**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**NASSER AL-AULAQI, on his own behalf and as next friend of Anwar Al-Aulaqi,**

**Plaintiff,**

**v.**

**BARACK H. OBAMA, in his official capacity as President of the United States; ROBERT M. GATES, in his official capacity as Secretary of Defense; and LEON E. PANETTA, in his official capacity as Director of the Central Intelligence Agency,**

**Defendants.**

**Civil Action No. 10-1469 (JDB)**

**MEMORANDUM OPINION**

On August 30, 2010, plaintiff Nasser Al-Aulaqi ("plaintiff") filed this action, claiming that the President, the Secretary of Defense, and the Director of the CIA (collectively, "defendants") have unlawfully authorized the targeted killing of plaintiff's son, Anwar Al-Aulaqi, a dual U.S.-Yemeni citizen currently hiding in Yemen who has alleged ties to al Qaeda in the Arabian Peninsula ("AQAP"). Plaintiff seeks an injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi "unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief (c). Defendants have responded with a motion to dismiss plaintiff's complaint on five threshold grounds: standing, the political question doctrine, the Court's exercise of its "equitable discretion," the

absence of a cause of action under the Alien Tort Statute ("ATS"), and the state secrets privilege.

This is a unique and extraordinary case. Both the threshold and merits issues present fundamental questions of separation of powers involving the proper role of the courts in our constitutional structure. Leading Supreme Court decisions from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), through Justice Jackson's celebrated concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), to the more recent cases dealing with Guantanamo detainees have been invoked to guide this Court's deliberations. Vital considerations of national security and of military and foreign affairs (and hence potentially of state secrets) are at play.

Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? Can a U.S. citizen -- himself or through another -- use the U.S. judicial system to vindicate his constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for "jihad against the West," and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States? Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization? How can the courts, as plaintiff proposes, make real-time assessments of the nature and severity of alleged threats to national security, determine the imminence of those threats, weigh the benefits and costs of possible diplomatic and military responses, and ultimately decide whether, and under what circumstances, the use of military force against such threats is justified? When would it

ever make sense for the United States to disclose in advance to the "target" of contemplated military action the precise standards under which it will take that military action? And how does the evolving AQAP relate to core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the September 18, 2001 Authorization for the Use of Military Force?

These and other legal and policy questions posed by this case are controversial and of great public interest. "Unfortunately, however, no matter how interesting and no matter how important this case may be . . . we cannot address it unless we have jurisdiction." United States v. White, 743 F.2d 488, 492 (7th Cir. 1984). Before reaching the merits of plaintiff's claims, then, this Court must decide whether plaintiff is the proper person to bring the constitutional and statutory challenges he asserts, and whether plaintiff's challenges, as framed, state claims within the ambit of the Judiciary to resolve. These jurisdictional issues pose "distinct and separate limitation[s], so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) (internal citations omitted).

Although these threshold questions of jurisdiction may seem less significant than the questions posed by the merits of plaintiff's claims, "[m]uch more than legal niceties are at stake here" -- the "constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998). Here, the jurisdictional hurdles that plaintiff must surmount are

both complex and at the heart of the intriguing nature of this case. But "[a] court without jurisdiction is a court without power, no matter how appealing the case for exceptions may be," Bailey v. Sharp, 782 F.2d 1366, 1373 (7th Cir. 1986) (Easterbrook, J., concurring), and hence it is these threshold obstacles to reaching the merits of plaintiff's constitutional and statutory challenges that must be the initial focus of this Court's attention. Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum.

## BACKGROUND

This case arises from the United States's alleged policy of "authorizing, planning, and carrying out targeted killings, including of U.S. citizens, outside the context of armed conflict." See Compl. ¶ 13. Specifically, plaintiff, a Yemeni citizen, claims that the United States has authorized the targeted killing of plaintiff's son, Anwar Al-Aulaqi, in violation of the Constitution and international law. See id. ¶¶ 3-4, 9, 17, 21, 23.

Anwar Al-Aulaqi is a Muslim cleric with dual U.S.-Yemeni citizenship, who is currently believed to be in hiding in Yemen. See id. ¶¶ 9, 26; see also Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Mem.") [Docket Entry 15], at 1; Pl.'s Mem. in Support of Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mem.") [Docket Entry 3], Decl. of Ben Wizner ("Wizner Decl."), Ex. AA. Anwar Al-Aulaqi was born in New Mexico in 1971, and spent much of his early life in the United States, attending college at Colorado State University and receiving his master's degree from San Diego State University before moving to Yemen in 2004. See Wizner Decl., Ex. AB, Decl. of Dr. Nasser Al-Aulaqi ("Al-Aulaqi Decl.") ¶¶ 3-4. On July 16, 2010, the U.S. Treasury

Department's Office of Foreign Assets Control ("OFAC") designated Anwar Al-Aulaqi as a Specially Designated Global Terrorist ("SDGT") in light of evidence that he was "acting for or on behalf of al-Qa'ida in the Arabian Peninsula (AQAP)" and "providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]" See Defs.' Mem. at 6-7 (quoting Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233 (July 16, 2010)) (hereinafter, "OFAC Designation"). In its designation, OFAC explained that Anwar Al-Aulaqi had "taken on an increasingly operational role" in AQAP since late 2009, as he "facilitated training camps in Yemen in support of acts of terrorism" and provided "instructions" to Umar Farouk Abdulmutallab, the man accused of attempting to detonate a bomb aboard a Detroit-bound Northwest Airlines flight on Christmas Day 2009. See OFAC Designation. Media sources have also reported ties between Anwar Al-Aulaqi and Nidal Malik Hasan, the U.S. Army Major suspected of killing 13 people in a November 2009 shooting at Fort Hood, Texas. See, e.g., Wizner Decl., Exs. E, F, H, J, L, M, V, W. According to a January 2010 Los Angeles Times article, unnamed "U.S. officials" have discovered that Anwar Al-Aulaqi and Hasan exchanged as many as eighteen e-mails prior to the Fort Hood shootings. See id., Ex. E.

Recently, Anwar Al-Aulaqi has made numerous public statements calling for "jihad against the West," praising the actions of "his students" Abdulmutallab and Hasan, and asking others to "follow suit." See, e.g., Wizner Decl., Ex. V; Defs.' Reply to Pl.'s Opp. to Defs.' Mot. to Dismiss ("Defs.' Reply") [Docket Entry 29], Exs. 1-2; Defs.' Mem., Ex. 1, Unclassified Decl. of James R. Clapper, Dir. of Nat'l Intelligence ("Clapper Decl.") ¶ 16. Michael Leiter, Director of the National Counterterrorism Center, has explained that Anwar Al-Aulaqi's "familiarity with the

West" is a "key concern[]" for the United States, see Defs.' Mem., Ex. 3, and media sources have similarly cited Anwar Al-Aulaqi's ability to communicate with an English-speaking audience as a source of "particular concern" to U.S. officials, see Wizner Decl., Ex. V. But despite the United States's expressed "concern" regarding Anwar Al-Aulaqi's "familiarity with the West" and his "role in AQAP," see Defs.' Mem., Ex. 3, the United States has not yet publicly charged Anwar Al-Aulaqi with any crime. See Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss ("Pl.'s Opp.") [Docket Entry 25], at 9. For his part, Anwar Al-Aulaqi has made clear that he has no intention of making himself available for criminal prosecution in U.S. courts, remarking in a May 2010 AQAP video interview that he "will never surrender" to the United States, and that "[i]f the Americans want me, [they can] come look for me." See Wizner Decl., Ex. V; see also Clapper Decl. ¶ 16; Defs.' Mem. at 14 n.5 (quoting Anwar Al-Aulaqi as stating, "I have no intention of turning myself in to [the Americans]. If they want me, let them search for me.").

Plaintiff does not deny his son's affiliation with AQAP or his designation as a SDGT. Rather, plaintiff challenges his son's alleged unlawful inclusion on so-called "kill lists" that he contends are maintained by the CIA and the Joint Special Operations Command ("JSOC"). See Pl.'s Mem. at 5; see also Compl. ¶¶ 3, 19. In support of his claim that the United States has placed Anwar Al-Aulaqi on "kill lists," plaintiff cites a number of media reports, which attribute their information to anonymous U.S. military and intelligence sources. See, e.g., Compl. ¶ 19; Pl.'s Mem. at 5; Wizner Decl., Exs. F, H, L. For example, in January 2010, The Washington Post reported that, according to unnamed military officials, Anwar Al-Aulaqi was on "a shortlist of U.S. citizens" that JSOC was authorized to kill or capture. See Wizner Decl., Ex. F. A few months later, The Washington Post cited an anonymous U.S. official as stating that Anwar Al-

Aulaqi had become "the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill." See id., Ex. L. And in July 2010, National Public Radio announced -- on the basis of unidentified "[i]ntelligence sources" -- that the United States had already ordered "almost a dozen" unsuccessful drone and air-strikes targeting Anwar Al-Aulaqi in Yemen. See id., Ex. S.

Based on these news reports, plaintiff claims that the United States has placed Anwar Al-Aulaqi on the CIA and JSOC "kill lists" without "charge, trial, or conviction." See Compl. ¶ 1. Plaintiff alleges that individuals like his son are placed on "kill lists" after a "closed executive process" in which defendants and other executive officials determine that "secret criteria" have been satisfied. See id. ¶ 21; Pl.'s Mem. at 5-6. Plaintiff further avers "[u]pon information and belief" that once an individual is placed on a "kill list," he remains there for "months at a time." See Compl. ¶ 22; see also Pl.'s Mem. at 6; Wizner Decl., Ex. E (quoting unnamed U.S. officials as stating that "kill lists" are reviewed every six months and names are removed from the list if there is no longer intelligence linking the person to "known terrorists or [terrorist] plans"). Consequently, plaintiff argues, Anwar Al-Aulaqi is "now subject to a standing order that permits the CIA and JSOC to kill him . . . without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." See Compl. ¶¶ 21, 23.

The United States has neither confirmed nor denied the allegation that it has issued a "standing order" authorizing the CIA and JSOC to kill plaintiff's son. See Defs.' Mem. at 36; see also Mot. Hr'g Tr. [Docket Entry 30] 17:24-18:1, Nov. 8, 2010. Additionally, the United States has neither confirmed nor denied whether -- if it has, in fact, authorized the use of lethal force against plaintiff's son -- the authorization was made with regard to whether Anwar Al-Aulaqi

presents a concrete, specific, and imminent threat to life, or whether there were reasonable means short of lethal force that could be used to address any such threat. See Defs.' Mem. at 36. The United States has, however, repeatedly stated that if Anwar Al-Aulaqi "were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances." Id. at 2; see also Mot. Hr'g Tr. 15:2-9.

Nevertheless, plaintiff alleges that due to his son's inclusion on the CIA and JSOC "kill lists," Anwar Al-Aulaqi is in "hiding under threat of death and cannot access counsel or the courts to assert his constitutional rights without disclosing his whereabouts and exposing himself to possible attack by Defendants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10 (stating that "[b]ecause the U.S. government is seeking to kill my son, as reported, he cannot access legal assistance or a court without risking his life"). Plaintiff therefore brings four claims -- three constitutional, and one statutory -- on his son's behalf. He asserts that the United States's alleged policy of authorizing the targeted killing of U.S. citizens, including plaintiff's son, outside of armed conflict, "in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat," violates (1) Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures and (2) his Fifth Amendment right not to be deprived of life without due process of law. See Compl. ¶¶ 27-28. Plaintiff further claims that (3) the United States's refusal to disclose the criteria by which it selects U.S. citizens like plaintiff's son for targeted killing independently violates the notice requirement of the Fifth

Amendment Due Process Clause. See id. ¶ 30. Finally, plaintiff brings (4) a statutory claim under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, alleging that the United States's "policy of targeted killings violates treaty and customary international law." See id. ¶ 29.

Plaintiff seeks both declaratory and injunctive relief. First, he requests a declaration that, outside of armed conflict, the Constitution prohibits defendants "from carrying out the targeted killing of U.S. citizens," including Anwar Al-Aulaqi, "except in circumstances in which they present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief (a); id. ¶ 6; Pl.'s Mem. at 39-40. Second, plaintiff requests a declaration that, outside of armed conflict, "treaty and customary international law" prohibit the targeted killing of all individuals -- regardless of their citizenship -- except in those same, limited circumstances. See Compl., Prayer for Relief (b); id. ¶ 6; Pl.'s Mem. at 40. Third, plaintiff requests a preliminary injunction prohibiting defendants from intentionally killing Anwar Al-Aulaqi "unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." See Compl., Prayer for Relief (c); Pl.'s Mem. at 40. Finally, plaintiff seeks an injunction ordering defendants to disclose the criteria that the United States uses to determine whether a U.S. citizen will be targeted for killing. See Compl., Prayer for Relief (d); id. ¶ 6; Pl.'s Mem. at 40.

Presently before the Court is defendants' motion to dismiss plaintiff's complaint on five distinct grounds: (1) standing; (2) political question; (3) "equitable discretion"; (4) lack of a cause of action under the ATS; and (5) the state secrets privilege. See Defs.' Mot. at 1. On November 8, 2010, this Court held a motions hearing on plaintiff's motion for a preliminary

injunction and defendants' motion to dismiss, and heard nearly three hours of argument from counsel for the parties.

**STANDARD OF REVIEW**

Defendants assert three primary grounds for dismissal, arguing that (1) plaintiff fails to state an ATS claim upon which relief can be granted; (2) plaintiff lacks standing to bring his three constitutional claims; and (3) all of plaintiff's claims -- both statutory and constitutional -- present non-justiciable political questions. See Defs.' Mot. at 1; see also Mot. Hr'g Tr. 37:3-5 (in which defendants state that plaintiff's constitutional claims and his ATS claim are barred by the political question doctrine). The first of these three grounds for dismissal constitutes a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, whereas the latter two challenge subject matter jurisdiction and must be evaluated under Rule 12(b)(1). See Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) (stating that "the defect of standing is a defect in subject matter jurisdiction"); Gonzalez-Vera v. Kissinger, 449 F.3d 1260, 1262 (D.C. Cir. 2006) (explaining that a dismissal under the political question doctrine constitutes a dismissal for lack of subject matter jurisdiction and "not an adjudication on the merits"). "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see Leatherman v. Tarrant Cnty. Narcotics and Coordination Unit, 507 U.S. 163, 164 (1993); Phillips v. Bureau of Prisons, 591 F.2d 966, 968 (D.C. Cir. 1979). In other words, the factual allegations in the plaintiff's complaint must be presumed true, and the plaintiff must be given every favorable inference that may be drawn from the allegations of fact. Scheuer, 416 U.S. at 236; Sparrow v. United Air Lines, Inc.,

216 F.3d 1111, 1113 (D.C. Cir. 2000). At the same time, however, the Court need not accept as true "a legal conclusion couched as a factual allegation," nor need it accept inferences that are unsupported by the facts set forth in the complaint. Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

Under Rule 12(b)(1), the party seeking to invoke the jurisdiction of a federal court -- plaintiff in this case -- bears the burden of establishing that the court has jurisdiction to hear his claims. See U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000); Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (explaining that a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"); Pitney Bowes, Inc. v. U.S. Postal Serv., 27 F. Supp. 2d 15, 19 (D.D.C. 1998). Since the elements necessary to establish jurisdiction are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof; i.e., with the manner and degree of evidence required at successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Although courts examining a Rule 12(b)(1) motion to dismiss -- such as for lack of standing -- will "construe the complaint in favor of the complaining party," see Warth v. Seldin, 422 U.S. 490, 501 (1975), the "'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim," Grand Lodge, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987)). Thus, a court may consider material other than the allegations of the complaint in determining whether it has jurisdiction to hear the case, so long as the court accepts the factual

allegations in the complaint as true. See Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 197 (D.C. Cir. 1992).

To survive a motion to dismiss under Rule 12(b)(6), a complaint need only contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,'" such that the defendant has "'fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); accord Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" in order to provide the "grounds" of "entitle[ment] to relief." Twombly, 550 U.S. at 555-56; see also Papasan, 478 U.S. at 286. Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570); Atherton v. Dist. of Columbia Office of the Mayor, 567 F.3d 672, 681 (D.C. Cir. 2009). A complaint is considered plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. This amounts to a "two-pronged approach," under which a court first identifies the factual allegations that are entitled to an assumption of truth and then determines "whether they plausibly give rise to an entitlement to relief." Id. at 1950-51.

## DISCUSSION

### I. Standing

Before this Court may entertain the merits of his claims, plaintiff, as the party invoking federal jurisdiction, must establish that he has the requisite standing to sue. See Lujan, 504 U.S. at 560-61. Article III of the U.S. Constitution "limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies,'" Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982), and the doctrine of standing serves to identify those "'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III" and which are thus "'appropriately resolved through the judicial process,'" Lujan, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." See Warth, 422 U.S. at 498.

Standing doctrine encompasses "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Id. To establish the "irreducible constitutional minimum of standing," a plaintiff must allege (1) an "injury in fact" which is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61 (internal quotation marks and citations omitted). A "particularized" injury is defined as one that "affect[s] the plaintiff in a personal and individual way." Id. at 561 n.1. Thus, Article III "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Valley Forge,

454 U.S. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)) (emphasis added).

Closely related to the constitutional requirement that a plaintiff must suffer a "personal" injury to establish standing is the prudential requirement that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499; see also Allen v. Wright, 468 U.S. 737, 751 (1984). This "self-imposed" judicial limitation on the exercise of federal jurisdiction serves dual purposes, as it helps to prevent "the adjudication of rights which those not before the Court may not wish to assert" and also seeks to ensure "that the most effective advocate of the rights at issue is present to champion them." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978). Nevertheless, since the prohibition against one party asserting the legal rights of another is prudential -- not constitutional -- the Supreme Court may "recognize[] exceptions to this general rule," see Coalition of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1160 (9th Cir. 2002), and it has done so in "narrowly limited" circumstances, see Duke Power Co., 438 U.S. at 80. The doctrines of "next friend" and "third party" standing constitute two such limited exceptions to the general rule that a party may not bring suit to vindicate the legal rights of another. See Whitmore, 495 U.S. at 162-65; Powers v. Ohio, 499 U.S. 400, 410-11 (1991).

In his complaint, plaintiff purports to bring three constitutional claims as his son's "next friend." See Compl. ¶¶ 27-28, 30. First, he claims that the United States's alleged policy of authorizing the targeted killing of U.S. citizens, including his son, outside of armed conflict, and "in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be

employed to neutralize any such threat," violates Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures. See id. ¶ 27. Second, plaintiff argues that this targeted killing policy violates Anwar Al-Aulaqi's Fifth Amendment right not to be deprived of life without due process of law. See id. ¶ 28. Third, plaintiff alleges that the failure to disclose the criteria by which U.S. citizens like Anwar Al-Aulaqi are selected for targeted killing violates those citizens' rights to notice under the Fifth Amendment Due Process Clause. See id. ¶ 30. In opposing defendants' motion to dismiss, plaintiff asserts an additional basis for raising these claims, maintaining that he also has third party standing to sue on his son's behalf. See Pl.'s Opp. at 2-6, 11-15. The Court will address plaintiff's arguments in support of "next friend" standing and third party standing in turn.[1]

A. Next Friend Standing

"Next friend" standing originated in connection with petitions for habeas corpus, as early American courts allowed "next friends" to appear "on behalf of detained prisoners who [were] unable, usually because of mental incompetence or inaccessibility, to seek relief themselves."

[1] Any contention that plaintiff has "direct party" or "individual" standing to bring claims alleging violations of his son's constitutional rights is mistaken. Plaintiff does not assert that the alleged targeted killing of his son would violate plaintiff's own constitutional right to maintain a relationship with his adult child. Nor could he. See Butera v. Dist. of Columbia, 235 F.3d 637, 656 (D.C. Cir. 2001) (foreclosing the possibility of such a claim by holding that "a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority and independent"). Instead, plaintiff argues that the alleged inclusion of his son on a "kill list" violates plaintiff's son's rights under the Fourth and Fifth Amendments. See Compl. ¶¶ 27-28, 30. Thus, it is plaintiff's son -- and not plaintiff -- who would have "direct party" standing to pursue these claims. See, e.g., Reed v. Islamic Republic of Iran, 439 F. Supp. 2d 53, 62 (D.D.C. 2006) (explaining that son's allegations that his father was subject to "torture, arbitrary and prolonged detention and hostage taking are third party claims because they arise from acts perpetrated against the plaintiff's father" and it is therefore the father, not the son, "who has direct party standing to bring an action on these claims.")

See Whitmore, 495 U.S. at 162. Congress statutorily authorized "next friend" standing in the habeas corpus context in 1948, amending the habeas corpus statute to allow petitions to be "'signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*.'" See id. at 162-63 (quoting 28 U.S.C. § 2242) (emphasis in original). In Whitmore v. Arkansas, the Supreme Court expressly declined to decide whether congressional authorization -- like that provided by 28 U.S.C. § 2242 -- is necessary to confer "next friend" standing outside the habeas corpus context. See id. at 164-65. The Court noted, however, that to the extent parties may ever invoke a "federal doctrine of 'next friend' standing" in non-habeas proceedings, the scope of that doctrine "is no broader than what is permitted by the habeas corpus statute, which codified the historical practice." Id.

