Will Accept Guantanamo Detainee Khadr in a Year*, CNN WORLD (Nov. 1, 2010), http://articles.cnn.com/2010-11-01/world/canada.khadr_1_guantanamo-detainee-omar-khadr-youngest-detainee?_s=PM:WORLD.

106. Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief paras. 17-18, *Al-Bakri v. Obama*, No. 08-1307 (D.D.C. Sept. 1, 2010). The details in this paragraph are drawn from paras. 19-21 of the Amended Petition.

surgery.¹⁰⁷ His father, who filed a habeas petition on his behalf, and his other family members have not seen him in the eight years since his disappearance.

While in detention, Al-Bakri has apparently improved his English, French, Urdu, and Farsi, and has served as an interpreter and mediator between U.S. authorities and other detainees.¹⁰⁸ Although he has transmitted some messages to his family (subject to length restrictions and censorship) through the ICRC, he has not had access to counsel.¹⁰⁹ A motion for summary judgment to obtain records under the Freedom of Information Act request filed by the American Civil Liberties Union seeking records relating to the detention and treatment of prisoners at Bagram was denied on October 25, 2010.¹¹⁰

Al-Bakri is one of three known Yemeni detainees at Bagram.¹¹¹ Along with Fadi Al-Maqaleh, he is one of the petitioners in *Maqaleh v. Gates*, which was decided by the D.C. Circuit in May 2010.¹¹² In that case, the D.C. Circuit determined that Bagram is distinguishable from Guantanamo, and that the Suspension Clause does not extend to Bagram.¹¹³ The court characterized the issue as “the availability of the writ of habeas corpus and the constitutional protections it effectuates to noncitizens of the United States held beyond the sovereign territory of the United States.”¹¹⁴ While the government had argued that the writ does not reach noncitizens beyond territory that is “effectively part of the United States,”¹¹⁵ the D.C. Circuit found that this narrow position was precluded by the Supreme Court’s

107. *Id.* para. 24.

108. *Id.* para. 33.

109. In accordance with applicable procedures, he was not represented by counsel in his appearance before a Detainee Review Board on February 9, 2010. *Id.* Exh. 2 (Letter from Robert Loeb & Jean Lin to Ramzi Kassem & Hope Metcalf, March 1, 2010). The D.C. Circuit indicated: “As the district court correctly noted, proceedings before the UECRB [“Unlawful Enemy Combatant Review Board”] afford even less protection to the rights of detainees in the determination of status than was the case with the CSRT [at Guantanamo].” *Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010).

110. Memorandum and Order, *ACLU v. Dep’t of Def.* Case No. 1:09-Civ.08071 (S.D.N.Y. Oct. 25, 2010).

111. Mohammed al-Qiri, *Interview with Mohammed al-Bakri, Father of Bagram Prison Detainee Amin al-Bakri*, YEMEN OBSERVER (July 15, 2008 8:17 AM), <http://www.yobserver.com/reports/10014605.html> [hereinafter *Interview with Mohammed al-Bakri*].

112. *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

113. *Id.* at 95.

114. *Id.* at 88.

115. *Id.* at 94, quoting Reply Brief of the United States at 7, *Maqaleh*, 605 F.3d at 84 (Nos. 09-5265, 09-5266, 09-5267).

decision in *Boumediene v. Bush*.¹¹⁶ The court reasoned that:

[H]ad the *Boumediene* Court intended to limit its understanding of the reach of the Suspension Clause to territories over which the United States exercised *de facto* sovereignty, it would have had no need to outline the factors to be considered either generally or in the detail which it in fact adopted.¹¹⁷

However, the court also rejected Petitioners' argument, which "would seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world,"¹¹⁸ reasoning that "[i]f it were the Supreme Court's intention to declare such a sweeping application, it would surely have said so."¹¹⁹ Ultimately, the court determined that practical obstacles to the writ precluded its application to Bagram, which "remains in a theater of war."¹²⁰

The *Al-Maqaleh* decision suggests that non-citizens held at overseas detention facilities in periods of armed conflict will not have recourse to U.S. courts in the form of habeas corpus absent some evidence of executive branch manipulation of the location of their detention for the express purpose of avoiding constitutional constraints.¹²¹ Al-Bakri therefore remains detained at Parwan (formerly known as Bagram).¹²²

VII. CONCLUSION

Even in cases with transborder elements, constitutional and quasi-constitutional rights operate primarily as mechanisms for domestic, rather than transnational, political ordering. Both the country and the compact approaches capture the idea of a constitution as enshrining a particular society's internal bargain about the appropriate trade-off between liberty and security: the country model defines that society territorially, and the compact model defines it through citizenship or some other pre-existing relationship between the government and the individual.¹²³ Only the conscience model does not link the application of domestic rights regimes

116. *Id.* at 94; see *Boumediene v. Bush*, 553 U.S. 723, 762-63 (2008).

117. *Maqaleh*, 605 F.3d at 95.

118. *Id.*

119. *Id.*

120. *Id.* at 98.

121. *Id.* at 99.

122. Mike Gudgell, *New Prison at Bagram Points to Shift in Approach*, ABC NEWS INT'L (Nov. 15, 2009), <http://abcnews.go.com/International/Afghanistan/prison-bagram-points-shift-approach/story?id=9088741&qtqkw=&qtqshow=>; *Interview with Mohammed al-Bakri*, *supra* note 111.

123. Keitner, *supra* note 1, at 61-65.

to either territory or membership.¹²⁴ It thus creates greater room for judicial review of action by the political branches beyond national borders.

The primary concern animating support for the conscience model seems to be the worry that, absent the existence of judicially enforceable constraints, the political branches will effectively operate in “law free” zones.¹²⁵ Narrow constructions of domestic rights generally require confidence in either the self-restraint of the political branches, or the possibility of more robust enforcement of international legal constraints. Domestic courts have also attempted to fill certain perceived gaps in creative ways, such as the human rights exception articulated by the Canadian Supreme Court in *Khadr*¹²⁶ and the executive branch manipulation proviso articulated by the D.C. Circuit in *Al-Maqaleh*.¹²⁷

As a theoretical matter, international human rights seem better suited than domestic constitutional rights to a conscience approach, since they are explicitly designed to transcend borders, rather than to define and govern relationships within a particular polity. However, there remain limited opportunities for the direct enforcement of international rights, in part because of the lack of a true international polity. The decisions canvassed above both reflect and constitute the self-understandings of judges operating within particular domestic institutions, and not (yet) a global cosmopolis. That said, domestic institutions, including courts, do not operate in “splendid isolation.” Judges are becoming more aware of, and responsive to, rights-based claims that implicate certain forms of extraterritorial government action—a potential step towards more porous conceptions of the relationships among territory, membership, and judicial constraints on the exercise of political power.

124. *Id.* at 61, 66-68.

125. *Id.* at 110-11.

126. *See* Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125, 2008 SCC 28, paras. 2-3 (Can).

127. *See* Maqaleh v. Gates, 605 F.3d 84, 98-99 (D.C. Cir. 2010).