After examining "[d]ecisions applying the habeas corpus statute," the Whitmore Court set forth "two firmly rooted prerequisites" that must be satisfied in order for an individual to be accorded standing to proceed as another's "next friend." See id. at 163. First, the putative "'next friend' must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf to prosecute the action." Id. Second, "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate." Id. The Whitmore Court further suggested that -- while not necessarily a "firmly rooted prerequisite" to "next friend" standing -- a "next friend" must also "have some significant relationship with the real party in interest." Id. at 164. The burden is on the putative "next friend" to prove "the propriety of his status and thereby justify the jurisdiction of the court." Id. Even where the requirements of "next friend" standing are met, the "'next friend' does not himself become a party to the . . . action in which he participates, but

simply pursues the cause on behalf of the . . . real party in interest." Id. at 163. Thus, the "next friend" relies "wholly on the injury to the real party in interest to satisfy constitutional standing requirements." Id. at 178 n.6 (Marshall, J., dissenting).[2]

1. *Anwar Al-Aulaqi's Access to the Courts*

Plaintiff has failed to provide an adequate explanation for his son's inability to appear on his own behalf, which is fatal to plaintiff's attempt to establish "next friend" standing.[3] In his complaint, plaintiff maintains that his son cannot bring suit on his own behalf because he is "in hiding under threat of death" and any attempt to access counsel or the courts would "expos[e] him[] to possible attack by Defendants." Compl. ¶ 9; see also id. ¶ 26; Al-Aulaqi Decl. ¶ 10. But while Anwar Al-Aulaqi may have chosen to "hide" from U.S. law enforcement authorities, there is nothing preventing him from peacefully presenting himself at the U.S. Embassy in

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[2] Hence, if plaintiff satisfies the criteria for "next friend" standing, the Court would need to conduct a further inquiry to determine whether Anwar Al-Aulaqi meets the constitutional standing requirements of injury in fact, causation, and redressability.

[3] Plaintiff is correct that for purposes of a motion to dismiss for lack of standing, the trial court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth, 422 U.S. at 501; see Pl.'s Opp. at 5 n.2. However, in the context of "next friend" standing, courts have refused -- even at the pleading stage -- to accept unsubstantiated allegations that the real party in interest is "incompetent" or "lacks access to the courts"; rather, courts have required that claims pertaining to incompetency or inaccessibility have some "support in the record." See, e.g., Demonsthenes v. Baal, 495 U.S. 731, 736 (1990) (refusing to grant next friend standing where state court determination that real party in interest was competent was "fairly supported by the record"); Diamond v. Charles, 476 U.S. 54, 67 (1986) (explaining that father lacked standing to sue on his daughter's behalf because he had failed "to adduce factual support" that his daughter "is currently a minor or that she is otherwise incapable of asserting her own rights"); Coalition of Clergy, 310 F.3d at 1160 (finding an evidentiary hearing on "inaccessibility" unnecessary where putative "next friend" failed to make even "a preliminary showing that upon remand it could prove" that the real parties in interest lacked access to the courts under Whitmore). This Court thus need not accept plaintiff"s bald assertion that his son lacks access to the courts if "the record makes clear the contrary." See Coalition of Clergy, 310 F.3d at 1160 n.2.

Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts. Defendants have made clear -- and indeed, both international and domestic law would require -- that if Anwar Al-Aulaqi were to present himself in that manner, the United States would be "prohibit[ed] [from] using lethal force or other violence against him in such circumstances." See Defs.' Mem. at 2; see also id. at 5, 13-14; Mot. Hr'g Tr. 15:6-8 (government counsel states that "if [Anwar Al-Aulaqi] does present himself, he is under no danger of the United States government using lethal force" against him); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (explaining that "[i]n the case of armed conflict not of an international character," a party to the conflict is prohibited from using "violence to life and person" with respect to individuals "who have laid down their arms"); Hamdan v. Rumsfeld, 548 U.S. 557, 629-32 (2006) (holding that Geneva Convention Common Article 3 applies to the current U.S. conflict with al Qaeda); Tennessee v. Garner, 471 U.S. 1, 11 (1985) (explaining in the domestic law enforcement context that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead").

Plaintiff argues that to accept defendants' position -- that Anwar Al-Aulaqi can access the U.S. judicial system so long as he "surrenders" -- "would require the Court to accept at the standing stage what is disputed on the merits," since the Court would then be acknowledging that Anwar Al-Aulaqi is, in fact, currently "a participant in an armed conflict against the United States." See Pl.'s Opp. at 9. Not so. The Court's conclusion that Anwar Al-Aulaqi can access the U.S. judicial system by presenting himself in a peaceful manner implies no judgment as to Anwar Al-Aulaqi's status as a potential terrorist. All U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may

simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities. Anwar Al-Aulaqi is thus faced with the same choice presented to all U.S. citizens.[4]

It is certainly possible that Anwar Al-Aulaqi could be arrested -- and imprisoned -- if he were to come out of hiding to seek judicial relief in U.S. courts. Without expressing an opinion as to the likelihood of Anwar Al-Aulaqi's future arrest or imprisonment, it is significant to note that an individual's incarceration does not render him unable to access the courts within the meaning of Whitmore. See Avent v. Dist. of Columbia, 2009 WL 387668, at *1 (D.D.C. Feb. 13, 2009) (finding that parent lacked "next friend" standing to pursue claim on behalf of her incarcerated and mentally capable adult child); see also Arocho v. Camp Hill Corr. Facilities, 417 F. Supp. 2d 661, 662 (M.D. Pa. 2005) (denying father "next friend" standing to sue on behalf of his incarcerated adult son, who "had access to prison legal sources" and was fully capable of prosecuting the case on his own behalf). Indeed, "prisoners can, and do, bring civil suits all the time." Avent, 2009 WL 387668, at *1. Given that an individual's actual incarceration is insufficient to show that he lacks access to the courts, the mere prospect of Anwar Al-Aulaqi's future incarceration fails to satisfy Whitmore's "inaccessibility" requirement.

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[4] In fact, it is possible that Anwar Al-Aulaqi would not even need to emerge from "hiding" in order to seek judicial relief. The use of videoconferencing and other technology has made civil judicial proceedings possible even where the plaintiff himself cannot physically access the courtroom. For example, courts frequently entertain habeas corpus petitions from detainees at Guantanamo Bay despite the fact that those detainees are not present in the courtroom. See, e.g., Al-Maqaleh v. Gates, 604 F. Supp. 2d 205, 228 (D.D.C. 2009), *rev'd and remanded on other grounds*, 605 F.3d 84 (D.C. Cir. 2010) (explaining that "real-time video conferencing provides a workable substitute for an in-court appearance" and noting that this "is the process being used in scores of Guantanamo habeas proceedings now taking place in this District Court, in which no Guantanamo detainee has been physically transferred here"). There is no reason why -- if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding -- he could not communicate with attorneys via the Internet from his current place of hiding.

Plaintiff argues, however, that if his son were to seek judicial relief, he would not be detained as an ordinary federal prisoner, but instead would be subject to "indefinite detention without charge." See Pl.'s Opp. at 14; see also Mot. Hr'g Tr. 64:10-12. It is true that courts have, in some instances, granted "next friend" standing to enemy combatants being held "incommunicado." For example, in Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004), the Second Circuit granted an attorney "next friend" standing to file a habeas petition on behalf of an American citizen who was being detained as an enemy combatant at a U.S. naval base in South Carolina. See id. at 700, 703. The court in Padilla had little difficulty concluding that the real party in interest was unable to "access the courts" under Whitmore, as he had been denied "any contact with his counsel, his family or any other non-military personnel" for eighteen months. See id. Similarly, in Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), *vacated on other grounds*, 542 U.S. 507 (2004), the Fourth Circuit permitted the father of a military detainee to petition the court on his son's behalf, see id. at 280, as the son was being "held incommunicado and subjected to an infinite detention . . . without access to a lawyer," see Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

But unlike the detainees in Padilla and Hamdi, Anwar Al-Aulaqi is not in U.S. custody, nor is he being held incommunicado against his will. To the extent that Anwar Al-Aulaqi is currently incommunicado, that is the result of his own choice. Moreover, there is reason to doubt whether Anwar Al-Aulaqi is, in fact, incommunicado. Since his alleged period of hiding began in January 2010, see Al-Aulaqi Decl. ¶ 8, Anwar Al-Aulaqi has communicated with the outside world on numerous occasions, participating in AQAP video interviews and publishing online

articles in the AQAP magazine Inspire. See, e.g., Defs.' Mem. at 14 n.5 (describing May 2010 AQAP video interview with Anwar Al-Aulaqi); Clapper Decl. ¶ 16 (same); Wizner Decl., Ex. V (same); Defs.' Reply at 4 (referencing April 2010 and July 2010 Inspire articles written by Anwar Al-Aulaqi); Defs.' Reply, Exs. 1-2 (providing copies of Anwar Al-Aulaqi's April 2010 and July 2010 Inspire articles). Anwar Al-Aulaqi has continued to use his personal website to convey messages to readers worldwide, see Wizner Decl., Ex. V, and a July 2010 online article written by Anwar Al-Aulaqi advises readers that they "may contact Shayk [Anwar] Al-Aulaqi through any of the emails listed on the contact page." See Defs.' Reply at 4 n.4; id., Ex. 2. Needless to say, Anwar Al-Aulaqi's access to e-mail renders the circumstances of his existing, self-made "confinement" far different than the confinement of the detainees in Padilla and Hamdi.

Even if Anwar Al-Aulaqi were to be captured and detained, the conditions of his confinement would still need to be akin to those in Padilla and Hamdi before his father could be accorded standing to proceed as Anwar Al-Aulaqi's "next friend." In cases brought by purported "next friends" on behalf of detainees at Guantanamo Bay, courts have not presumed that the detainees lack access to the U.S. judicial system, but have required the would-be "next friends" to make a showing of inaccessibility. See, e.g., Ahmed v. Bush, 2005 WL 6066070, at *1-2 (D.D.C. May 25, 2005) (ordering supplemental briefing to substantiate petitioner's claim to "next friend" standing where petition had merely "presume[d], rather than demonstrate[d] through facts, that [the detainee] ha[d] been denied access to the courts of the United States"); Fenstermaker v. Bush, 2007 WL 1705068, at *6 (S.D.N.Y. June 12, 2007) (finding that "next friend" lacked standing to proceed, in part because he was "unable to demonstrate that the Detainees cannot appear on their own behalf"); Does 1-570 v. Bush, 2006 WL 3096685, at *5

(D.D.C. Oct. 31, 2006) (questioning whether petitioners satisfied Whitmore "inaccessibility" requirement in light of evidence that Guantanamo Bay detainees have "been able to file petitions before the Court in large numbers").

Because Anwar Al-Aulaqi has not yet been detained, it is impossible to determine whether the nature of any such hypothetical detention would be more similar to that in Padilla and Hamdi, or to the Guantanamo Bay cases in which detainees have been found capable of bringing suit on their own behalf. Regardless, the mere prospect of future detention is insufficient to warrant a finding that Anwar Al-Aulaqi currently lacks access to the courts.

2. *Plaintiff's Dedication to Anwar Al-Aulaqi's "Best Interests"*

Not only has plaintiff failed to prove that Anwar Al-Aulaqi lacks access to the courts, but he has also failed to show that he is "truly dedicated" to Anwar Al-Aulaqi's "best interests." Plaintiff states that, as Anwar Al-Aulaqi's father, he "only wants to do what is in his [son's] best interests." See Al-Aulaqi Decl. ¶ 11. He further maintains that "he believe[s] taking legal action to stop the United States from killing [his] son is in his [son's] best interests." Id. Accepting these statements as true, they are nonetheless insufficient to establish that this lawsuit accords with Anwar Al-Aulaqi's best interests within the meaning of Whitmore.

Under the second prong of Whitmore, a purported "next friend" may not simply speculate as to the best interests of the party on whose behalf he seeks to litigate. See Does 1-570, 2006 WL 3096685, at *5. Rather, the "next friend" must provide some evidence that he is acting in accordance with the intentions or wishes of the real party in interest. See id. Courts have therefore refused to grant "next friend" standing where the putative "next friend" has never conferred with the party in interest and, as a result, can offer no "basis on which to conclude that

the [party] want[s] legal representation as a general matter or more specifically by counsel in the instant matter." Id.; see also Idris v. Obama, 667 F. Supp. 2d 25, 29 (D.D.C. 2009) (holding that "because [the putative 'next friend'] has never met with petitioner since his confinement, counsel cannot be certain that [the 'next friend'] represents petitioner's best interests").

In Does 1-570, the court denied standing to attorneys seeking to file habeas petitions as "next friends" on behalf of hundreds of unidentified Guantanamo Bay detainees with whom they had never met. See Does 1-570, 2006 WL 3096685, at *5, *8. As the court explained, "[w]hile it may be fair to assume that the detainees want to be released from detention in Guantanamo Bay, there may be reasons why detainees may not want to file habeas petitions as a vehicle for accomplishing this purpose." Id. at *6. For example, the court noted, "certain detainees may mistrust the United States judicial system and choose to avoid participating in such proceedings altogether." Id. Absent proof as to the specific "interests and preferences" of the detainees on whose behalf they sought to litigate, the attorneys in Does 1-570 could not meet "the requirements of 'next friend' standing pursuant to the second prong of Whitmore." See id. at *4, *5; see also Fenstermaker, 2007 WL 1705068, at *6 n. 10 (refusing to accord "next friend" standing to attorney seeking to represent Guantanamo Bay detainees when attorney conceded that if consulted, the detainees might express their desire to become "martyrs" rather than to litigate).

Here, plaintiff has presented no evidence that his son wants to vindicate his U.S. constitutional rights through the U.S. judicial system. Plaintiff concedes that he has not spoken to Anwar Al-Aulaqi since he was allegedly first targeted for "killing" by the United States, see Compl. ¶ 26; Al-Aulaqi Decl. ¶ 9; Pl.'s Opp. at 7, and hence plaintiff "cannot be certain that [he] represents [Anwar Al-Aulaqi's] best interests," see Idris, 667 F. Supp. 2d at 29. Although

plaintiff maintains that his son's "public silence with respect to the present lawsuit" supports an inference that Anwar Al-Aulaqi does not object to this litigation, see Pl.'s Opp. at 10, plaintiff cannot base his claim to "next friend" standing on his son's mere failure to expressly disavow this suit. Rather, plaintiff bears the burden of showing that this action accords with his son's best interests. See Whitmore, 495 U.S. at 164 (explaining that "[t]he burden is on the 'next friend' clearly to establish the propriety of his status and thereby justify the jurisdiction of the court").

Indeed, to the extent that Anwar Al-Aulaqi has made his personal preferences known, he has indicated precisely the opposite -- i.e., that he believes it is not in his best interests to prosecute this case. According to plaintiff's complaint, the media first reported that Anwar Al-Aulaqi had been added to the JSOC "kill list" as early as January 2010. See Compl. ¶ 19. However, at no point has Anwar Al-Aulaqi sought to challenge his alleged inclusion on the CIA or JSOC "kill lists," nor has he communicated any desire to do so. Although plaintiff maintains that "Anwar Al-Aulaqi cannot communicate with his father or counsel without endangering his own life," see Compl. ¶ 26 (emphasis added), this contention is belied by the numerous public statements that Anwar Al-Aulaqi has made since his alleged period of hiding began. Several times during the past ten months, Anwar Al-Aulaqi has publicly expressed his desire for "jihad against the West," see Defs.' Reply, Ex. 2, and he has called upon Muslims to meet "American aggression" not with "pigeons and olive branches" but "with bullets and bombs." See id., Ex. 1. Given that Anwar Al-Aulaqi has been able to make such controversial statements with impunity, there is no reason to believe that he could not convey a desire to sue without somehow placing his life in danger. Under these circumstances, the fact that Anwar Al-Aulaqi has chosen not to communicate any such desire strongly supports the inference that he does not want to litigate in

the U.S. courts.

This inference is further corroborated by the content of Anwar Al-Aulaqi's public statements, in which he has decried the U.S. legal system and suggested that Muslims are not bound by Western law. As recently as April 2010, Anwar Al-Aulaqi wrote an article for the AQAP publication Inspire, in which he asserted that Muslims "should not be forced to accept rulings of courts of law that are contrary to the law of Allah." See Defs.' Reply, Ex. 1. According to Anwar Al-Aulaqi, Muslims need not adhere to the laws of the "civil state," since "the modern civil state of the West does not guarantee Islamic rights." Id. In a July 2010 Inspire article, Anwar Al-Aulaqi again expressed his belief that because Western "government, political parties, the police, [and] the intelligence services . . . are part of a system within which the defamation of Islam is . . . promoted . . . the attacking of any Western target [is] legal from an Islamic viewpoint." Id., Ex. 2. He went on to argue that a U.S. civilian who drew a cartoon depiction of Mohammed should be "a prime target of assassination" and that "[a]ssassinations, bombings, and acts of arson" constitute "legitimate forms of revenge against a system that relishes the sacrilege of Islam in the name of freedom." Id.

Such statements -- which reveal a complete lack of respect for U.S. law and governmental structures as well as a belief that it is "legal" and "legitimate" to violate U.S. law -- do not reflect the views of an individual who would likely want to sue to vindicate his U.S. constitutional rights in U.S. courts. After all, the substantive rights that are being asserted in this case are only provided to Anwar Al-Aulaqi by the U.S. Constitution and international law. Yet he has made clear his belief that "international treaties" do not govern Muslims, and that Muslims are not bound by any law -- U.S., international, or otherwise -- that conflicts with the "law of Allah."

See id., Ex. 1. There is, then, reason to doubt that Anwar Al-Aulaqi would even regard a ruling from this Court as binding -- much less that he would want to litigate in order to obtain such a ruling. Anwar Al-Aulaqi's public statement that "[i]f the Americans want me, [they can] come look for me" provides further evidence that he has no intention of making himself the subject of litigation in U.S. courts. See Wizner Decl., Ex. V; see also Defs.' Mem. at 14 n.5 (quoting Anwar Al-Aulaqi as stating, "I have no intention of turning myself in . . . [i]f they want me, let them search for me."). In light of such remarks, this Court cannot conclude that Anwar Al-Aulaqi believes "taking legal action to stop the United States from killing" him would be in his "best interests." See Al-Aulaqi Decl. ¶ 11. While he may very well wish to avoid targeted killing by the United States, all available evidence indicates that he does not wish "to file [suit] as a vehicle for accomplishing this purpose." See Does 1-570, 2006 WL 3096685, at *6.

Plaintiff's mere assertion of a *per se* rule that a parent meets the "best interests" test does not satisfy his burden of showing that he is acting in accordance with his son's best interests, especially in the face of his son's numerous public statements suggesting the contrary. See Pl.'s Opp. at 6 (citing Vargas ex rel. Sagastegui v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998)). Although "[t]he existence of a significant relationship enhances the probability" that a putative next friend "knows and is dedicated to the [absent party's] individual best interests," Coalition of Clergy, 310 F.3d at 1162, courts have refused to infer -- simply on the basis of a close familial tie -- that a putative "next friend" actually represents the absent party's best interests. See, e.g., Anthem Life Ins. Co. v. Olguin, 2007 WL 1390672, at *2 (E.D. Cal. May 9, 2007) (explaining that "a parent is not entitled to be the next friend of his or her child as a matter of absolute right" and noting that "the best interests of a child and the best interests of even a loving parent can

conflict"); Finan v. Good Earth Tools, Inc., 2007 WL 1452246, at *2 (E.D. Mo. May 15, 2007) (closely examining whether husband's interests might conflict with those of his incompetent wife before allowing husband to file suit as his wife's "next friend"). In other words, where a party's own views as to his best interests appear to conflict with those of a putative "next friend," a court cannot substitute the views of the would-be "next friend" for those of the absent party, even where the purported "next friend" is a loving parent who only wants what he rationally believes to be in the best interests of his adult child. See Gilmore v. Utah, 429 U.S. 1012, 1017 (1976). Thus, courts have uniformly denied "next friend" standing to parents of death row inmates seeking to stay their adult children's executions where the inmate is mentally competent and has chosen not to seek a stay of execution on his own behalf. See id.; see also Baal, 495 U.S. at 737; Hauser v. Moore, 223 F.3d 1316, 1321 (11th Cir. 2000); Brewer v. Lewis, 989 F.2d 1021, 1027 (9th Cir. 1993).

Hence, even accepting that plaintiff, as Anwar Al-Aulaqi's father, has a "significant relationship" with his son, plaintiff nonetheless cannot establish "next friend" standing under the second prong of Whitmore. There is no dispute that Anwar Al-Aulaqi is mentally competent, and the Court has found that he has access to the courts within the meaning of Whitmore. And yet, during the past ten months that his name has allegedly appeared on "kill lists," Anwar Al-Aulaqi has neither filed suit on his own behalf nor expressed any desire to do so. Moreover, all available evidence as to Anwar Al-Aulaqi's "intentions and preferences" suggests that if consulted, he would have no desire to use the U.S. judicial system as a means of preventing his alleged targeting by the United States. To allow plaintiff to sue as his son's "next friend" under these circumstances would risk "allow[ing] the adjudication of rights which parties not before the

Court may not wish to assert." Duke Power, 438 U.S. at 80. Because plaintiff cannot show that Anwar Al-Aulaqi lacks access to the courts and that he is acting in Anwar Al-Aulaqi's best interests, plaintiff lacks standing to bring constitutional claims as his son's "next friend."

B. Third Party Standing

In opposing defendants' motion to dismiss, plaintiff argues -- for the first time -- that he "also has third-party standing to raise his son's constitutional claims." See Pl.'s Opp. at 11. Like "next friend" standing, third party or *jus tertii* standing constitutes a "limited exception[]" to the general rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." Powers, 499 U.S. at 410. Because third party standing is the "exception" rather than the norm, the burden is on the plaintiff "to establish that [he] has third party standing, not on the defendant to rebut third party standing." Amato v. Wilentz, 952 F.2d 742, 750 (3d Cir. 1991).

In Powers v. Ohio, the Supreme Court held that a criminal defendant had third party standing to assert the equal protection rights of jurors allegedly excluded from serving at the defendant's trial on account of their race. See Powers, 499 U.S. at 415. In so doing, the Court articulated three requirements that must be satisfied before a litigant may be accorded third party standing. See id. at 411. First, he must show that he himself has suffered a concrete, redressable "injury in fact" adequate to satisfy Article III's case-or-controversy requirement.[5] See id. Second, the litigant must have "a close relation to the third party." Id. Third, there must be

[5] From a constitutional perspective, third party standing thus parallels direct party standing; in either case, the plaintiff himself must satisfy Article III standing requirements of an injury in fact, which is caused by the defendant's conduct, and which is likely to be redressed by a favorable decision. See Kowalski v. Tesmer, 543 U.S. 125, 129 n.2 (2004).

"some hindrance to the third party's ability to protect his or her own interests." Id. The first of these requirements is constitutional, while the latter two are prudential. See Caplin & Drysdale, Ctd. v. United States, 491 U.S. 617, 624 n.3 (1989).

Prior to Powers, the Supreme Court articulated an additional prudential factor for courts to consider in deciding whether to permit third party standing: "the impact of the litigation on third-party interests." See id. Where "genuine conflicts" exist between the litigant's interests and those of the absent third party, this factor "strongly counsels against third party standing." Amato, 952 F.2d at 750; see also Clifton Terrace Assocs., Ltd. v. United Tech. Corp., 929 F.2d 714, 722 (D.C. Cir. 1991) (denying third party standing where the litigant's "interests in the subject of this suit to some extent conflict with those of the [third parties] whose rights [the litigant] purports to advance"). Although Powers did not specifically list this factor in its three-part test for third party standing, "the opinion's later discussion of the relationship prong incorporated it." Amato, 952 F.2d at 750 n.7; see also Powers, 499 U.S. at 414 (noting that the "excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom"). Courts examining claims of third party standing after Powers have continued to assess whether the litigant and the third party have common interests, either as an additional, independent prudential factor, see, e.g., Hutchins by Owens v. Dist. of Columbia, 144 F.3d 798, 803 (D.C. Cir. 1998) (listing the "impact of the litigation on the rights of the third party" as one of three prudential considerations), *rev'd on other grounds,* 188 F.3d 531 (D.C. Cir. 1999) (en banc), or as an aspect of the "close relationship" inquiry under Powers, see, e.g., Amato, 952 F.2d at 750 n.7 (explaining its decision to follow the Powers approach of "combining these closely linked factors"); Lepelletier v. FDIC, 164 F.3d 37, 44 (D.C. Cir. 1999)

(noting that courts applying Powers have "only required a 'close relation' in the sense that there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third parties' interests").

Ultimately, plaintiff's belated argument in support of third party standing fares no better than his attempt to sue as his son's "next friend." Plaintiff cannot show that a parent suffers an injury in fact if his adult child is threatened with a future extrajudicial killing. Moreover, even if plaintiff could make such a showing, the prudential Powers factors militate against according plaintiff third party standing to assert violations of his son's constitutional rights. As the Supreme Court has observed, where "the interests of [a] parent and [a] child are not in parallel, and indeed, are potentially in conflict," a parent may not evade the requirements of "next friend" standing by instead bringing suit under the related doctrine of third party standing. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004).

1. *Article III Standing Requirements*

In contrast to "next friend" standing, where the "next friend" relies on the injury to the real party in interest, third party standing requires that the plaintiff himself satisfy the demands of Article III. See Kowalski, 543 U.S. at 129 n.2. Plaintiff maintains that "[t]he threatened injury here -- the killing of Plaintiff's son -- is plainly sufficient to satisfy Powers' first requirement" that the party bringing suit suffer a constitutional injury in fact. See Pl.'s Opp. at 11. Whether plaintiff has met Article III standing requirements, however, is not nearly so plain as plaintiff suggests.

Under Article III, a party invoking the jurisdiction of a federal court must show that he has suffered an injury in fact, defined as "an invasion of a legally protected interest which is (a)

concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks and citations omitted). When a plaintiff seeks to vindicate the rights of a third party not before the court, the plaintiff himself must suffer a concrete injury, which must be particularized in the sense that it "affect[s] the plaintiff in a personal and individual way." Id. at 561 n.1; see Caplin & Drysdale, 491 U.S. at 624 n.3. At least one court has therefore denied standing to a father suing state actors for their alleged use of "excessive force" against his son, on the ground that the alleged injuries to the son did not impact the father "in a personal and individual way." Weakes v. FBI-MPD Safe Streets Task Force, 2006 WL 212141, at *2 (D.D.C. Jan. 27, 2006).

Plaintiff, however, does not merely allege that his son will be injured by defendants' use of "excessive force"; rather, plaintiff maintains that he, too, will be injured by defendants' use of lethal force, since defendants' extrajudicial killing of Anwar Al-Aulaqi would permanently sever plaintiff's relationship with his adult child. See Pl.'s Opp. at 13 (explaining that "[i]n this case, a father seeks to preserve the very existence of a relationship with his son by protecting his son's right to life"). Although this Court does not question the severity of the emotional harm that plaintiff may suffer if his son were to be killed by the United States, emotional harm -- in and of itself -- is not sufficient to satisfy Article III's injury in fact requirement. See, e.g., Humane Soc'y of U.S. v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) (explaining that "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes"). Instead, a plaintiff can only establish an Article III injury in fact based on emotional harm if that alleged harm stems from the infringement of some "legally protected," see Lujan, 504 U.S. at 560, or "judicially cognizable," see Bennett v. Spear, 520 U.S. 154, 167 (1997), interest that is either

"recognized at common law or specifically recognized as such by the Congress." Sargeant v. Dixon, 130 F.3d 1067, 1069 (D.C. Cir. 1997).[6]

Here, this Court has been unable to find any legal basis for such an interest, either statutory or otherwise. The D.C. wrongful death statute does not provide a basis for plaintiff's alleged legally protected interest in preserving his relationship with his adult son, as it only protects persons who are "officially appointed executors or administrators of the child's estate." See Saunders v. Air Florida, Inc., 558 F. Supp. 1233, 1235 (D.D.C. 1983) (citing Strother v. Dist. of Columbia, 372 A.2d 1291, 1296 n.7 (D.C. 1977)) (finding that parents could not bring suit under the D.C. wrongful death statute where the adult child's widow, and not the parents, was the duly appointed administrator of the decedent's estate). There is no evidence in the record to suggest that plaintiff is the "executor or administrator" of Anwar Al-Aulaqi's estate, and the Court is aware of no other possible statutory basis for plaintiff's alleged legally protected interest.

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[6] In Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003), the D.C. Circuit held that a former Ringling Brothers employee did allege an Article III injury in fact based on the "aesthetic and emotional injury," id. at 335 (internal quotation marks omitted), he suffered upon witnessing the "mistreatment of the [Asian] elephants to which he became emotionally attached during his tenure at Ringling Bros." Id. at 338. The court explained that the former circus employee's "personal relationship with the elephants," coupled with his stated "desire to visit the elephants" in the future without detecting "the effects of mistreatment," satisfied the injury in fact requirement for standing, at least for purposes of a motion to dismiss. See id. at 337-38. At first glance, it would seem that if one suffers an Article III injury in fact when an elephant to whom one has an emotional attachment is threatened with future mistreatment, one must also suffer an injury in fact when one's adult son is threatened with future extrajudicial killing. But the alleged injury in Ringling Bros. is distinguishable from plaintiff's alleged injury here in one legally significant respect: the plaintiff in Ringling Bros. could cite a statutory basis for his alleged interest in maintaining a relationship with the (unharmed) Asian elephants -- namely, the citizen-suit provision of the Endangered Species Act, which "allows any person to commence a civil suit to enjoin violations of the Act or its regulations." See 16 U.S.C. § 1540(g)(1)(A) (emphasis added). By contrast, plaintiff can point to no statutory basis for his claim that as a parent he enjoys a legally protected interest in maintaining a relationship with his adult child.

Plaintiff also has no constitutionally protected interest in maintaining a relationship with his adult child. In suits brought under 42 U.S.C. § 1983, several federal circuits have considered "whether the Constitution protects a parent's relationship with his adult children in the context of state action which has the incidental effect of severing that relationship." Russ v. Watts, 414 F.3d 783, 787 (7th Cir. 2005).[7] To date, however, no court has held that a parent possesses a constitutionally protected liberty interest in maintaining a relationship with his adult child free from indirect government interference. Rather, all circuits to address the issue "have expressly declined to find a violation of the familial liberty interest" where state action has only an incidental effect on the parent's relationship with his adult child, and "was not aimed specifically at interfering with the relationship." See, e.g., Russ, 414 F.3d at 791 (declining to recognize a "constitutional right to recover for the loss of the companionship of an adult child" where the parent-child relationship "is terminated as an incidental result of state action"); McCurdy v. Dodd, 352 F.3d 820, 830 (3d Cir. 2003) (dismissing section 1983 claim against police officers implicated in the fatal shooting of plaintiff's son on the ground that "the fundamental guarantees of the Due Process Clause do not extend to a parent's interest in the companionship of his independent adult child"); Valdivieso Ortiz v. Burgos, 807 F.2d 6, 9 (1st Cir. 1986) (holding that stepfather of an adult inmate allegedly beaten to death by prison guards had no remedy under section 1983 for the "incidental deprivation" of his relationship with his adult stepson); cf.

[7] Suits brought under section 1983 "must be based upon the violation of [a] plaintiff's personal rights, and not the rights of someone else." Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990); see also Claybrook v. Birchwell, 199 F.3d 350, 357 (6th Cir. 2000) (explaining that "a section 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort"); Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir. 1982) (stating that a 1983 civil rights action "does not accrue to a relative, even the father of the deceased").

Trujillo v. Bd. of Cnty. Comm'rs, 768 F.2d 1186, 1189-90 (10th Cir. 1985) (finding that mother had a constitutionally protected liberty interest in her relationship with her adult son, but dismissing claim against government officials allegedly responsible for son's death where there was no allegation of the officials' intent to interfere with the parent-adult child relationship). Most importantly, in Butera v. Dist. of Columbia, 235 F.3d at 656, the D.C. Circuit dismissed a mother's section 1983 claim that her son's death during his employment with the D.C. Metropolitan Police Department violated her due process right to the companionship of her adult child. As the D.C. Circuit held, "a parent does not have a constitutionally protected liberty interest in the companionship of a child who is past minority and independent." 235 F.3d at 656.[8]

To be sure, plaintiff does not actually need to show that he has a constitutionally protected liberty interest in the preservation of his relationship with his adult son, since he -- unlike the mother in Butera -- does not bring suit under section 1983 for a violation of his own constitutional rights. Nevertheless, plaintiff does need to show that he has suffered an injury to some legally protected interest. See Lujan, 504 U.S. at 560; Powers, 499 U.S. at 411. Because plaintiff can cite no statutory basis for such an interest, and because there is no constitutional basis for such an interest in light of Butera, the only remaining question is whether plaintiff's

[8] According to defendants, even if Butera had concluded that a parent enjoys a constitutionally protected liberty interest in maintaining a relationship with his adult child, plaintiff, "as an alien residing in Yemen . . . would not have [such] a liberty interest under the Constitution that could support the third party standing argument he seeks to pursue." See Defs.' Reply at 7 n.7. This argument is not without merit, as "[t]he Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." See Jifry v. F.A.A., 370 F.3d 1174, 1182 (D.C. Cir. 2004). But this Court need not reach this issue in light of Butera's clear holding that no parent -- regardless of his citizenship -- enjoys such an interest.

alleged interest is somehow protected by common law.

But plaintiff has failed to cite a single case to support the argument that a parent enjoys a common law interest in maintaining a relationship with his adult child. Although he cites a few cases in which courts have found that the separation of a parent from a child creates an Article III injury in fact, all of these cases involved minor rather than adult children. See Pl.'s Opp. at 12 (citing Jones v. Prince George's Cnty., 348 F.3d 1014, 1018 (D.C. Cir. 2003) (holding that an infant child suffered an injury in fact when her father was wrongfully killed, thereby permanently depriving her of his "financial and emotional support"); Reed, 439 F. Supp. 2d at 58, 62 (concluding that a six-year-old boy suffered an injury in fact when his father was kidnaped, detained, and tortured for more than three years)); see also Payne-Barahona v. Gonzalez, 474 F.3d 1, 2 (1st Cir. 2007) (acknowledging as sufficient for Article III purposes the injury in fact that a father would sustain if he were deported and thereby separated from his minor children); Coleman v. United States, 454 F. Supp. 2d 757, 763 (N.D. Ill. 2006) (finding that minor child alleged injury in fact under Article III by showing that, "unless enjoined, Defendants will execute an order of removal that will force his mother to leave the United States").

On the other hand, courts have repeatedly emphasized the need for differential treatment of the parent-child relationship when it "involves two adults." See Butera, 235 F.3d at 656. As the D.C. Circuit has explained, "[w]hen children grow up, their dependence on their parents for guidance, socialization, and support gradually diminishes . . . [and] the strength and importance of the emotional bonds between them and their parents usually decrease." Franz v. United States, 712 F.2d 1428, 1432 (D.C. Cir. 1983), *addendum to* 707 F.2d 582 (D.C. Cir. 1983). The differences that emerge in the parent-child relationship as the child becomes an adult have been

held "sufficiently marked to warrant sharply different constitutional treatment." Id. Hence, although both the Supreme Court and the D.C. Circuit have recognized that a parent enjoys a constitutionally protected liberty interest in maintaining a relationship with his minor child (and is therefore entitled to procedural due process protections before the government directly interferes with that relationship), see, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982); Stanley v. Illinois, 405 U.S. 645, 650 (1972); Franz v. United States, 707 F.2d 582, 599 (D.C. Cir. 1983), the Supreme Court has never extended such a right beyond settings involving minor children, see Ortiz, 807 F.2d at 8-9, and this Circuit expressly declined to make that extension in Butera.

There are many reasons why courts have been reluctant to extend procedural due process protections to the relationship between a parent and his adult child, and these same reasons counsel against recognizing plaintiff's alleged injury here as sufficient for standing. In declining to find that a parent enjoys a constitutionally protected liberty interest in maintaining a relationship with his adult child, the First Circuit explained that a contrary holding "would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny." See Ortiz, 807 F.2d at 9. For example, the court noted, parents could then be expected to sue for "the alleged wrongful prosecution and incarceration of a child or the alleged wrongful discharge of a child from a state job, forcing the child to seek employment in another part of the country." Id. Similarly, if this Court were to recognize plaintiff's interest in preserving his relationship with his adult son as legally protected, other parents could be expected to raise claims in federal court asserting violations of their adult children's rights whenever their children were arrested, incarcerated or discharged from government employment. These claims would be

cognizable under third party standing doctrine, so long as the parent was able to demonstrate a "close relationship" to the adult child and some "hindrance" to the adult child's ability to sue on his own behalf. See Powers, 499 U.S. at 411.

This Court will not advance that outcome, absent case law holding that a parent enjoys a legally protected interest in his relationship with his adult child. Indeed, this Circuit's opinion in Butera strongly suggests that such an interest should not be recognized, in light of the marked changes that occur in the parent-child relationship once a child reaches the age of majority. Like the D.C. Circuit, this Court "does not minimize the devastating loss that a parent can experience from the death of an adult child." Butera, 235 F.3d at 656. But not all devastating losses constitute invasions of judicially cognizable interests. And absent an invasion of such an interest, plaintiff cannot show that he has suffered the requisite Article III injury in fact needed to establish third party standing.[9]

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[9] Defendants make much of the fact that plaintiff's alleged injury is "speculative," since plaintiff has not shown whether the United States is acting "in compliance with the standard plaintiff argues should be applied here." See Defs.' Reply at 10; see also Defs.' Mem. at 16-18; Mot. Hr'g Tr. 29:12-31:12. Because plaintiff has failed to allege an invasion of any legally protected interest, this Court need not address defendants' argument that the threatened extrajudicial killing of plaintiff's adult child is also too "speculative" to satisfy Article III. The Court notes, however, that a threatened injury -- like that asserted by plaintiff here -- may form the basis of an Article III injury in fact so long as it is "certainly impending." See Whitmore, 495 U.S. at 158 (internal quotation marks and citations omitted); see also City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (explaining that "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical") (internal quotation marks and citations omitted); Steffel v. Thompson, 415 U.S. 452, 459 (1974) (permitting plaintiff to challenge the legality of his potential arrest under a criminal trespass statute where plaintiff alleged threats of prosecution that were neither imaginary nor speculative); Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (explaining that where a criminal statute has not yet been enforced against a litigant, the litigant may still challenge the statute if she "can demonstrate that she faces a threat of prosecution . . . which is credible and immediate, and not merely abstract or speculative").

2. *Prudential Standing Requirements*

Even assuming that plaintiff did suffer an "injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement," this Court still must ask whether "prudential considerations . . . point to permitting [plaintiff] to advance his claim." See Caplin & Drysdale, 491 U.S. at 624 n.3. The Supreme Court has been clear in enumerating the relevant third party standing prudential considerations -- a close relationship and an identity of interests between the litigant and the third party as well as some hindrance to the third party's ability to litigate on his own behalf -- but the Court has been "less clear . . . about what to do with these factors." Amato, 952 F.2d at 749; see also Amer. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1362 (D.C. Cir. 2000) (noting that "the general state of third party standing law" is "not entirely clear"); Miller v. Albright, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring) (explaining that the Court's third party standing jurisprudence "is in need of what may charitably be called clarification").

Powers implied that a litigant must satisfy all of the prudential third party standing criteria in order to be accorded third party standing. See Powers, 499 U.S. at 411 (stating that the litigant "must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests"); see also Amato, 952 F.2d at 749 (explaining that the Court's language in Powers "seemed to *require* certain showings from would-be third party claimants") (emphasis in original). Yet the Supreme Court has, in some instances, been "quite forgiving" in its application of the Powers prudential factors (see Kowalski, 543 U.S. at 130), allowing third party standing even where there is no discernible "hindrance" to the third party's ability to litigate on his own behalf. See, e.g., Caplin & Drysdale, 491 U.S. at 624 n.3 (granting third party standing to attorney challenging forfeiture law as a

violation of his client's Sixth Amendment rights although the client himself suffered no "obstacles . . . to advancing his own constitutional claim"); Craig v. Boren, 429 U.S. 190, 192-97 (1976) (permitting vendor to bring third party challenge to state statute prohibiting sales of 3.2% beer to males under age 21 but permitting sales to females between ages 18 and 21, even though the suit could have been brought by a discriminated-against 18-to-21-year-old male); Miller, 523 U.S. at 433 (permitting daughter to raise equal protection claims on her father's behalf despite the absence of any apparent obstacles to the father's assertion of his own constitutional rights).

In light of the Supreme Court's apparent willingness to dispense with the hindrance requirement in certain circumstances, the Third Circuit has adopted a "more flexible balancing approach" to the prudential Powers factors in order to determine whether third party standing is appropriate. See Amato, 952 F.2d at 742 (explaining that "we read the body of Supreme Court precedent as (1) identifying factors that are relevant to determining third party standing and (2) rendering an overall balance of factors dispositive"). The D.C. Circuit has, on occasion, also used a balancing analysis of the Powers criteria for third party standing. See, e.g., Hutchins, 144 F.3d at 803 (finding that third party standing was justified where "the closeness of the relationship between parents and children and the magnitude of the potential impact of our decision on children's rights outweigh[ed] the absence of [any barrier to the children's ability to litigate on their own behalf]"). But most recently, the D.C. Circuit has stated that "when the 'Powers test' is applied, all three requirements must be met." See Amer. Immigration Lawyers Ass'n, 199 F.3d at 1362 n. 15.

The D.C. Circuit has also observed that the Supreme Court's seemingly inconsistent third party standing jurisprudence can be reconciled without resort to balancing of the Powers factors.

See Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1280 (D.C. Cir. 1994). Instead, the court in Fair Emp't Council implied, the cases in which the Supreme Court has found third party standing despite the absence of the Powers "hindrance" factor can be understood as falling within an alternative test for third party standing provided by the D.C. Circuit in Haitian Refugee Ctr. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987). See 28 F.3d at 1280-81. In Haitian Refugee -- which pre-dated Powers -- the court held that "third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant." See 809 F.2d at 809. Although the D.C. Circuit has yet to clarify the precise impact of Powers on the Haitian Refugee approach, it has recognized the possibility that the two tests "now coexist and a party can establish third party standing by meeting either standard." See Amer. Immigration Lawyers Ass'n, 199 F.3d at 1362. Thus, in its most recent in-depth discussion of third party standing, the D.C. Circuit first examined whether the litigants could proceed under Haitian Refugee and then whether they met the Powers prudential criteria for third party standing. See id. Because the litigants could not show that the challenged government action specifically targeted a protected "relationship" between the litigant and the third party (as required by Haitian Refugee), and also could not establish "'some hindrance to the third party's ability to protect his or her own interests'" (as required by Powers), the court in Amer. Immigration Lawyers Ass'n found that prudential considerations precluded the litigants from suing on behalf of the absent third parties. Id. at 1362 (quoting Powers, 499 U.S. at 411).

Here, plaintiff has similarly failed both the Powers and the Haitian Refugee tests for third party standing. Despite the arguable hindrance to Anwar Al-Aulaqi's ability to sue on his own behalf, plaintiff lacks third party standing under Powers because his interests do not align with

those of his son. Plaintiff also cannot pass the Haitian Refugee "relationship" inquiry, because none of the rights that plaintiff claims are infringed by the alleged targeted killing of his son constitute substantive protections of the father-adult son relationship, and the alleged targeted killing of plaintiff's adult son is not "designed to interfere with" the father-adult son relationship. See Haitian Refugee, 809 F.2d at 809-10.

(a) Application of the Powers Factors

In order to establish third party standing under Powers, plaintiff must show (1) a close relationship with his son in the sense that they have an identity of interests and (2) some hindrance to Anwar Al-Aulaqi's ability to protect his own legal rights. See Powers, 499 U.S. at 411. These prudential standing requirements serve dual purposes. First, the presence of a hindrance or genuine obstacle preventing the third party from asserting his own legal rights reduces the likelihood that the third party's absence is due to the fact that his rights are either "not truly at stake or not truly important to him." See Singleton v. Wulff, 428 U.S. 106, 116 (1976). Application of this factor thus prevents courts from "adjudicat[ing] . . . rights unnecessarily," where "in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Id. at 113-14. Second, the requirement that the litigant and the third party have a close relationship such that there is an identity of interests between them helps to ensure that there will be "little loss in terms of effective advocacy" by allowing the litigant to proceed on the absent third party's behalf. See Craig, 429 U.S. at 194 (internal quotation marks and citation omitted).

Plaintiff is correct that "the 'hindrance' requirement under Powers has been more liberally construed and is significantly less stringent than the analogous consideration under the doctrine

of next friend standing." See Pl.'s Opp. at 14. Whereas one purporting to act as another's "next friend" must show that the real party in interest is unable to access the courts, one seeking to satisfy the hindrance requirement for third party standing need only demonstrate that there is some impediment to the real party in interest's ability to assert his own legal rights. See, e.g., Singleton, 428 U.S. at 118 (explaining that the obstacles to the third party bringing suit on his own behalf need not be insurmountable in order to justify third party standing). The Supreme Court has recognized as sufficient hindrances justifying third party standing (1) a third party's financial disincentive to litigate, see Powers, 499 U.S. at 414-15 (permitting criminal defendant to bring third party challenge to alleged race-based exclusion of jurors in part because an excluded juror would have only a "small financial stake" in the outcome of a suit but would be forced to endure the "economic burdens of litigation"); (2) a party's desire to protect her personal privacy, see Singleton, 428 U.S. at 118 (according physicians third party standing to assert the rights of their women patients in challenging a statute as an unconstitutional "interference with the abortion decision" in part because the pregnant women "may be chilled from such assertion by a desire to protect the very privacy of [their] decision[s] from the publicity of a court suit"); and (3) the "imminent mootness" of a party's claims, see id. at 117 (describing the "imminent mootness" of a pregnant woman's challenge to a statute restricting the circumstances in which pregnant women may receive medicaid benefits for abortions); Craig, 429 U.S. at 192-93 (permitting vendor to continue equal protection challenge to a statute prohibiting certain alcohol sales to male minors when the named plaintiff turned 21 during the course of the litigation); see also Hutchins, 144 F.3d at 803 (allowing parents to bring third party challenge to D.C. curfew law in part because a young plaintiff "might turn seventeen by the end" of the litigation, thereby

mooting his claims).

Anwar Al-Aulaqi certainly would face challenges if he were to sue on his own behalf. Although he can access U.S. courts within the meaning of Whitmore, this access is constrained as a result of Anwar Al-Aulaqi's current location in Yemen. The D.C. Circuit has explained that individuals who reside outside the country and "far from the courthouse are hindered when it comes to taking legal action," although such hindrance -- in and of itself -- has not been found sufficient to justify third party standing. See Amer. Immigration Lawyers Ass'n, 199 F.3d at 1364. But here, plaintiff has alleged a further hindrance to his son's ability to bring suit: namely, Anwar Al-Aulaqi's inclusion on the CIA and JSOC "kill lists."

Anwar Al-Aulaqi would not be killed if he were to present himself in a peaceful manner and seek relief in U.S. courts, but he would expose himself to possible detention as an enemy combatant. If Anwar Al-Aulaqi were to emerge from hiding and be detained, the present action -- which seeks to prevent defendants from unlawfully killing him -- would likely be deemed moot. Given the Supreme Court's suggestion that the "imminent mootness" of a party's claims can constitute a sufficient hindrance under Powers, see Singleton, 428 U.S. at 117; Craig, 429 U.S. at 192-93, this case may satisfy that criterion. Nevertheless, the purpose of the hindrance requirement is to ensure "that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so." Miller, 523 U.S. at 450 (O'Connor, J., concurring). It appears that Anwar Al-Aulaqi could have brought suit on his own behalf, but that he has simply declined to do so. Unlike the third parties in Powers, then, who lacked a sufficient incentive to litigate, see Powers, 499 U.S. at 414-15, Anwar Al-Aulaqi should have the requisite incentive to sue, given that his life is allegedly at stake. The fact that Anwar Al-Aulaqi has not brought suit

during the past ten months that his name has allegedly appeared on "kill lists" strongly suggests that his rights are either "not truly at stake or not truly important to him." Singleton, 428 U.S. at 116. Thus, despite the potential imminent mootness of Anwar Al-Aulaqi's claims, allowing plaintiff to litigate the present action would not seem to further the purpose of the Powers hindrance requirement.

But regardless of whether there is some hindrance to Anwar Al-Aulaqi's ability to litigate within the meaning of Powers, plaintiff cannot meet the other Powers prudential requirement -- that he and his son have a close relationship such that they have an identity of interests. It is true that courts have often found the parent-child relationship sufficiently close to justify third party standing. See, e.g., Hutchins, 144 F.3d at 803 (joining other circuits in concluding that "the parent-child relationship is sufficiently close to meet [the] prudential standing requirements" of third party standing); Reed, 439 F. Supp. 2d at 62 (explaining that "the relationship between a son and his father constitutes the requisite close relationship for the second prong of the third party standing test"); Yaman v. U.S. Dep't of State, 709 F. Supp. 2d 85, 90-91 (D.D.C. 2010) (finding that a mother had third party standing to sue on behalf of her minor daughters where she had "a close relation to her children," whose minority rendered them "hindered from bringing suit on their own"). But none of these cases involved a parent-adult child relationship. Moreover, in these cases, there was no indication that the interests of the parent might diverge from those of the minor child on whose behalf the parent sought to litigate. The courts therefore had no reason to examine the underlying purpose of the Powers close relationship prong, which is to ensure "that the plaintiff will act as an effective advocate for the third party." Lepelletier, 164 F.3d at 43 (quoting Lepelletier v. FDIC, 977 F. Supp. 456, 463 (D.D.C. 1997)).

In requiring a "close" relationship between a litigant and a third party, Powers did not intend for close to be "synonymous with loving or affectionate." See N. Jeremi Duru, A Claim for Third Party Standing in America's Prisons, 20 BUFF. PUB. INT. L.J. 101, 116 (2002). If that were the case, Powers would not have accorded third party standing to a criminal defendant asserting the equal protection rights of excluded jurors with whom he had never spoken. Rather, the Supreme Court "only required a 'close relation' in the sense that there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests." Lepelletier, 164 F.3d at 44; see also Powers, 499 U.S. at 414 (describing the relationship between criminal defendant and excluded juror as "close" in the sense that they "have a common interest in eliminating racial discrimination from the courtroom"). Courts examining claims of third party standing thus must assess "the extent of potential conflicts of interests between the plaintiff and the third party whose rights are [being] asserted," Amato, 952 F.2d at 750, and deny third party standing where the litigant's "interests in the subject of [the] suit to some extent conflict with those of the [third parties] whose rights [the litigant] purports to advance," Clifton Terrace Assocs., 929 F.2d at 722.

Although a parent may sometimes serve as an effective advocate for the interests of his child, a parent may not be accorded third party standing where his interests are "potentially in conflict" with his child's. See Elk Grove, 542 U.S. at 15 (denying father standing to sue on behalf of his minor daughter where he was not authorized to sue as his daughter's "next friend" and where, "[i]n marked contrast to our case law on *jus tertii*, the interests of [the] parent and [his] child are not parallel, and indeed, are potentially in conflict"). Here, plaintiff's interests are potentially in conflict with those of his son. Plaintiff maintains that he has an interest in

"preserv[ing] the very existence of a relationship with his son by protecting his son's right to life," Pl.'s Opp. at 13, and that he "believe[s] taking legal action to stop the United States from killing [Anwar Al-Aulaqi] is in [his son's] best interests," see Al-Aulaqi Decl. ¶ 11. Anwar Al-Aulaqi, however, has given no indication that he believes it is in his interest to take legal action to stop the United States from killing him. Not only has he failed to bring suit on his own behalf at any point over the past ten months -- despite the fact that his life is allegedly at stake -- but he has made numerous public statements condemning the U.S. judicial system, see, e.g., Defs.' Reply, Exs. 1-2, and has publicly announced that he has no intention of "surrendering" to the Americans. See Wizner Decl., Ex. V (quoting Anwar Al-Aulaqi as remarking, "[a]s for the Americans, I will never surrender to them"); see also Clapper Decl. ¶ 16; Defs.' Mem. at 14 n.5. Taken together, Anwar Al-Aulaqi's actions and statements strongly suggest that his interests do not include litigating in U.S. courts.

Whatever the reason for Anwar Al-Aulaqi's failure to seek legal redress for his alleged inclusion on the CIA and JSOC "kill lists" -- a mistrust of or disdain for the American judicial system, a desire to become a martyr, or a mere lack of interest in pursuing a case thousands of miles away from his current location -- this Court cannot subvert the purpose of the Powers prudential standing requirements by "adjudicat[ing] . . . rights unnecessarily" when "the holders of those rights . . . do not wish to assert them." Singleton, 428 U.S. at 114. As the Supreme Court has explained, "[i]t is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." Whitmore, 495 U.S. at 161. Because it does not appear as though plaintiff would be an effective advocate for his son in light of their seemingly divergent interests, plaintiff cannot satisfy the Powers prudential criteria for

third party standing.

(b) The "Relationship" Inquiry Under Haitian Refugee

In Haitian Refugee, the D.C. Circuit examined whether a non-profit organization designed to assist Haitian refugees (and two of its members) had third party standing to assert the rights of Haitian refugees in challenging the United States's program of interdicting undocumented aliens on the high seas. See Haitian Refugee, 809 F.2d at 796. In an opinion by Judge Bork, the D.C. Circuit held that "third party standing . . . is appropriate only when the third party's rights protect that party's relationship with the litigant." See id. at 809. "If the government has directly interfered with the litigant's ability to engage in conduct together with the third party . . . by putting the litigant under a legal disability with criminal penalties . . . the litigant has standing to challenge the government's interference by invoking the third party's rights." Id. at 808. Hence, in Craig v. Boren, the Supreme Court had permitted beer vendors to assert the equal protection rights of male beer purchasers in challenging a state statute that prohibited sales of 3.2% beer to males under age 21 but permitted sales to females between ages 18 and 21. See id. (citing Craig v. Boren, 429 U.S. at 192-97). Similarly, in other cases where "'enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights,'" see id. (quoting Warth, 422 U.S. at 510), the Supreme Court found that the litigant had standing to challenge the restriction on behalf of the third parties. See, e.g., Carey v. Population Servs. Inc., 431 U.S. 678, 683-84 (1977) (permitting distributors of contraceptives to assert the rights of "potential purchasers" in challenging the constitutionality of a state law restricting the distribution of contraceptives); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (allowing white property owners to raise the constitutional rights of black property

inhabitants as a defense in a lawsuit charging the white owners with breach of a racially discriminatory restrictive covenant).

Even where a statute does not impose legal sanctions on a litigant for maintaining a relationship with a third party, the statute may still be subject to third-party challenge if it "disrupt[s] a special relationship - protected by the rights in question - between the litigants and the third parties." Fair Emp't Council, 28 F.3d at 1281; see Caplin & Drysdale, 491 U.S. at 623-24 n. 3 (granting an attorney third party standing to assert a client's Sixth Amendment rights in challenging a forfeiture statute that prevented the client from paying the attorney's legal fees). Thus, in Singleton the Court permitted physicians to assert the constitutional rights of their low-income women patients in challenging a state statute that prohibited the use of medicaid benefits to pay for non-"medically indicated" abortions. See 428 U.S. at 118. Although the statute in Singleton did not impose "legal penalties" on physicians who continued to perform abortions on their low-income patients, it was nonetheless subject to challenge by the physicians, as it was "specifically intended to burden" the physicians' relationship with their low-income patients. See Haitian Refugee, 809 F.2d at 810.

Because the interdiction program in Haitian Refugee did not impose legal sanctions on the plaintiffs for maintaining a relationship with Haitian aliens, and was not "designed to interfere with" a special relationship between Haitian aliens and the plaintiffs, the court held that the plaintiffs lacked third party standing to challenge the program on behalf of Haitian aliens. See id. at 809-10. As the court explained, "none of the laws that the interdiction program [was] alleged to violate [were] substantive protections of a relationship between Haitian aliens and [the plaintiffs]" and any interference that the program caused to that relationship was only "an

unintended side effect of a program with other purposes." Id.

Just as in Haitian Refugee, none of the Fourth and Fifth Amendment rights that plaintiff claims are infringed by the targeted killing of his son provide "substantive protections" of a father's relationship with his adult child. Indeed, as explained earlier, plaintiff's relationship with his adult child is not entitled to any "substantive protection" under the U.S. Constitution. Moreover, defendants' alleged targeting of plaintiff's son is not designed to interfere with the father-adult son relationship. Unlike cases in which a statute places legal sanctions on a litigant if he maintains a relationship with a third party, see, e.g., Craig v. Boren, 429 U.S. at 192-97, or cases in which a statute directly infringes upon a special relationship, see, e.g., Singleton, 428 U.S. at 118, any harm caused to plaintiff as a result of the extrajudicial killing of his son would be an "unintended side effect" of government action having other purposes. Hence, plaintiff cannot establish third party standing under Haitian Refugee.

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Because plaintiff can satisfy neither the requirements of third party standing (under Haitian Refugee or Powers) nor the requirements of "next friend" standing (under Whitmore), all three of plaintiff's constitutional claims must be dismissed due to lack of standing.

## II. The Alien Tort Statute

Plaintiff brings his fourth and final claim under the Alien Tort Statute ("ATS"), alleging that the United States's "policy of targeted killings violates treaty and customary international law." See Compl. ¶ 29. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Plaintiff is an alien, see Al-Aulaqi

Decl. ¶ 2, but in order for his ATS claim to survive a motion to dismiss, he must also show that (1) an alien suffers a legally cognizable tort -- which rises to the level of a "customary international law norm" -- when his U.S. citizen son is threatened with a future extrajudicial killing and (2) the United States has waived sovereign immunity for that type of claim. Because plaintiff has failed to make either showing, his ATS claim must be dismissed.

A. Plaintiff's Alleged ATS Cause of Action

In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Supreme Court explained that Congress, in enacting the ATS as part of the Judiciary Act of 1789, "intended the ATS to furnish jurisdiction for a relatively modest set of actions" that were recognized at common law as being "torts in violation of the law of nations." Id. at 720. Specifically, the Court concluded that the ATS was originally meant to provide a cause of action for "three primary offenses": (1) violation of safe conducts; (2) infringement of the rights of ambassadors; and (3) piracy. Id. at 724. Citing historical evidence as to the limited scope of the ATS -- and additional reasons for exercising "great caution in adapting the law of nations to private rights," id. at 728 -- the Supreme Court held that ATS claims must allege violations of "the present-day law of nations" that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." Id. at 725. The Court further explained that all judicial determinations as to whether an alleged international law norm "is sufficiently definite to support a cause of action [under the present-day law of nations] should (and indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." Id. at 732-33. Since Sosa, it has become clear that "[w]hile the ATS may provide subject-matter jurisdiction for

modern causes of action not recognized at the time of its initial passage in 1789, there is a 'high bar to new private causes of action for violating international law.'" Ali Shafi v. Palestinian Auth., 686 F. Supp. 2d 23, 26 (D.D.C. 2010) (quoting Sosa, 542 U.S. at 727); see also Saleh v. Titan Corp., 580 F.3d 1, 14 (D.C. Cir. 2009) (explaining that "[t]he Sosa Court, while opening the door a crack to the expansion of international law norms to be applied under the ATS, expressed the imperative of judicial restraint").

Plaintiff maintains that his alleged tort -- extrajudicial killing -- meets the high bar of Sosa, since there is a customary international law norm against state-sponsored extrajudicial killings, which has been "consistently recognized by U.S. courts" and "indeed codified in domestic law under the Torture Victim Protection Act." See Pl.'s Opp. at 39.[10] Plaintiff is correct insofar as many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim. See, e.g., Wiwa, 626 F.

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[10] The Torture Victim Protection Act of 1991 ("TVPA") provides in relevant part that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to an extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350 note § 2(a)(2). The Seventh Circuit has held that the TVPA "occup[ies] the field" with respect to claims alleging extrajudicial killing, see Enahoro v. Abubakar, 408 F.3d 877, 884-85 (7th Cir. 2005), but most courts have found that the TVPA does not preclude ATS claims for extrajudicial killing. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995) (stating that "[t]he scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim [Protection] Act"); In re XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 593 n.29 (E.D. Va. 2009) (explaining that "most courts have held that the TVPA supplements the ATS, and does not preempt it"); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005) (noting that "[t]he Court does not believe that the TVPA precludes claims of . . . extrajudicial killing under the ATS"). These courts view the TVPA and its legislative history as providing strong evidence that there is, in fact, a customary international law norm against extrajudicial killing, upon which an ATS claim may be based. See, e.g., In re XE Servs. Alien Tort Litig., 665 F. Supp. 2d at 593; Mujica, 381 F. Supp. 2d at 1178-79; Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009).

Supp. 2d at 383 n.4; Mujica, 381 F. Supp. 2d at 1178-79; Kadic, 70 F.3d at 241-45; Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), *recons. granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). Significantly, however, plaintiff cites no case in which a court has ever recognized a "customary international law norm" against a threatened future extrajudicial killing, nor does he cite a single case in which an alien has ever been permitted to recover under the ATS for the extrajudicial killing of his U.S. citizen child. These two features of plaintiff's ATS claim -- that it is based on a threat of a future extrajudicial killing, not an actual extrajudicial killing, that is directed not to plaintiff or to his alien relative, but to his U.S. citizen son -- render plaintiff's ATS claim fundamentally distinct from all extrajudicial killing claims that courts have previously held cognizable under the ATS.

Even assuming that the threat at issue were directed to plaintiff (rather than to plaintiff's U.S. citizen son), there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing -- as opposed to the commission of a past state-sponsored extrajudicial killing -- constitutes a tort in violation of the "law of nations." A threatened extrajudicial killing could possibly -- depending on the precise nature of the threat -- form the basis of a state tort law claim for assault, see REST. (SECOND) OF TORTS § 21 (1965) (explaining that an actor is subject to liability for assault if he acts "with the intent to cause a harmful or offensive contact, or an imminent apprehension of such a contact," and the other person "is thereby put in such imminent apprehension"), or for intentional infliction of emotional distress, see id. § 46(1) (stating that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm"). But common law tort claims for assault and

intentional infliction of emotional distress do not rise to the level of international torts that are "sufficiently definite and accepted 'among civilized nations' to qualify for the ATS jurisdictional grant." See Ali Shafi, 686 F. Supp. 2d at 29 (quoting Sosa, 542 U.S. at 732). Plaintiff cites no treaty or international document that recognizes assault or intentional infliction of emotional distress as a violation of the "present-day law of nations," nor does he cite any case in which a court has ever found such common law torts cognizable under the ATS. Indeed, there appears to be only one case in which a court has even considered whether "fear" and "anguish" could form the basis of an ATS claim. See Mujica, 381 F. Supp. 2d at 1183. There, the court expressly rejected the plaintiffs' contention that psychic, emotional harms were sufficient to state a claim under the ATS. As that court explained, "[i]t would be impractical to recognize these allegations as constituting an ATS claim because it would allow foreign plaintiffs to litigate claims in U.S. courts that bear a strong resemblance to intentional infliction of emotional distress." Id. Such a holding, the court noted, would make "broad swaths of conduct" actionable by aliens under the ATS, id., which is precisely what the Supreme Court in Sosa warned against.

In Sosa, the Supreme Court instructed federal courts to exercise "great caution" in recognizing new causes of action under the ATS as violations of the "present-day law of nations," and urged courts to consider "the practical consequences" of making such causes of action available to litigants worldwide. See Sosa, 542 U.S. at 728, 732-33. If this Court were to conclude that alleged government threats -- no matter how plausible or severe they may be -- constitute international torts committed in violation of the law of nations, federal courts could be flooded with ATS suits from persons across the globe who alleged that they were somehow placed in fear of danger as a result of contemplated government action. Surely, as interpreted in

Sosa, the ATS was not intended to provide a federal forum for such speculative claims.

The precise relief that plaintiff seeks here -- an injunction against the President, the Secretary of Defense, and the Director of the CIA preventing them from carrying out specific national security measures abroad -- is, as defendants point out, both "novel" and "extraordinary." See Defs.' Mem. at 40. The Supreme Court in Sosa did not call upon the federal courts to recognize such novel, extraordinary claims under the ATS, but rather merely "opened the door a crack to the possible recognition of new causes of action under international law (such as, perhaps, torture) if they were firmly grounded on an international consensus." Saleh, 580 F.3d at 14; see also Sosa, 542 U.S. at 738 (declining to recognize a cause of action for "arbitrary" detentions under the ATS since "[c]reating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise"). Here, it would be an abuse of this Court's discretion, properly constrained by Sosa, to recognize a cause of action under the ATS for alleged threats of state-sponsored extrajudicial killings, given that no court has ever found that the threat of a future extrajudicial killing is a recognized tort, much less one that violates the present-day law of nations. Because plaintiff cannot point to a single case recognizing such a claim, his ATS claim cannot possibly be held to violate a "norm of customary international law so well defined as to support the creation of a federal remedy." See Sosa, 542 U.S. at 738.

Moreover, even if the mere threat of a future state-sponsored extrajudicial killing did constitute a violation of the present-day law of nations, plaintiff could not bring an ATS claim based on the alleged threat of an extrajudicial killing of his U.S. citizen son. Significantly, the ATS authorizes federal jurisdiction over "civil actions by an alien for a tort only, committed in

violation of the law of nations." 28 U.S.C. § 1350 (emphasis added). Although plaintiff is an alien, his son is a U.S. citizen, and as such, Anwar Al-Aulaqi is not authorized to sue under the ATS. Given that Anwar Al-Aulaqi could not maintain an ATS action, plaintiff cannot instead bring an ATS action as a "next friend" or third party on Anwar Al-Aulaqi's behalf. In other words, plaintiff can only sue under the ATS if he alleges that he himself has suffered a tort that rises to the level of a "customary international law norm."

Plaintiff has been far from clear in articulating whether his ATS claim is a third party or "next friend" claim stemming from alleged violations of his U.S. citizen son's rights, or instead an individual claim based on personal injuries that he would suffer if defendants' alleged threatened extrajudicial killing of his son materialized. In his complaint, plaintiff purports to bring his ATS claim not as his son's "next friend" or as a third party, but "in his own right to prevent the injury he would suffer if defendants were to kill his son." See Compl. ¶ 29. But in opposing defendants' motion to dismiss, plaintiff explains that his cause of action under the ATS is not premised upon intentional infliction of emotional distress, loss of consortium, or any other "independent" tort that a parent himself might suffer as a result of his child's wrongful death. See Pl.'s Opp. at 39 (stating that plaintiff's claim is not "one for intentional infliction of emotional distress"). Rather, plaintiff alleges that "Defendants' authorization for the targeted killing of his son in Yemen would constitute an extrajudicial killing," and it is this "extrajudicial killing" -- and not any emotional injury sustained by plaintiff -- that forms the basis of plaintiff's ATS claim. See id. At the November 8th motions hearing, plaintiff seemed to conflate his two arguments, stating both that his ATS claim "[is] a claim based on the prohibition of extrajudicial killing," (which, *a fortiori*, is a claim that belongs to Anwar Al-Aulaqi, and not to plaintiff), Mot.

Hr'g Tr. 92:15-16; see also id. 94:4-5 ("what we are talking about here is a claim for extrajudicial killing"); id. 95:24-96:1 ("the tort that would be occurring . . . would be a violation of the norm of extrajudicial killing"), and that he "is bringing the [ATS] claim in his own name for . . . the harm that he would suffer by virtue of the death of his son," see id., 92:15-21.

Plaintiff cannot have it both ways. He either is bringing an ATS claim on behalf of his U.S. citizen son, alleging violations of Anwar Al-Aulaqi's right to be free from an extrajudicial killing, or he is bringing an ATS claim based on violations of his own right to be free from the emotional harm that he would suffer if his son were to be unlawfully killed. But the former fails as a result of Anwar Al-Aulaqi's U.S. citizenship, and the latter fails because there is not even domestic consensus as to whether a parent can recover for emotional injuries stemming from the death of his adult child, much less universal agreement that such a tort is actionable. See 22 AM. JUR. 2d DEATH § 208 (2010) (explaining that domestic courts are "divided on the question of whether the survivors of a tortiously killed child can recover damages for their grief or mental anguish"); see also 45 A.L.R. 4th 234 §§ 4-6 (1986) (noting that even where such recovery is allowed, courts are split as to whether parents can recover for mental anguish or grief stemming from the tortious death of an adult child). Perhaps recognizing that he can prevail on neither claim, plaintiff seeks to create a novel "hybrid" ATS claim, under which a party can sue in his individual capacity not for his own injuries, but for injuries inflicted upon his adult child. Plaintiff analogizes his unique ATS claim to an action for wrongful death, in which, he alleges, a claimant can sue "for the wrongful death of another individual, for harm that [the] claimant herself has suffered." See Mot. Hr'g Tr. 93:8-11; see also id. 95:24-96:5 (explaining that plaintiff's ATS claim is "no different than wrongful death actions where plaintiffs bring a claim

based on the wrongful death itself, but the injury [to the plaintiff] is of a different nature").

But domestic wrongful death law provides no basis for plaintiff's contention that an alien parent can bring an ATS claim "in his own right" for the threatened extrajudicial killing of his adult U.S. citizen child. Although wrongful death statutes vary from state to state, there are two main types -- "Lord Campbell" statutes and "continuation" statutes. See 12 AM. JUR. TRIALS 317 §§ 4-6 (1966). The less common, continuation-type wrongful death statute creates no new cause of action, but merely provides that "the deceased victim's cause of action against the defendant-tortfeasor shall continue and survive for the benefit of the decedent's estate." See id. § 5-6 (emphasis added). The damages in a continuation wrongful death action are those sustained by the decedent himself (rather than by the decedent's heirs or beneficiaries) and therefore include "the value of the destruction of the decedent's earning capacity plus his inability to engage in all of life's activities." See id. § 5. Plaintiff clearly does not benefit by comparing his ATS claim to a claim brought under a continuation wrongful death statute, since such claims -- by their very nature -- may only be brought in the name of the decedent. Here, plaintiff's ATS claim may not be brought in the name of his U.S. citizen son, who cannot sue under the ATS.

Plaintiff fares no better by analogizing his ATS claim to a wrongful death action brought under a Lord Campbell statute. Deriving its name from Lord Campbell's Act, enacted by the British Parliament in 1864, modern-day Lord Campbell wrongful death statutes -- which exist in the majority of states -- create a new, independent cause of action in favor of certain statutorily designated beneficiaries, which is "distinct and separable from the victim's own right of action for his injuries." See 12 AM. JUR TRIALS 317 §§ 3-4, 6. Unlike continuation wrongful death statutes, Lord Campbell statutes do not permit recovery for "damages which [the decedent

himself] might have recovered for his injury if he had survived," but rather, establish a new form of "liability for the loss and damage sustained by relatives dependent upon the decedent." See Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 69 (1913). Although damages under Lord Campbell statutes traditionally included only pecuniary losses (such as loss of support), "a clear majority of States . . . either by express statutory provision or by judicial construction" now also permit recovery for certain emotional losses (such as loss of society). See Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 584-87 (1974), *superseded by statute as stated in* Miles v. Apex Marine Corp., 498 U.S. 19, 30 n.1 (1990); see also 12 AM. JUR TRIALS 317 § 19 (explaining that more recent cases interpreting Lord Campbell statutes have allowed damages for "matters not of a pecuniary nature such as loss of the decedent's society, association, and companionship").

Plaintiff's hybrid ATS claim is equally untenable when viewed as a kind of preemptive wrongful death action brought under a Lord Campbell statute. Significantly, claims brought by a decedent's relatives under Lord Campbell statutes are not based on the harms that the decedent himself has suffered, but only on the injuries suffered by the decedent's relatives as a result of the death. Here, plaintiff has not alleged that he would suffer any pecuniary losses as a result of his son's death, and he expressly disavows any intent to recover for emotional injuries that he would suffer if his son were to be unlawfully killed. See Pl.'s Opp. at 39. Plaintiff's hybrid ATS claim is thus not analogous to a Lord Campbell wrongful death action, which can only be brought by statutorily designated relatives for their own injuries.

Ultimately, the Court concludes, plaintiff's ATS claim is not based on any pecuniary or emotional injuries sustained by plaintiff, but on the injury that his U.S. citizen son would suffer if he were to be subject to a state-sponsored extrajudicial killing. And despite his assertions to the

contrary, plaintiff cannot bring such a claim in his own right, since it is Anwar Al-Aulaqi, and not plaintiff, who has allegedly been "targeted" for killing by the United States. Thus, even if plaintiff could establish that the threat of a future extrajudicial killing -- as opposed to the commission of a past extrajudicial killing -- did constitute a violation of "customary international law" (which he cannot), plaintiff would not be authorized to bring such a claim under the ATS on behalf of his U.S. citizen son, who himself is not within the class of persons who can sue under the Act.

B. Sovereign Immunity Under the ATS

Because plaintiff brings his ATS claim against the President, the Secretary of Defense, and the Director of the CIA in their official capacities, his suit is tantamount to a suit against the United States itself. See Kentucky v. Graham, 473 U.S. 159, 165-67 (1985). "It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). Waivers of sovereign immunity "must be unequivocally expressed in statutory text, and will not be implied." Lane v. Pena, 518 U.S. 187, 192 (1996); see also United States v. King, 395 U.S. 1, 4 (1969). Moreover, all purported waivers of sovereign immunity will be "strictly construed . . . in favor of the sovereign." Lane, 518 U.S. at 187; see also Soriano v. United States, 352 U.S. 270, 276 (1957) (explaining that "this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"). Thus, assuming that plaintiff could allege a cognizable tort under the ATS, his ATS claim still must fail absent a valid waiver of sovereign immunity. The ATS "itself does not provide a waiver of sovereign immunity," Industria Panificadora, S.A. v. United States, 957 F.2d

886, 887 (D.C. Cir. 1992); accord Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985), but plaintiff argues that his ATS claim may proceed against the United States either because it is within the Administrative Procedure Act's waiver of sovereign immunity for claims seeking non-monetary relief, or because it is within the so-called Larson-Dugan exception to sovereign immunity. See Pl.'s Opp. at 41. Neither argument is persuasive.

1. *Waiver of Sovereign Immunity Under the APA*

The APA provides that agency action "seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702. This waiver of sovereign immunity is not available in suits against the President, since the President is not an "agency" within the meaning of the APA. See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (plurality opinion). Plaintiff therefore may not assert an ATS claim against the President through reliance on the APA's waiver of sovereign immunity. While the APA remains "arguably available" as a waiver of sovereign immunity with respect to plaintiff's ATS claims against the Secretary of Defense and the Director of the CIA, see Sanchez-Espinoza, 770 F.2d at 207 (recognizing the possibility that ATS suits seeking non-monetary relief may proceed against the Secretary of Defense and the Director of the CIA under the APA's waiver of sovereign immunity), there are several reasons to question whether the APA should be interpreted as a waiver of sovereign immunity for an ATS claim like plaintiff's, which seeks to enjoin U.S. military action abroad that allegedly "received the approval of the President, . . . the Secretary of Defense, and the Director of the CIA." See id. at 208; see also Compl. ¶ 21.

First, defendants' alleged action here might be considered agency action "committed to agency discretion by law," in which case the APA's waiver of sovereign immunity would not

apply. See 5 U.S.C. § 701(a)(2). Agency action is deemed committed to agency discretion by law if "'a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" Al Odah v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)), *rev'd and remanded*, Rasul v. Bush, 542 U.S. 466 (2004). Given the "lack of judicially manageable standards" by which the Court can resolve this case, see discussion infra pp. 70-71, plaintiff's ATS claim may well seek to challenge agency action that is committed to agency discretion by law.[11]

Ultimately, however, this Court need not decide that issue. Even if the action involved in this case does not fall within the APA's exception for agency action committed to agency discretion by law, this Court nonetheless would follow the approach adopted by the D.C. Circuit in Sanchez-Espinoza and exercise its equitable discretion not to grant the relief sought. There, citizens of Nicaragua brought suit against federal officials under the ATS, alleging that the

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[11] Defendants also argue that the Federal Tort Claims Act ("FTCA") precludes application of the APA's waiver of sovereign immunity to ATS claims seeking injunctive relief. See Defs.' Mem. at 41. The APA's waiver of sovereign immunity does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." See 5 U.S.C. § 702. The FTCA waives sovereign immunity for suits against the U.S. government "for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Despite defendants' contention to the contrary, it does not appear that the FTCA's waiver of sovereign immunity for tort claims seeking money damages against the United States by implication precludes any injunctive relief. The Supreme Court has explained that "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy." Carlson v. Green, 446 U.S. 14, 20 (1980). Defendants point to no legislative history indicating that the FTCA was intended to provide the exclusive remedy for tort claims against the United States, and the FTCA itself does not purport to forbid injunctive relief, as it merely states that it is "exclusive of any other civil action or proceeding for money damages." 28 U.S.C. § 2679(b)(1). Moreover, in U.S. Info. Agency v. Krc, 989 F.2d 1211, 1216 (D.C. Cir. 1993), the D.C. Circuit expressly declined to adopt the view that the FTCA "impliedly forbids specific relief [against the United States] for tortious interference with prospective employment opportunities."

officials had "approved a plan submitted by the CIA for covert activities to destabilize and overthrow the government of Nicaragua." Sanchez-Espinoza, 770 F.2d at 205. The plaintiffs maintained that the defendants' support of the contras in Nicaragua led to "scores of attacks upon innocent Nicaraguan civilians" which resulted in "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities." Id. (internal quotation marks and citation omitted). Just as in the present case, the plaintiffs in Sanchez-Espinoza argued that their ATS claims for non-monetary relief against federal officials sued in their official capacities could proceed pursuant to the APA's waiver of sovereign immunity. Recognizing that the APA's waiver of sovereign immunity was "arguably available" for these claims, the D.C. Circuit nonetheless noted that "all the bases for nonmonetary relief -- including injunction, mandamus, and declaratory judgment -- are discretionary." Id. at 207-08. As a result, the court held, "[a]t least where the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief." Id. at 208.

Here, plaintiff also asks this Court to interject itself into a "sensitive" foreign affairs matter, by issuing discretionary relief that would prohibit military and intelligence activities against an alleged enemy abroad. See Defs.' Mem. at 31 (describing plaintiff's request "to limit *ex ante* the circumstances in which force against an enemy overseas may be used in the future"). Just as in Sanchez-Espinoza, the military and intelligence activities at issue in this case allegedly "received the attention and approval of the President . . . the Secretary of Defense, and the Director of the CIA." See Sanchez-Espinoza, 770 F.2d at 208; see also Compl. ¶ 21.

Irrespective of whether this case is "a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all," then, the Court concludes that it "at least requires the withholding of discretionary relief." See Sanchez-Espinoza, 770 F.2d at 208.

The Supreme Court has repeatedly acknowledged the separation-of-powers concerns posed by any judicial attempt to "'enjoin the President in performance of his official duties.'" See Franklin, 505 U.S. at 802-03 (quoting Mississippi v. Johnson, 74 U.S. 475, 501 (1866)); see also Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (noting the "general rule . . . that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other"). Just as the issuance of "injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken," Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996), so, too, would it be extraordinary for this Court to order declaratory and injunctive relief against the President's top military and intelligence advisors, with respect to military action abroad that the President himself is alleged to have authorized. Given that there is no clear waiver of sovereign immunity permitting such "extraordinary relief," and that "[t]he Alien Tort Statute has never been held to cover suits against the United States or United States Government officials," see El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 858 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring),[12] this Court declines to exercise its equitable

[12] One district court has concluded that the APA waives sovereign immunity with respect to "international law claims" seeking non-monetary relief. See Rosner v. United States, 231 F. Supp. 2d 1202, 1211 (S.D. Fla. 2002). There, Hungarian Jews and their descendants sued the United States, arguing that the U.S. Army wrongfully refused to return their property, which had been unlawfully expropriated by the pro-Nazi Hungarian Government during World War II. See id. at 1204-05. In finding that the APA waived sovereign immunity for the plaintiffs' claims, the court in Rosner stressed that the conduct complained of, "although exercised by military personnel, [wa]s decidedly non-military in nature." See id. at 1212. Here, defendants' alleged conduct is "decidedly military in nature."

discretion to grant such relief here.

2. *The Larson-Dugan Exception to Sovereign Immunity*

Plaintiff's argument that his ATS claim "may proceed under the 'Larson-Dugan' exception to sovereign immunity," see Pl.'s Opp. at 41, merits little discussion. Under that exception -- derived from the Supreme Court's decisions in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and Dugan v. Rank, 372 U.S. 609 (1963) -- "sovereign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority, on the grounds that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'" Swan, 100 F.3d at 981 (quoting Larson, 337 U.S. at 689); see also Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 901 (D.C. Cir. 1996). In other words, where an officer acts outside the bounds of his legal authority, he "'is not doing the business which the sovereign has empowered him to do, or he is doing it in a way which the sovereign has forbidden,'" and hence the officer's actions "'may be made the object of specific relief.'" Wash. Legal Found., 89 F.3d at 901 (quoting Larson, 337 U.S. at 689).

However, the D.C. Circuit in Sanchez-Espinoza expressly stated that the Larson-Dugan exception to sovereign immunity "can have no application when the basis for jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing." Sanchez-Espinoza, 770 F.2d at 207. Here, just as in Sanchez-Espinoza, the ATS is the statute that provides the basis for this Court's jurisdiction, and the D.C. Circuit has held that the ATS only confers jurisdiction over actions that are authorized by the sovereign. See id. (explaining that "the law of nations -- so called 'customary international law,' arising from 'the customs and

usages of civilized nations' . . . does not reach private, non-state conduct"). Because it "would make a mockery of the doctrine of sovereign immunity" if the Larson-Dugan exception were interpreted as authorizing "federal courts . . . to sanction or enjoin . . . actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States," id. (emphasis in original), this Court rejects plaintiff's contention that the Larson-Dugan exception applies to the conduct challenged in this case.

## III. The Political Question Doctrine

Defendants argue that even if plaintiff has standing to bring his constitutional claims or states a cognizable claim under the ATS, his claims should still be dismissed because they raise non-justiciable political questions. Like standing, the political question doctrine is an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement of Article III of the Constitution." Schlesinger, 418 U.S. at 215. The political question doctrine "is 'essentially a function of the separation of powers,'" El-Shifa, 607 F.3d at 840 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)), and "'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" Id. (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)). The precise "'contours'" of the political question doctrine remain "'murky and unsettled.'" Harbury v. Hayden, 522 F.3d 413, 418 (D.C. Cir. 2008) (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.3 (D.C. Cir. 1984) (Bork, J., concurring)); see also Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985) (describing the "shifting contours and

uncertain underpinnings" of the political question doctrine). Still, the Supreme Court has articulated six factors which are said to be "[p]rominent on the surface" of cases involving non-justiciable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. The first two factors -- a textual commitment to another branch of government and a lack of judicially manageable standards -- are considered "the most important," see Harbury, 522 F.3d at 418, but in order for a case to be non-justiciable, the court "need only conclude that one factor is present, not all," Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005).

Unfortunately, the Baker factors are much easier to enumerate than they are to apply, and it is perhaps for this reason that the political question doctrine "continues to be the subject of scathing scholarly attack." See Ramirez, 745 F.2d at 1514. Dean Erwin Chemerinsky has gone so far as to remark that the Baker criteria "seem useless in identifying what constitutes a political question." See Erwin Chemerinsky, Federal Jurisdiction 149 (5th ed. 2007). According to him, the political question doctrine cannot be understood by mechanically applying the factors enumerated in Baker, but "only by examining the specific areas where the Supreme Court has invoked [the doctrine]." Id. at 150. Although Dean Chemerinsky's derogation of the Baker factors is extreme, it is true that "the category of political questions is more amenable to

description by infinite itemization than by generalization." Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 933 (D.C. Cir. 1988) (internal quotation marks and citations omitted).

An examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are "'quintessential sources of political questions.'" See El-Shifa, 607 F.3d at 841 (quoting Bancoult v. McNamara, 445 F.3d 427, 433 (D.C. Cir. 2006)); see also Haig v. Agee, 453 U.S. 280, 292 (1981) (explaining that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"). As the D.C. Circuit recently explained, cases involving national security and foreign relations "raise issues that 'frequently turn on standards that defy judicial application' or 'involve the exercise of a discretion demonstrably committed to the executive or legislature.'" El-Shifa, 607 F.3d at 841 (quoting Baker, 369 U.S. at 211). Unlike the political branches, the Judiciary has "no covert agents, no intelligence sources, and no policy advisors." See Schneider, 412 F.3d at 196. Courts are thus institutionally ill-equipped "to assess the nature of battlefield decisions," DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973), or to "define the standard for the government's use of covert operations in conjunction with political turmoil in another country," Schneider, 412 F.3d at 197. These types of decisions involve "delicate, complex" policy judgments with "large elements of prophecy," and "are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility." Chicago & S. Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948). The difficulty that U.S. courts would encounter if they were tasked with "ascertaining the 'facts' of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question

[posed] is a 'political' one." DaCosta, 471 F.2d at 1148.

At the same time, the Supreme Court has also made clear that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker, 369 U.S. at 211.[13] Although "'attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs.'" Schneider, 412 F.3d at 198 (quoting DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987)). The political question doctrine, the Supreme Court has warned, was only designed to cover a "narrow" category of "carefully defined" cases, and should not be employed as "an ad hoc litmus test of [courts'] reactions to the desirability of and need for judicial application of constitutional or statutory standards to a given type of claim." Davis v. Bandemer, 478 U.S. 109, 126 (1986). Hence, in order to decide whether a particular legal challenge constitutes an impermissible "attack on foreign policymaking" or is instead a justiciable claim with a permissible "effect on foreign affairs," a court "must conduct 'a discriminating analysis of the particular question posed' in the 'specific case.'" El-Shifa, 607 F.3d at 841 (quoting Baker, 369 U.S. at 211).

Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar

[13] Indeed, since Baker, the Supreme Court has only sustained a political question claim twice. See Walter Nixon v. United States, 506 U.S. 224 (1993); Gilligan v. Morgan, 413 U.S. 1 (1973).

Al-Aulaqi's alleged terrorist activity renders him a "concrete, specific, and imminent threat to life or physical safety," see Compl., Prayer for Relief (c); and (4) whether there are "means short of lethal force" that the United States could "reasonably" employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests, see id. Such determinations, in turn, would require this Court, in defendants' view, to understand and assess "the capabilities of the [alleged] terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets that the [alleged] terrorist[] may strike, the availability of military and non-military options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force." Defs.' Mem. at 26; see also Mot. Hr'g Tr. 38:6-14. Viewed through these prisms, it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.

Most recently, in El-Shifa v. United States the D.C. Circuit examined whether the political question doctrine barred judicial resolution of claims by owners of a Sudanese pharmaceutical plant who brought suit seeking to recover damages after their plant was destroyed by an American cruise missile. President Clinton had ordered the missile strike in light of intelligence indicating that the plant was '"associated with the [Osama] bin Ladin network' and 'involved in the production of materials for chemical weapons.'" El-Shifa, 607 F.3d at 838 (internal citation omitted). The plaintiffs maintained that the U.S. government had been negligent in determining that the plant was tied "to chemical weapons and Osama bin Laden," and therefore sought "a declaration that the government's failure to compensate them for the

destruction of the plant violated customary international law, a declaration that statements government officials made about them were defamatory, and an injunction requiring the government to retract those statements." Id. at 840. Dismissing the plaintiffs' claims as non-justiciable under the political question doctrine, the D.C. Circuit explained that "[i]n military matters . . . the courts lack the competence to assess the strategic decision to employ force or to create standards to determine whether the use of force was justified or well-founded." Id. at 844. Rather than endeavor to resolve questions beyond the Judiciary's institutional competence, the court held that "[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." Id.

Here, plaintiff asks this Court to do exactly what the D.C. Circuit forbid in El-Shifa -- assess the merits of the President's (alleged) decision to launch an attack on a foreign target. Although the "foreign target" happens to be a U.S. citizen, the same reasons that counseled against judicial resolution of the plaintiffs' claims in El-Shifa apply with equal force here. Just as in El-Shifa, any judicial determination as to the propriety of a military attack on Anwar Al-Aulaqi would "'require this court to elucidate the . . . standards that are to guide a President when he evaluates the veracity of military intelligence.'" Id. at 846 (quoting El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365 (Fed. Cir. 2004)). Indeed, that is just what plaintiff has asked this Court to do. See Compl., Prayer for Relief (d) (requesting that the Court order the defendants to "disclose the criteria used in determining whether the government will carry out the targeted killing of a U.S. citizen"). But there are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his

resulting decision -- based on that intelligence -- whether to use military force against a terrorist target overseas. See El-Shifa, 378 F.3d at 1367 n. 6 (expressing the view that "it would be difficult, if not extraordinary, for the federal courts to discover and announce the threshold standard by which the United States government evaluates intelligence in making a decision to commit military force in an effort to thwart an imminent terrorist attack on Americans"). Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual. In fact, the D.C. Circuit has expressly held that the question whether an organization's alleged "terrorist activity" threatens "the national security of the United States" is "nonjusticiable." People's Mohahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999). Given that courts may not undertake to assess whether a particular organization's alleged terrorist activities threaten national security, it would seem axiomatic that courts must also decline to assess whether a particular individual's alleged terrorist activities threaten national security. But absent such a judicial determination as to the nature and extent of the alleged national security threat that Anwar Al-Aulaqi poses to the United States, this Court cannot possibly determine whether the government's alleged use of lethal force against Anwar Al-Aulaqi would be "justified or well-founded." See El-Shifa, 607 F.3d at 844. Thus, the second Baker factor -- a "lack of judicially discoverable and manageable standards" for resolving the dispute -- strongly counsels against judicial review of plaintiff's claims.

The type of relief that plaintiff seeks only underscores the impropriety of judicial review here. Plaintiff requests both a declaration setting forth the standard under which the United States can select individuals for targeted killing as well as an injunction prohibiting defendants

from intentionally killing Anwar Al-Aulaqi unless he meets that standard -- i.e., unless he "presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat." Compl., Prayer for Relief (a), (c). Yet plaintiff concedes that the "'imminence' requirement" of his proffered legal standard would render any "real-time judicial review" of targeting decisions "infeasible," Pl.'s Opp. at 17, 30, and he therefore urges this Court to issue his requested preliminary injunction and then enforce the injunction "through an after-the-fact contempt motion or an after-the-fact damages action." Id. at 17-18. But as the D.C. Circuit has explained, "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action." El-Shifa, 607 F.3d at 844. Such military determinations are textually committed to the political branches. See Schneider, 412 F.3d at 194-95 (explaining that "Article I, Section 8 of the Constitution . . . is richly laden with the delegation of foreign policy and national security powers to Congress," while "Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive" and Commander in Chief of the Army and Navy). Moreover, any post hoc judicial assessment as to the propriety of the Executive's decision to employ military force abroad "would be anathema to . . . separation of powers" principles. See El-Shifa, 607 F.3d at 845. The first, fourth, and sixth Baker factors thus all militate against judicial review of plaintiffs' claims, since there is a "textually demonstrable constitutional commitment" of the United States's decision to employ military force to coordinate political departments (Congress and the Executive), and any after-the-fact judicial review of the Executive's decision to employ military force abroad would reveal a "lack of respect due

coordinate branches of government" and create "the potentiality of embarrassment of multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

The mere fact that the "foreign target" of military action in this case is an individual -- rather than alleged enemy property -- does not distinguish plaintiff's claims from those raised in El-Shifa for purposes of the political question doctrine. The D.C. Circuit has on several occasions dismissed claims on political question grounds where resolution of those claims would require a judicial determination as to the propriety of the use of force by U.S. officials against a specific individual abroad. For example, the court in Harbury v. Hayden dismissed as non-justiciable the claims of an American widow who alleged that her husband -- a Guatemalan rebel fighter -- had been tortured and killed by Guatemalan army officers working in conjunction with the CIA in Guatemala. See 522 F.3d at 415. Notwithstanding the plaintiff's contention that "U.S. officials were responsible for physically abusing and killing" her husband, the D.C. Circuit concluded that "the political question doctrine plainly applies to this case." Id. at 420.

Similarly, in Schneider v. Kissinger, the D.C. Circuit deemed non-justiciable the claims raised by the decedents of a Chilean general, who alleged that the United States had caused the general's kidnaping, torture, and death in furtherance of its Cold War efforts to overthrow the leftist Chilean leader Salvador Allende. 412 F.3d at 191-92. As the Schneider court explained, "in order to determine whether the covert operations which allegedly led to the tragic death of [the general] were wrongful," it would first need to determine "whether, 35 years ago, at the height of the Cold War . . . 'it was proper for an Executive Branch official . . . to support covert actions against' a committed Marxist who was set to take power in a Latin American country." Id. at 196-97 (internal citation omitted). The court conceded that it may have been a "drastic

measure" for the United States to ally itself with "dissidents in another country to kidnap a national of that country," but nonetheless concluded that any determination as to "whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." Id. at 197. Because there were no judicially "discoverable and manageable standards for the resolution" of the plaintiffs' claims, the court dismissed the case as posing a non-justiciable political question. See id.; see also Gonzalez-Vera, 449 F.3d at 1264 (holding non-justiciable claims alleging that Henry Kissinger and other U.S. executive officials cooperated with Chilean dictator Augusto Pinochet to commit human rights abuses in Chile, since "[w]hatever Kissinger did as National Security Advisor or Secretary of State 'can hardly be called anything other than foreign policy'") (internal citation omitted); Bancoult, 445 F.3d at 436 (dismissing claims by former residents of the Chagos Archipelago, who alleged that the United States had caused the forcible relocation and killing of island residents in the 1960s in order to establish a military base on the island, on the ground that the "specific tactical measures" employed by the United States in depopulating the island were "inextricably intertwined with the underlying strategy of establishing a regional military presence" -- an unreviewable political question).

Plaintiff's claim is distinguishable from those asserted in these cases in only one meaningful respect: Anwar Al-Aulaqi -- unlike the Guatemalan rebel fighter in Harbury, the Chilean general in Schneider, the other Chileans in Gonzalez-Vera, or the Chagos Archipelago inhabitants in Bancoult -- is a U.S. citizen. The significance of Anwar Al-Aulaqi's U.S. citizenship is not lost on this Court. Indeed, it does not appear that any court has ever -- on political question doctrine grounds -- refused to hear a U.S. citizen's claim that his personal

constitutional rights have been violated as a result of U.S. government action taken abroad.

Nevertheless, there is inadequate reason to conclude that Anwar Al-Aulaqi's U.S. citizenship -- standing alone -- renders the political question doctrine inapplicable to plaintiff's claims. Plaintiff cites two contexts in which courts have found claims asserting violations of U.S. citizens' constitutional rights to be justiciable despite the fact that those claims implicate grave national security and foreign policy concerns. See Pl.'s Opp. at 22-23, 25-27. Courts have been willing to entertain habeas petitions from U.S. citizens detained by the United States as enemy combatants, see, e.g., Hamdi, 542 U.S. at 509, and they have also heard claims from U.S. citizens alleging unconstitutional takings of their property by the U.S. military abroad, see, e.g., Ramirez de Arellano, 745 F.2d at 1511-12. But habeas petitions and takings claims are both much more amenable to judicial resolution than the claims raised by plaintiff in this case.

Courts have been willing to hear habeas petitions (from both U.S. citizens and aliens) because "the Constitution specifically contemplates a judicial role" for claims by individuals challenging their detention by the Executive. See El-Shifa, 607 F.3d at 848-49; see also Boumediene v. Bush, 553 U.S. 723, 745 (2008) (explaining that the Suspension Clause "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account"). While the Suspension Clause reflects a "textually demonstrable commitment" of habeas corpus claims to the Judiciary, see Baker, 369 U.S. at 217, there is no "constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target," El-Shifa, 607 F.3d at 849. Indeed, such military decisions are textually committed not to the Judiciary, but to the political branches. See Schneider, 412 F.3d at 194-96. Moreover, the resolution of habeas petitions does not require expertise beyond the purview of the Judiciary.

Although plaintiff is correct to point out that habeas cases involving Guantanamo detainees often involve judicial scrutiny of highly sensitive military and intelligence information, see Mot. Hr'g Tr. 54:7-10, 83:24-84:1, such information is only used to determine whether "the United States has unjustly deprived an American citizen of liberty through acts it has already taken." Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 65 (D.D.C. 2004); see also Defs.' Mem. at 31. These post hoc determinations are "precisely what courts are accustomed to assessing." Abu Ali, 350 F. Supp. 2d at 65. But courts are certainly not accustomed to assessing claims like those raised by plaintiff here, which seek to prevent future U.S. military action in the name of national security against specifically contemplated targets by the imposition of judicially-prescribed legal standards enforced through "after-the-fact contempt motion[s]" or "after-the-fact damages action[s]." See Pl.'s Opp. at 17-18. Hence, the Baker factors dictate a different outcome for plaintiff's claims than for habeas petitions filed by detainees at Guantanamo Bay.

Plaintiff's claims are also fundamentally distinct from those in which U.S. citizens have been permitted to sue the United States for alleged unconstitutional takings of their property by the U.S. military abroad. In Ramirez de Arellano, the D.C. Circuit declined to dismiss as non-justiciable the claims brought by U.S. citizens who asserted that the U.S. military had unlawfully expropriated their cattle ranch in Honduras in violation of the Fifth Amendment. 745 F.2d at 1511-12. The D.C. Circuit, ruling en banc, explained that the plaintiffs' claims did not constitute a challenge "to the United States military presence in Honduras" but instead were "narrowly focused on the lawfulness of the United States defendants' occupation and use of the plaintiffs' cattle ranch." Id. at 1512. Once the court characterized the case as a land dispute between the plaintiffs and the U.S. government, it had little difficulty concluding that "adjudication of the

defendants' constitutional authority to occupy and use the plaintiffs' property" did not require "expertise beyond the capacity of the Judiciary" or "unquestioning adherence to a political decision by the Executive." See id. at 1513, 1514; see also Comm. of U.S. Citizens Living in Nicaragua, 859 F.2d at 934-35 (finding justiciable the Fifth Amendment claims raised by U.S. citizens living in Nicaragua, who alleged that the United States's funding of the Contras in Nicaragua deprived them of their liberty and property without due process by making them "targets of the Contra 'resistance,'" but ultimately declining to hear the plaintiffs' claims since there was "no allegation that the United States itself has participated in or in any way sought to encourage injuries to Americans in Nicaragua").

Unlike Ramirez, the questions posed in this case do require both "expertise beyond the capacity of the Judiciary" and the need for "unquestioning adherence to a political decision by the Executive." Here, plaintiff asks the Judiciary to limit the circumstances under which the United States may employ lethal force against an individual abroad whom the Executive has determined "plays an operational role in AQAP planning terrorist attacks against the United States." Defs.' Mem. at 36; see also Clapper Decl. ¶¶ 13-17. The injunctive and declaratory relief sought by plaintiff would thus be vastly more intrusive upon the powers of the Executive than the relief sought in Ramirez, where the court was only called upon to adjudicate "the defendants' constitutional authority to occupy and use the plaintiffs' property." Ramirez, 745 F.2d at 1513. Moreover, although resolution of the plaintiffs' claims in Ramirez only required "interpretations of the Constitution and of federal statutes," which are "quintessential tasks of the federal Judiciary," see id., resolution of the claims in this case would require assessment of "strategic choices directing the nation's foreign affairs [that] are constitutionally committed to the political

branches," El-Shifa, 607 F.3d at 843.

To be sure, this Court recognizes the somewhat unsettling nature of its conclusion -- that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas is "constitutionally committed to the political branches" and judicially unreviewable. But this case squarely presents such a circumstance. The political question doctrine requires courts to engage in a fact-specific analysis of the "particular question" posed by a specific case, see El-Shifa, 607 F.3d at 841 (quoting Baker, 369 U.S. at 211), and the doctrine does not contain any "carve-out" for cases involving the constitutional rights of U.S. citizens. While it may be true that "the political question doctrine wanes" where the constitutional rights of U.S. citizens are at stake, Abu Ali, 350 F. Supp. at 64, it does not become inapposite. Indeed, in one of the only two cases since Baker v. Carr in which the Supreme Court has dismissed a case on political question grounds, the plaintiffs were U.S. citizens alleging violations of their constitutional rights. See Gilligan v. Morgan, 413 U.S. 1, 3 (1973).

In Gilligan, students at Kent State University brought suit in the wake of the "Kent State massacre," seeking declaratory and injunctive relief that would prohibit the Ohio Governor from "prematurely ordering National Guard troops to duty in civil disorders" and "restrain leaders of the National Guard from future violation of the students' constitutional rights." Id. According to the Court, the plaintiffs were, in essence, asking for "initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard." Id. at 6. Dismissing the plaintiffs' claims as presenting non-justiciable political questions,[14] the Court

[14] The precise scope of the Court's holding in Gilligan is not entirely clear. Although the Court noted that "the questions to be resolved . . . are subjects committed expressly to the political branches of government," it went on to state that "[t]hese factors, when coupled with the

noted that "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches." Id. at 10. As the Court explained, the Judiciary lacks the "competence" to make "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force," and "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." Id.

So, too, does the Constitution place responsibility for the military decisions at issue in this case "in the hands of those who are best positioned and most politically accountable for making them." Hamdi, 542 U.S. at 531; see also Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (explaining that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' - departments of the government, and the propriety of what may be done in the exercise of this power is not subject to judicial inquiry or decision"). "Judges, deficient in military knowledge . . . and sitting thousands of miles away from the field of action, cannot reasonably or appropriately determine" if a specific military operation is necessary or wise. DaCosta, 471 F.2d at 1155. Whether the alleged "terrorist activities" of an individual so threaten the national security of the United States as to warrant that military action be taken against that individual is a "political judgment[]. . . [which] belong[s] in the domain of political power not subject to judicial intrusion or inquiry." El-Shifa, 607 F.3d at 843 (internal quotation marks and citations omitted).

Contrary to plaintiff's assertion, in holding that the political question doctrine bars

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uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing, render the claim . . . nonjusticiable." 413 U.S. at 10.

plaintiff's claims, this Court does not hold that the Executive possesses "unreviewable authority to order the assassination of any American whom he labels an enemy of the state." See Mot. Hr'g Tr. 118:1-2. Rather, the Court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an "operational" member of AQAP, see Clapper Decl. ¶ 15, presents such a threat to national security that the United States may authorize the use of lethal force against him. This Court readily acknowledges that it is a "drastic measure" for the United States to employ lethal force against one of its own citizens abroad, even if that citizen is currently playing an operational role in a "terrorist group that has claimed responsibility for numerous attacks against Saudi, Korean, Yemeni, and U.S. targets since January 2009," id. ¶ 13. But as the D.C. Circuit explained in Schneider, a determination as to whether "drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking." 412 F.3d at 197. Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case.

## IV. The Military and State Secrets Privilege

Defendants invoke the military and state secrets privilege as the final basis for dismissal of plaintiff's complaint. The state secrets privilege is premised on the recognition that "in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." See Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc) (citing

Totten v. United States, 92 U.S. 105, 107 (1876)); see also United States v. Reynolds, 345 U.S. 1, 7-8 (1953). As the Ninth Circuit has recently explained, "contemporary state secrets doctrine encompasses two applications of this principle. One completely bars adjudication of claims premised on state secrets (the 'Totten bar'); the other is an evidentiary privilege ('the Reynolds privilege') that excludes privileged evidence from the case and *may* result in dismissal of the claims." Jeppesen Dataplan, 614 F.3d at 1077 (emphasis in original).

The Totten bar only applies "'where the very subject matter of the action' is [itself] 'a matter of state secret.'" Id. (quoting Reynolds, 345 U.S. at 11 n.26). In contrast, successful invocation of the Reynolds privilege "remove[s] the privileged evidence from the litigation," but does not necessarily require the plaintiffs' claims to be dismissed. Id. at 1079. Nevertheless, in some instances, "the Reynolds privilege converges with the Totten bar," id. at 1083, and then "the assertion of the privilege will require dismissal because it will become apparent during the Reynolds analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets," id. at 1079.

Here, defendants do not argue that the very subject matter of this case is itself a "state secret." See Mot. Hr'g Tr. 12:9-12. Rather, they contend that this case is one in which the "Reynolds privilege converges with the Totten bar," because "specific categories of information properly protected against disclosure by the privilege would be necessary to litigate each of plaintiff's claims." Defs.' Mem. at 43; see also Defs.' Reply at 23.[15] Defendants correctly note

[15] In support of their state secrets assertion, defendants have provided brief public and lengthy classified declarations from the Director of National Intelligence, the Secretary of Defense, and the Director of the CIA, all of which this Court has very carefully reviewed. Of

that the privilege protects information from disclosure "where there is a reasonable danger that disclosure would 'expose military matters which, in the interests of national security, should not be divulged.'" Defs.' Mem. at 46 (quoting Reynolds, 345 U.S. at 10). They argue that "where 'the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable,' dismissal is required." Id. at 52 (quoting Jeppesen Dataplan, 614 F.3d at 1089). And here, according to defendants, that is most certainly the case because

> [i]n unclassified terms, [the disclosure harmful to national security] includes information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat posed by al-Qaeda, AQAP, or Anwar al-Aulaqi, and other matters that plaintiff has put at issue, including any criteria governing the use of lethal force.

Defs.' Reply at 24; see also Defs.' Mem. at 48-49.

But defendants also correctly and forcefully observe that this Court need not, and should not, reach their claim of state secrets privilege because the case can be resolved on the other grounds they have presented. It is certainly true that the state secrets privilege should be "invoked no more often or extensively than necessary." Jeppesen Dataplan, 614 F.3d at 1080. Indeed, last year the Attorney General promulgated a policy confirming that the state secrets privilege will only be invoked in limited circumstances involving a significant risk of harm to national security and after detailed procedures are followed (including personal approval of the Attorney General). See Defs.' Mem., Ex. 2. And here, defendants have confirmed that the privilege has been invoked only after that careful review and adherence to the mandated

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course, a court must engage in such a careful, independent review before sustaining an invocation of the state secrets privilege. See Jeppesen Dataplan, 614 F.3d at 1086.

procedures under the Attorney General's policy. See Defs.' Mem. at 44.[16]

Under the circumstances, and particularly given both the extraordinary nature of this case and the other clear grounds for resolving it, the Court will not reach defendants' state secrets privilege claim. That is consistent with the request of the Executive Branch and with the law, and plaintiff does not contest that approach. Indeed, given the nature of the state secrets assessment here based on careful judicial review of classified submissions to which neither plaintiff nor his counsel have access, there is little that plaintiff can offer with respect to this issue.[17] But in any event, because plaintiff lacks standing and his claims are non-justiciable, and because the state secrets privilege should not be invoked "more often or extensively than necessary," see Jeppesen Dataplan, 614 F.3d at 1080, this Court will not reach defendants' invocation of the state secrets privilege.

## CONCLUSION

For the foregoing reasons, the Court will grant defendants' motion to dismiss. A separate order has been filed on this date.

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[16] So, too, defendants have established that the three procedural requirements for invocation of the state secrets privilege -- (1) a formal claim of privilege (2) by an appropriate department head (3) after personal consideration -- have been satisfied here. See Reynolds, 345 U.S. at 7-8; Jeppesen Dataplan, 614 F.3d at 1080; Defs.' Mem. at 48-50.

[17] Plaintiff's contention that media speculation and public disclosures concerning Anwar Al-Aulaqi undercut the state secrets privilege assertion is not persuasive. Partial disclosure of some aspects of the relevant subject matter does not warrant disclosure of other information that risks serious harm to the national security. Jeppesen Dataplan, 614 F.3d at 1090. Nor does "media and public speculation" preclude assertion of the state secrets privilege where "official acknowledgment" would damage national security. Afshar v. Dep't of State, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983).

HCJ 769/02

1. The Public Committee against Torture in Israel
2. Palestinian Society for the Protection of Human Rights and the Environment

v.

1. The Government of Israel
2. The Prime Minister of Israel
3. The Minister of Defense
4. The Israel Defense Forces
5. The Chief of the General Staff of the Israel Defense Forces
6. Shurat HaDin – Israel Law Center and 24 others

The Supreme Court Sitting as the High Court of Justice
[December 11 2005]
*Before President (Emeritus) A. Barak, President D. Beinisch, and Vice President E. Rivlin*

Petition for an *Order Nisi* and an *Interlocutory Order*
For Petitioners: Avigdor Feldman, Michael Sfarad
For Respondents no. 1-5: Shai Nitzan
For Respondents no. 6: Nitsana Darshan-Leitner, Sharon Lubrani

**JUDGMENT**

**President (Emeritus) A. Barak:**

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

## 1. Factual Background

In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls "the policy of targeted frustration" of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. During the second *intifada*, such preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. The policy of targeted killings is the focus of this petition.

## 2. The Petitioners' Arguments

3. Petitioners' position is that the targeted killings policy is totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality. It violates the human rights recognized in Israeli and international law, both the rights of those targeted, and the rights of innocent passersby caught in the targeted killing zone.

4. Petitioners' position is that the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, rather the legal system dealing with law enforcement in occupied territory. Changes were made in petitioners' stance during the hearing of the petition, some as a result of changes in respondents' position. At first it was claimed that the laws of war deal primarily with international conflicts, whereas the armed conflict between Israel and the Palestinians does not fit the definition of an international conflict. Thus, the laws which apply to this conflict are not the laws of war, rather the laws of policing and law enforcement. In the summary of their arguments (of September 9 2004), petitioners conceded that the conflict under discussion is an international conflict, however they claim that within its framework, military acts to which the laws of war apply are not allowed. That is since Israel's right to self defensive military action, pursuant to article 51 of the Charter of the United Nations of 1945, does not apply to the conflict under discussion. The right to self defense is granted to a state in response to an armed attack by another state. The territories of the area of Judea, Samaria, and Gaza are under belligerent occupation by the State of Israel, and thus article 51 does not apply to the issue. Since the State cannot claim self defense against its own population, nor can it claim self defense against persons under the occupation of its army. Against a civilian population under occupation there is no right to self defense; there is only the right to enforce the law in accordance with the laws of belligerent occupation. In any case, the laws applicable to the issue at hand are the laws of policing and law enforcement within the framework of the law of belligerent occupation, and not the laws of war. Within that framework, suspects are not to be killed without due process, or without arrest or trial. The targeted killings violate the basic right to life, and no defense or justification is to be found for that violation. The prohibition of arbitrary killing which is not necessary for self defense is entrenched in the customary norms of international law. Such a prohibition stems also from the duties of the force controlling occupied territory toward the members of the occupied population, who are protected persons according to IV Geneva Convention Relative to the Protection

of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*), as well as the two additional protocols to the conventions signed in 1977. All of this law reflects the norms of customary international law, which obligate Israel. According to petitioners' argument, the practice employed by states fighting terrorism unequivocally indicates international custom, according to which members of terrorist organizations are treated as criminals, and the penal law, supplemented at times with special additional emergency powers, is the law which controls the ways of the struggle against terrorism is conducted. Petitioners note, as examples on this point, Britain's struggle against the Irish underground, Spain's struggle against the Basque underground, Germany's struggle against terrorist organizations, Italy's struggle against the Red Brigades, and Turkey's struggle against the Kurdish underground.

5. Alternatively, petitioners claim that the targeted killings policy violates the rules of international law even if the laws applicable to the armed conflict between Israel and the Palestinians are the laws of war. These laws recognize only two statuses of people: combatants and civilians. Combatants are legitimate targets, but they also enjoy the rights granted in international law to combatants, including immunity from trial and the right to the status of prisoner of war. Civilians enjoy the protections and rights granted in international law to civilians during war. *Inter alia*, they are not a legitimate target for attack. The status of civilians, and their protection, are anchored in Common Article 3 of the Geneva Conventions. That is the basic principle of customary international law. Petitioners' stance is that this division between combatants and civilians is an exhaustive division. There is no intermediate status, and there is no third category of "unlawful combatants". Any person who is not a combatant, and any person about whom there is doubt, automatically has the status of civilian, and is entitled to the rights and protections granted to civilians at the time of war. Nor is a civilian participating in combat activities an "unlawful combatant"; he is a civilian criminal, and in any case he retains his status as a civilian. Petitioners thus reject the State's position that the members of terrorist organizations are unlawful combatants. Petitioners note that the State itself refuses to grant those members the rights and protections granted in international law to combatants, such as the right to the status as prisoners of war. The result is that the State wishes to treat them according to the worst of the two worlds: as combatants, regarding the justification for killing them, and as civilians, regarding the need to arrest them and try them. That result is unacceptable. Even if they participate in combat activity, members of terrorist organizations are not thus removed from the application of the rules of international law. Therefore, according to petitioners' position, terrorist organization members should be seen as having the status of civilians.

6. Petitioners note that a civilian participating in combat might lose part of the protections granted to civilians at a time of combat; but that is so only when such a person takes a direct part in combat, and only for such time as that direct participation continues. Those conditions are determined in article 51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter – *The First Protocol*). According to petitioners' position, the provisions of that article reflect a customary rule of international law. Those provisions have been adopted in international caselaw, and they are referred to in additional international documents, as well as in the military manuals of most western states. In order to preserve the clear

differentiation between combatants and civilians, a narrow and strict interpretation has been given to those provisions. According to that interpretation, a civilian loses his immunity from attack only during such time that he is taking a direct and active part in hostilities, and only for such time that said direct participation continues. Thus, for example, from the time that the civilian returns to his house, and even if he intends to participate again later in hostilities, he is not a legitimate target for attack, although he can be arrested and tried for his participation in the combat. Petitioners claim that the targeted killings policy, as carried out in practice, and as respondents testify expressly, strays beyond those narrow boundaries. It harms civilians at times when they are not taking a direct part in combat or hostilities. The targeted killings are carried out under circumstances in which the conditions of immediacy and necessity – without which it is forbidden to harm civilians - are not fulfilled. Thus, it is an illegal policy which constitutes forbidden attack of civilian targets.

7. Petitioners attached the expert opinion of Professor Cassese, expert in international law, who served as the first president of the International Criminal Tribunal for the former Yugoslavia. In his opinion, Professor Cassese discusses the principled differentiation in international law between civilians and combatants, which is entrenched, *inter alia*, in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, annex to Convention (IV) respecting the Laws and Customs of War on Land. Those who do not fall into the category of combatants are, by definition, civilians. There is no third category of "unlawful combatants". Thus, those who participate in various combat activities without fitting the definition of combatant, are of civilian status, and are entitled to the protections granted them in the laws of war. A civilian who participates in combat activities loses those protections, and might be a legitimate target for attack. However, that is the case only if he is taking a direct part in the hostilities, and only if the attack against him is carried out during such time of said participation. That rule is determined in article 51(3) of *The First Protocol*, but it reflects a rule of customary international law. Professor Cassese's position is that the terms "direct part" and "such time" are to be interpreted strictly and narrowly. A civilian participating in hostilities loses the protections granted to civilians only for such time that he is actually taking a direct part in the combat activities, such as when he shoots or positions a bomb. A civilian preparing to commit hostilities might be considered a person who is taking a direct part in hostilities, if he is openly bearing arms. When he lays down his weapon, or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities, or who sends others to commit hostilities, is not a legitimate target for attack. Such indirect aid to hostilities might expose the civilian to arrest and trial, but it cannot turn him into a legitimate target for attack.

8. Petitioners' stance is that the targeted killings policy, as employed in practice, violates the proportionality requirements which are part of Israeli law and customary international law. The principle of proportionality is a central principle of the laws of war. It forbids striking even legitimate targets, if the attack is likely to lead to injury of innocent persons which is excessive, considering the military benefit stemming from the act. This principle is entrenched in article 51(5)(B) of *The First Protocol*, which constitutes a customary rule. The targeted killing policy does not fulfill that requirement. Its implementers are aware that it may, at times nearly certainly, lead to the death and injury of innocent persons. And, indeed, that result occurs time after

time. Due to the methods used in implementing that policy, many of the targeted killing attempts end up killing and wounding innocent civilians. Thus, for example, on July 22 2002 a 1000 kg bomb was dropped on the house of wanted terrorist Salah Shehade, in a densely populated civilian neighborhood in the city of Gaza. The bomb and its shock waves caused the death of the wanted terrorist, his wife, his family, and the deaths of twelve neighbors. Scores were wounded. This case, like other cases, demonstrates the damage caused by the targeted killings policy, which does not discriminate between terrorists and innocent persons. Thus, petitioners' stance is that the targeted killings policy does not withstand the proportionality requirement *stricto senso*. Moreover, petitioners argue that the policy does not withstand the second proportionality test, regarding the least harmful means. Petitioners argue that respondents use the means of targeted killings often, including on occasions when there are other means for apprehending those suspected of terrorist activity. Petitioners point out that the security forces made hundreds of arrests in "area A"[*] in Judea, Samaria, and the Gaza Strip during the second *intifada*. Those figures show that the security forces have the operational ability to arrest suspects even in "area A", and to bring them to detention and interrogation centers. In those circumstances, targeted killing is not to be done. Last, petitioners claim that the targeted killings policy is not immune from severe mistakes. The targeted persons are not granted an opportunity to prove their innocence. The entire targeted killings policy operates in a secret world in which the public eye does not see the dossier of evidence on the basis of which the targets are determined. There is no judicial review: not before, nor after the targeted killing. In at least one case, it is suspected that there was a mistake in identity, and a person with a name similar to the wanted terrorist, who lived in the same village, was killed.

## 3. The Respondents' Response

9. In their preliminary response to the petition, respondents pointed out that an essentially identical petition, with essentially identical arguments, had been heard and rejected by the Supreme Court (HCJ 5872/01, judgment of January 29 2002). In that judgment it was determined that "the choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene." Respondents' position is that this approach is appropriate. This petition, like its predecessor, is intended to lead this Court into the heart of the combat zone, into a discussion of issues which are operational *par excellence*, which are not justiciable. For those reasons, the petition should be rejected *in limine*. However, respondents did not repeat that argument in the later briefs they submitted.

10. On the merits, respondents point out the security background which led to the targeted killings policy. Since late September 2000, acts of combat and terrorism are being committed against Israel. As a result of those acts, more than one thousand Israeli citizens have been killed during the period from 2000-2005. Thousands more have been wounded. The security forces take various steps in order to confront these acts of combat and terrorism. In light of the armed conflict, the laws applicable to these acts are the laws of war, or the laws of armed conflict, which are part of

[*] Translator's note: "area A" consists of the territories in Judea, Samaria, and the Gaza Strip most densely populated by Palestinians, which, according to the Oslo Accords, were to come under Palestinian security and civilian control.

international law. Respondents' stance is that the argument that Israel is permitted to defend herself against terrorism only via means of law enforcement is to be rejected. It is no longer controversial that a state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right to self defense determined in article 51 of the Charter of the United Nations, which permits a state to defend itself against an "armed attack". Even if there is disagreement among experts regarding the question what constitutes an "armed attack", there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations. Respondents point out that additional states have ceased to view terrorist activity as mere criminal offenses, and have begun to use military means and means of war to confront terrorist activities directed against them. That is especially the case when dealing with wide scale acts of terrorism which continue for a long period of time. Respondents' stance is that the question whether the laws of belligerent occupation apply to all of the territory in the area is not relevant to the issue at hand, as the question whether the targeted killings policy is legal will be decided according to the laws of war, which apply both to occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it.

11. Respondents' position is that the laws of war apply not only to war in the classic sense, but also to other armed conflicts. International law does not include an unequivocal definition of the concept of "armed conflict". However, there is no longer any doubt that an armed conflict can exist between a state and groups and organizations which are not states. That is due, *inter alia*, to the military ability and means which such organizations have, as well as their willingness to use them. The current conflict between Israel and the terrorist organizations is an armed conflict, in the framework of which Israel is permitted to use military means. The Supreme Court also made that determination in a series of cases. Regarding the classification of the conflict, respondents originally argued that it is an international armed conflict, to which the usual laws of war apply. In their summary response (of January 26 2004), respondents claim that the question of the classification of the conflict between Israel and the Palestinians is a complicated question, with characteristics that point in different directions. In any case, there is no need to decide that question in order to decide the petition. That is because according to all of the classifications, the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are party to the armed conflict and take an active part in it, whether it is an international or non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law – a category of armed conflicts between states and terrorist organizations. According to each of these categories, a person who is party to the armed conflict and takes an active part in it is a combatant, and it is permissible to strike at him. Respondents' position is that the members of terrorist organizations are party to the armed conflict between Israel and the terrorist organizations, and they take an active part in the fighting. Thus, they are legal targets for attack for as long as the armed conflict continues. However, they are not entitled to the rights of combatants according to the Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (hereinafter *The Third Geneva Convention*) and *The Hague Regulations*, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. In light of that complex reality, respondents' position is that a third category of persons – the category of

unlawful combatants – should be recognized. Persons in that category are combatants, and thus they constitute legitimate targets for attack. However, they are not entitled to all the rights granted to legal combatants, as they themselves do not fulfill the requirements of the laws of war. Respondents' stance is that members of terrorist organizations in the boundaries of the *area* fall into the category of "unlawful combatants". The status of terrorists actively participating in the armed conflict is not that of civilians. They are party to the armed conflict, and thus they can be attacked. They do not obey the laws of war, and thus they do not benefit from the rights and protections granted to legal combatants, who obey the laws of war. Respondents' position is, then, that according to each of the alternatives, "the State is permitted to kill those who fight against it, in accordance with the fundamental principles of the laws of war which apply in every armed conflict" (paragraph 68 of respondents' response of January 26 2004).

12. Alternatively, respondents' position is that the targeted killings policy is legal even if the Court should reject the argument that terrorist organization members are combatants and party to the armed conflict, and even if they are to be seen as having the status of civilians. That is because the laws of armed conflict allow harming civilians taking a direct part in hostilities. Indeed, in general, the laws of war grant civilians immunity from harm. However, a "civilian" who takes a direct part in hostilities loses his immunity, and can be harmed. Thus, it is permissible to harm civilians in order to frustrate the intent to commit planned or future hostilities. Every person who takes a direct part in committing, planning, or launching hostilities directed against civilian or military targets is a legitimate target for attack. This exception reflects a customary rule of international law. Respondents' stance is that the simultaneity requirement determined in article 51(3) of *The First Protocol*, pursuant to which a civilian who takes a direct part in hostilities can be harmed only during such time that he is taking that direct part, does not obligate Israel, as it does not reflect a rule of customary international law. On this point respondents note that Israel, like other states, has not joined *The First Protocol*. Thus, harming civilians who take a direct part in hostilities is permitted even when they are not participating in the hostilities. There is no prohibition on striking at the terrorist at any time and place, as long as he has not laid down his arms and exited the circle of violence. Last, respondents claim that even if all of the provisions of article 51(3) of *The First Protocol* are considered customary rules, the targeted killings policy complies with them. That is since the article is to be interpreted more widely than the interpretation proposed by petitioners. Thus, the term "hostilities" is to be interpreted as including acts such as the planning of terrorist attacks, launching of terrorists, and command of a terrorist ring. There is no basis for Professor Cassese's position, according to which "hostilities" must include use of weapons or carrying of weapons. In addition, the term "direct part" should be given a wide interpretation, so that a person who plans, launches, or commits a terrorist attack is considered to be taking a direct part in hostilities. Finally, even the simultaneity condition should be interpreted widely, so that it is possible to strike at a terrorist at any time that he is systematically involved in terrorist acts. Respondents' position is that the very narrow interpretation proposed by petitioners for article 51(3) is unreasonable and angering. It appears from the stance of petitioners, as well as from the expert opinion on their behalf, that terrorists are granted immunity from harm for the entire time that they plan terrorist attacks, and that this immunity is removed for only a most short time, at the time of the actual execution of the terrorist attack. After the execution of the terrorist attack the

immunity once again applies to the terrorists, even if it is clearly known that they are returning to their homes to plan and execute the next terrorist attack. This interpretation allows those who take an active part in hostilities to "change their hat" at will, between the hat of a combatant and the hat of a civilian. That result is unacceptable. Nor is it in line with the purpose of the exception, which is intended to allow the state to act against civilians who take part in a conflict against it. Respondents' response is that the targeted killings policy complies with the laws of war, even if terrorists are to be seen as civilians, and even the provisions of article 51(3) of *The First Protocol* are to be considered customary rules.

13. Respondents' position is that the targeted killings policy, as implemented in practice, fulfills the proportionality requirement. The proportionality requirement does not lead to the conclusion that it is forbidden to carry out combat activities in which civilians might be harmed. Such a requirement would mean that harm to the civilians must be proportionate to the security benefit likely to stem from the military act. Moreover, the proportionality of the act is to be examined against the background of the inherent uncertainty which clouds all military activity, especially considering the circumstances of the armed conflict between Israel and the terrorist organizations. The State of Israel fulfils the proportionality requirement. Targeted killings are performed only as an exceptional step, when there is no alternative to them. Its goal is to save lives. It is considered at the highest levels of command. In every case, an attempt is made to minimize the collateral damage liable to be caused to civilians during the targeted killing. In cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible. At times targeted killing missions have been canceled, when it has turned out that there is no possibility of performing them without disproportionately endangering innocent persons.

## 4. The Petition and its Hearing

14. The petition was submitted (on January 24 2002), and after preliminary responses were submitted, it was scheduled for hearing before a panel of three Justices. After the first session (on April 18th 2002, before *Barak P., Dorner J. & Englard J.*), the parties were asked to submit supplementary briefs, including responses to a series of questions which were posed by the Court. After submission of those responses, an additional session of the petition's hearing was held (on July 8 2003, before a panel consisting of *Barak P., Or V.P. & Mazza J.*). During that session, petitioners' motion for interlocutory injunction was heard. The motion was denied. At the request of the parties, additional dates for submission of supplemental briefs were set. At petitioners' request, an additional session was held (on February 16 2005, before a panel consisting of *Barak P., Cheshin V.P. & Beinisch J.*). During this hearing respondents presented the Prime Minister's statement at the *Sharem a-Sheikh* conference, according to which the State of Israel suspended the use of the targeted killings policy. In light of that statement, we decided to suspend the hearing of the petition to another date, in case that should be necessary. In June 2005 the State renewed the implementation of the policy. In light of that, and to the parties' request, an additional hearing was held (on December 11, 2005, before a panel consisting of *Barak P., Cheshin V.P. & Beinisch J.*). At the end of that hearing, we determined that judgment would be given after the submission of additional

supplementary briefs on behalf of the parties. According to the decision of *Beinisch P.* (of November 22 2006), *Rivlin V.P.* replaced *Cheshin V.P.*, who had retired.

15. After the petition was submitted, two additional motions for enjoinder were submitted. First (on July 22 2003), petitioners' counsel submitted a motion, on behalf of the National Lawyers Guild and the International Association of Democratic Lawyers, for enjoinder to the petition and to submit briefs as *amici curie*. Respondents opposed the motion. Later (on February 23 2004) a motion was submitted by "Shurat ha-Din – Israel Law Center" and 24 additional applicants, for enjoinders as respondents to the petition. Petitioners opposed the motion. We decide to allow both motions and to enjoinder the applicants as parties to the petition. The arguments of *amici curie* support most of petitioners' arguments. They further argue that the killing of religious and political leaders contradicts international law and is illegitimate, both in times of war and in times of peace. In addition, the policy of targeted killing is not to be implemented against those involved in terrorist activity except in cases in which there is immediate danger to human life, and even then it is to be implemented only if there is no other means that can be used to remove the danger. The arguments on behalf of "Shurat haDin" support most of respondents' arguments. It further claims that targeted killings are permissible, and even required, pursuant to the Jewish law principle of "if one rises to kill you, rise and kill him first" (BABYLONIAN TALMUD, SANHEDRIN 8, 72a), and pursuant to the Jewish law rule regarding "he who pursues his fellow man to kill him…" (MAIMONIDES, MISHNE TORAH, NEZIKIM, *Halachot Rotzeach v'Shmirat Nefesh*, chapter 1, halacha 6).

## 5. The General Normative Framework

### A. International Armed Conflict

16. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*. The Supreme Court has discussed the existence of that conflict in a series of judgments (*see* HCJ 9255/00 *El Saka v. The State of Israel* (unpublished); HCJ 2461/01 *Kna'an v. The Commander of IDF Forces in the Judea and Samaria Area* (unpublished); HCJ 9293/01 *Barake v. The Minister of Defense*, 56(2) PD 509; HCJ 3114/02 *Barake v. The Minister of Defense*, 56(3) PD 11; HCJ 3451/02 *Almandi v. The Minster of Defense*, 56(3) PD 30 (hereinafter *"Almandi"*); HCJ 8172/02 *Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* (unpublished, hereinafter – *Mara'abe*). In one case I wrote:

> "Since late September 2000, severe combat has been taking place in the areas of Judea and Samaria. It is not police activity. It is an armed conflict" (HCJ 7015/02 *Ajuri v. The Military Commander of the Judea and Samaria Area*, 56(6) PD 352, 358; hereinafter *"Ajuri"*).

This approach is in line with the definition of armed conflict in the international literature (*see* O. BEN-NAFTALI & Y. SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE, 142 (2006) [HAMISHPAT HABEINLEUMI BEIN MILCHAMA

LE'SHALOM], hereinafter "BEN-NAFTALI & SHANI"; Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (4th ed. 2005); H. DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 219 (2005), hereinafter DUFFY). It accurately reflects what is taking place, to this very day, in the *area*. Thus the situation was described in the supplement to the summary on behalf of the State Attorney (on January 26 2004):

> "For more than three years now, the State of Israel is under a constant, continual, and murderous wave of terrorist attacks, directed at Israelis – because they are Israelis – without any discrimination between combatants and civilians or between men, women, and children. In the framework of the current campaign of terrorism, more than 900 Israelis have been killed, and thousands of other Israelis have been wounded to date, since late September 2000. In addition, thousands of Palestinians have been killed and wounded during that period. For the sake of comparison we note that the number of Israeli casualties in proportion to the population of the State of Israel, is a number of times greater than the percentage of casualties in the US in the events of September 11 in proportion to the US population. As is well known, and as we have already noted, the events of 9/11 were defined by the states of the world and by international organizations, with no hesitation whatsoever, as an 'armed conflict' justifying the use of counterforce.
>
> The terrorist attacks take place both within the territories of Judea, Samaria, and the Gaza Strip (hereinafter 'the territories') and in the State of Israel proper. They are directed against civilians, in civilian population concentrations, in shopping centers and in markets, and against IDF soldiers, in bases and compounds of the security forces. In these terrorist attacks, the terrorist organizations use military means *par excellence*, whereas the common denominator of them all is their lethalness and cruelty. Among those means are shooting attacks, suicide bombings, mortar fire, rocket fire, car bombs, *et cetera*" (p. 30).

17. This armed conflict does not take place in a normative void. It is subject to the normative systems regarding the permissible and the prohibited. I discussed that in one case, stating:

> "'Israel is not an isolated island. It is a member of an international system'…. The combat activities of the IDF are not conducted in a legal void. There are legal norms – some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law – which determine rules about how combat activities should be conducted" (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) PD 385, 391, hereinafter *Physicians for Human Rights*).

What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in the *area*?

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

> "An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict" (A. CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005), hereinafter CASSESE).

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *iue in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law (*see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, 240, hereinafter *The Legality of Nuclear Weapons*; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, hereinafter *The Fence*; Bankovic v. Belgium, 41 ILM 517 (ECHR, 12 December 2001); *see also* Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000)). Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply (see HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area ,* 37(4) P.D. 785, 810, hereinafter *Jami'at Ascan*; *Ajuri*, at p. 365; *Mara'abe*, at paragraph 14 of the judgment).

19. Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state" (*S.Z. Cheshin, J.*, CrimApp 174/54 *Shtempfeffer v. The Attorney General*, 10 PD 5, 15; *see also* CrimApp 336/61 *Eichmann v. The Attorney General*, 17 PD 2033; CApp 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson*, 51(1) PD 625, 639 *and the caselaw referred to within, and* Ruth Lapidoth, *The Status of Public International Law in Israeli Law*, 19 MISHPATIM 809 (5750) [*Mikumo shel haMishpat haBeinleumi haPombi beMishpat haYisraeli*]; R. SABLE, INTERNATIONAL LAW 29 (2003) [MISHPAT BEINLEUMI]). *Shamgar P.* expressed that well, stating:

> "According to the consistent caselaw of this Court, customary international law is a part of the law of the country, subject to Israeli

statute determining a contrary provision" (HCJ 785/87 *Afu v. The Commander of IDF Forces in the West Bank*, 42(2) PD 4, 35).

The international law entrenched in international conventions which is not part of customary international law (whether Israel is party to them or not), is not enacted in domestic law of the State of Israel (*see* HCJ 69/81 *Abu A'ita v. The Commander of the Judea and Samaria Area*, 37(2) PD 197, 234, *and* Zilbershatz, *Integration of International Law into Israeli Law – The Current Law is the Desirable Law*, 24 MISHPATIM 317 (5754) [*Klitat haMishpat haBeinleumi leMishpat haYisraeli – haDin haMatzui, Ratzui*]). In the petition before us, there is no question regarding contradictory Israeli law. Public Israeli law recognizes the Israel Defense Forces as "The People's Army" (article 1 of Basic Law: the Army). The army is authorized "to do all acts necessary and legal, in order to defend the State and in order to attain its security-national goals" (article 18 of the Administration of Rule and Justice Ordinance, 5708-1948). Basic Law: the Government recognizes the legality of "any military acts needed in order to defend the State and public security (article 40(b)). These acts also include, of course, armed conflict against terrorist organizations outside of the boundaries of the State. Also to be noted is the exception to criminal liability determined in article 34m(1) of The Penal Code, 5737-1977, according to which a person shall not be criminally liable for an act which he "has a duty, or is authorized, by law, to do." When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting "by law", and they have a good justification defense. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions. Indeed, the "geometric location" of our issue is in customary international law dealing with armed conflict. It is from that law that additional law which may be relevant will be derived according to our domestic law. International treaty law which has no customary force is not part of our internal law.

20. International law dealing with the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources (*see* DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2004), hereinafter DINSTEIN). The primary sources are as follows: the fourth Hague convention (Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), hereinafter *The Hague Convention*). The provisions of that convention, to which Israel is not a party, are of customary international law status (*see Jami'at Ascan*, at p. 793; HCJ 2056/04 *The Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 817, 827, hereinafter *Beit Sourik*; *Ajuri*, at p. 364). Alongside it stands *The Fourth Geneva Convention* (IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)). Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel (*see* the judgment of *Cohen, J.* in HCJ 698/80 *Kawasme v. The Minister of Defense*, 35(1) PD 617, 638, hereinafter *Kawasme*). As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in *The Fourth Geneva Convention* do not apply regarding the *area*. However, Israel honors the humanitarian provisions of that convention (*see Kawasme*; *Jami'at Ascan*, at p. 194; *Ajuri*, at p. 364; HCJ 3278/02 *Hamoked: Center for Defense of the Individual founded by Dr. Lotte Salzberger v. The Commander of IDF Forces in the West Bank Area*, 57(1) PD 385, 396, hereinafter *Hamoked: Center for Defense of the Individual*; *Beit Sourik*, at

p. 827; *Mara'abe*, at paragraph 14 of the judgment). That is sufficient for the purposes of the petition before us. In addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter *The First Protocol*). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of *The First Protocol* are part of Israeli law.

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the *area* is the international law dealing with armed conflicts. So this Court has viewed the character of the conflict in the past, and so we continue to view it in the petition before us. According to that view, the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict (*see* CASSESE, at p. 420). Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character. A number of other possibilities have been raised in the legal literature (*see* DUFFY, at p. 218; EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL ASPECTS 585 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATI'IM VE'MUSARI'IM] hereinafter GROSS; Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law'*: *a Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INTERNATIONAL LAW JOURNAL 233 (2003), hereinafter "Ben-Naftali & Michaeli"; Derek Jinks, *September 11 and the Law of War* 28 YALE JOURNAL OF INTERNATIONAL LAW 1 (2003), hereinafter "Jinks"). According to the approach of Professor Kretzmer, that armed conflict should be categorized as a conflict which is not of purely internal national character, but also not of international character, rather is of a mixed character, to which both international human rights law and international humanitarian law apply (*see* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2000), hereinafter "Kretzmer"); Respondents' counsel presented those possibilities to us, and pointed out their problems, without taking any stance on the issue. As stated, for years the starting point of the Supreme Court – and also of the State's counsel before the Supreme Court – is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view. It should be noted that even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it (*see* Kretzmer, at p. 194; BEN-NAFTALI & SHANI, at p. 142), as well as Hamdan v. Rumsfeld, 165 L. Ed. 2d 729 (2006); *and* Prosecutor v. Tadic, ICTY, case no. IT-94-1, para. 127, hereinafter *Tadic;* regarding armed conflict which is not international, *see* YORAM DINSTEIN, CHARLES H. B. GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY (2006).

22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations (*see Jami'at Ascan*, at p. 794;

*Moked: Center for Defense of the Individual*, at p. 396; *Beit Sourik*, at p. 833). One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success (*see* DINSTEIN, at p. 16). The balance between these considerations is the basis of international law of armed conflict. Professor Greenwood discussed that, stating:

> "International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity" (DIETER FLECK (ed.) THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (1995), hereinafter FLECK).

In *Jami'at Ascan*, I wrote:

> "*The Hague Regulations* revolve around two central axes: one, the ensuring of the legitimate security interests of the occupier in the territory under belligerent occupation; the other, the ensuring of the needs of the civilian population in the territory under belligerent occupation" (p. 794).

In another case *Procaccia J.* noted that *The Hague Convention* authorizes the military commander to look after two needs:

> "The one need is a military, and the other is civilian-humanitarian. The first focuses on concern for the security of the military force occupying the area, and the second on the responsibility for maintaining the welfare of the inhabitants. Within the latter sphere, the commander of the *area* is responsible not only for maintaining order and the security of the inhabitants, but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the commander must consider" (HCJ 10356/02 *Hass v. The Commander of IDF Forces in the West Bank*, 58(3) PD 443, 455, hereinafter – *Hass*).

In *Beit Sourik* I added that –

> "The law of belligerent occupation recognizes the authority of the military commander to maintain security in the *area* and to thus protect the security of his country and its citizens. However, it imposes upon the use of this authority the condition of a proper balance between that security and the rights, needs, and interests of the local population" (p. 833).

Indeed,

> "like in many other areas of law, the solution is not found in 'all' or 'nothing'; the solution is in location of the proper balance between the clashing considerations. The solution is not in assignment of absolute weight to one of the considerations; the solution is in assignment of

> relative weights to the various considerations, while balancing between them at the point of decision" (*Mara'abe*, paragraph 29 of the judgment).

The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. This balancing reflects the relativity of human rights, and the limits of military needs. The balancing point is not constant. "In certain issues the accent is upon the military need, and in others the accent is upon the needs of the civilian population" (*Jami'at Ascan*, at p. 794). What are the factors affecting the balancing point?

23. A central consideration affecting the balancing point is the identity of the person harmed, or the objective compromised in armed conflict. That is the central principle of the distinction (*see* DINSTEIN, at p. 82; BEN-NAFTALI & SHANI, at p. 151). Customary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives (*see The Legality of Nuclear Weapons*, at p. 257; *The First Protocol*, art. 48). According to the basic principle of the distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the state's military need and the other side's civilians and civilian objectives. In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by the combat. They can be killed and wounded. However, not every act of combat against them is permissible, and not every military means is permissible. Thus, for example, they can be shot and killed. However, "treacherous killing" and "perfidy" are forbidden (*see* DINSTEIN, at p. 198). Use of certain weapons is also forbidden. The discussion of all these does not arise in the petition before us. Moreover, comprehensive legal rules deal with the status of prisoners of war. Thus, for example, prisoners of war are not to be put on criminal trial for their very participation in combat, and they are to be "humanely treated" (*The Third Geneva Convention*, art. 13). They can of course be tried for war crimes which they committed during the hostilities. Opposite the combatants and military objectives stand the civilians and civilian objectives. Military attack directed at them is forbidden. Their lives and bodies are protected from the dangers of combat, provided that they themselves do not take a direct part in the combat. That customary principle is worded as follows:

> "Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.
>
> Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects" (J. I. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW pp. 3, 19, 25 (Vol. 1, 2005), hereinafter HENCKAERTS & DOSWALD-BECK).

This approach – which protects the lives, bodies, and property of civilians who are not taking a direct part in the armed conflict – passes like a thread throughout the caselaw of the Supreme Court (*see Jami'at Ascan*, at p. 794; HCJ 72/86 *Zalub v. The Military Commander of the Judea and Samaria Area*, 41(1) PD 528, 532; *Almandi*, at p. 35; *Ajuri*, at p. 365; *Moked: Center for the Defense of the Individual*, at p. 396; HCJ 5591/02 *Yasin v. The Commander of the Ktzi'ot Military Camp*, 57(1) PD 403, 412, hereinafter *Yasin*; HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57(2) PD 349, 364; *Hass*, at p. 465; *Mara'abe*, at paragraphs 24-29 of the judgment; HCJ 1890/03 *The Municipality of Bethlehem v. The State of Israel*, 59(4) PD 736, paragraph 15 of the judgment, hereinafter *The Municipality of Bethlehem*); HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GCO Central Command, IDF*, paragraph 23 of my judgment, hereinafter *The "Early Warning" Procedure*). I discussed that in *Physicians for Human Rights*, which dealt with the combat activity during the armed conflict in Rafiah:

> "…the central provision of international humanitarian law applicable in times of combat is that civilian persons are '…entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof' (*Fourth Geneva Convention*, § 27. *See also Hague Regulations*, regulation 46.) At the foundation of that provision is the recognition of the value of man, the sanctity of his life, and his freedom. . . . His life, and dignity as a person may not be harmed, and his dignity must be protected. This basic duty is not absolute. It is subject to '. . . such measures of control and security. . . as may be necessary as a result of the war" (*See Fourth Geneva Convention*, § 27, final clause). These measures may not affect the fundamental rights of the persons concerned. . . . They must be proportionate" (p. 393).

Later in the same case I stated:

> "The duty of the military commander according to the basic rule is twofold. First, he must refrain from acts that harm the local civilians. That is his 'negative' duty. Second, he must take action necessary to ensure that the local civilians are not harmed. That is his 'positive' duty. . . . Both these duties – the boundary between which is fine – should be fulfilled reasonably and proportionately, according to the requirements of time and place" (p. 394).

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?

**B. Combatants**

24. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions (*The Hague Regulations*, §1):

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> . . ."

Article 13 of *The First and Second Geneva Conventions* and article 4 of *The Third Geneva Conventions* repeat that wording (*compare also* article 43 of *The First Protocol*). Those conditions are examined in the legal literature, as well as additional conditions which are deduced from the relevant conventions (*see* DINSTEIN, at p. 39). We need not discuss all of them, as the terrorist organizations from the *area*, and their members, do not fulfill the conditions for combatants (*see* GROSS, at p. 75). It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. In one case, I wrote:

> "The Lebanese detainees are not to be seen as prisoners of war. It is sufficient, in order to reach that conclusion, that they do not fulfill the provisions of article 4a(2)(d) of *The Third Geneva Convention*, which provides that one of the conditions which must be fulfilled in order to fit the definition of 'a prisoner of war' is 'that of conducting their operations in accordance with the laws and customs of war.' The organizations to which the Lebanese detainees belonged are terrorist organizations acting contrary to the laws and customs of war. Thus, for example, these organizations intentionally harm civilians, and shoot from within the civilian population, which serves them as a shield. Each of these is an act contrary to international law. Indeed, Israel's constant stance throughout the years has been to view the various organizations, like the *Hizbollah*, as organizations to which *The Third Geneva Convention* does not apply. We found no cause to intervene in that stance" (HCJ 2967/00 *Arad v. The Knesset*, 54 PD(2) 188, 191; *see also* Severe CrimC 1158/02 (TA) *The State of Israel v. Barguti* (unpublished, paragraph 35 of the verdict); Tav Mem/69/4 *The Military Prosecutor v. Kassem*, 1 SELECTED JUDGMENTS OF THE MILITARY TRIBUNALS IN THE ADMINISTERED TERRITORIES 403 [PISKEI DIN NIVCHARIM SHEL BATEI HADIN HATSVAYIM BASHTACHIM HAMUCHZAKIM]).

25. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. The Chief Justice of the Supreme Court of the United States, *Stone C.J.* discussed that, writing:

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful" (Ex Parte Quirin 317 U.S. 1, 30 (1942); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

The Imprisonment of Unlawful combatants Law, 5762-2002 authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an "unlawful combatant". That term is defined in the statute as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949." Needless to say, unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law (Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES IN LAW 111, 119 (2004), hereinafter "Nolte"). That is certainly the case when they are in detention or brought to justice (*see* §75 of *The First Protocol*, which reflects customary international law, *as well as* Knut Dormann, *The Legal Situation of 'Unlawful/Unprivileged' Combatants*, 849 INTERNATIONAL REVIEW OF THE RED CROSS 45, 70 (2003), hereinafter "Dormann"). Does it follow that in Israel's conduct of combat against the terrorist organizations, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law? It is to the examination of that question which we now turn.

## C. Civilians

26. Customary international law regarding armed conflicts protects "civilians" from harm as a result of the hostilities. The International Court of Justice discussed that in *The Legality of Nuclear Weapons*, stating:

> "states must never make civilians the object of attack" (p. 257).

That customary principle is expressed in article 51(2) of *The First Protocol*, according to which:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack".

From that follows also the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on "combatants" (*see* Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians*, 39 ISRAEL LAW REVIEW 81 (2006). Against the background of that protection granted to "civilians", the question what constitutes a "civilian" for the purposes of that law arises. The approach of customary international law is that "civilians" are those who are not "combatants" (*see* §50(1) of *The First Protocol*, *and* SABLE, at p. 432). In the *Blaskic* case, the International Criminal Tribunal for the former Yugoslavia ruled that civilians are –

> "Persons who are not, or no longer, members of the armed forces" (Prosecutor v. Blaskic (2000) Case IT-95-14-T, para 180).

That definition is "negative" in nature. It defines the concept of "civilian" as the opposite of "combatant". It thus views unlawful combatants – who, as we have seen, are not "combatants" – as civilians. Does that mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is, no. Customary international law regarding armed conflicts determines that a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities (*see* §51(3) of *The First Protocol*). The result is that an unlawful combatant is not a combatant, rather a "civilian". However, he is a civilian who is not protected from attack as long as he is taking a direct part in the hostilities. Indeed, a person's status as unlawful combatant is not merely an issue of the internal state penal law. It is an issue for international law dealing with armed conflicts (*see* Jinks). It is manifest in the fact that civilians who are unlawful combatants are legitimate targets for attack, and thus surely do not enjoy the rights of civilians who are not unlawful combatants, provided that they are taking a direct part in the hostilities at such time. Nor, as we have seen, do they enjoy the rights granted to combatants. Thus, for example, the law of prisoners of war does not apply to them.

## D. A Third Category: Unlawful combatants?

27. In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The State's position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall under this category of unlawful combatants.

28. The literature on this subject is comprehensive (Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323 (1951); Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005), hereinafter "Watkin"; Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law*, 34 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 227 (2002); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?* 38 ISRAEL LW REVIEW 378 (2005); Nolte; Dormann). We shall take no stance regarding the question whether it is desirable to recognize this third category. The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law (*see* CASSESE, at pp. 408, 470). It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality (*see Jami'at Ascan*, at p. 800; *Ajuri*, at p. 381). In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

## 6. Civilians who are Unlawful combatants

### A. The Basic Principle: Civilians Taking a Direct Part in Hostilities are not Protected at Such Time they are Doing So

29. Civilians enjoy comprehensive protection of their lives, liberty, and property. "The protection of the lives of the civilian population is a central value in humanitarian law" (*The "Early Warning" Procedure*, at paragraph 23 of my judgment). "The right to life and bodily integrity is the basic right standing at the center of the humanitarian law intended to protect the local population" (HCJ 9593/04 *Yanun Village Council Head v. The Commander of IDF Forces in Judea and Samaria* (yet unpublished)). As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of *The First Protocol*, which constitutes customary international law:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. . ."

Article 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court determines, in the same spirit, in defining a war crime, that if an order to attack civilians is given intentionally, that is a crime. That crime applies to those civilians who are "not taking direct part in hostilities". In addition, civilians are not to be harmed in an indiscriminate attack; in other words, in an attack which, *inter alia*, is not directed against a particular military objective (*see* §51(4) of *The First Protocol*, which constitutes customary international law: *see* HENCKAERTS & DOSWALD-BECK, at p. 37). That protection is granted to all civilians, excepting those civilians taking a direct part in hostilities. Indeed, the protection from attack is not granted to unlawful combatants who are taking a direct part in the hostilities. I discussed that in one case, stating:

> "The fighting is against the terrorists. The fighting is not against the local population" (*Physicians for Human Rights*, at p. 394).

What is the source and the scope of that basic principle, according to which the protection of international humanitarian law is removed from those who take an active part in hostilities at such time that they are doing so?

**B. The Source of the Basic Principle and its Customary Character**

30. The basic principle is that the civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so. This principle is manifest in §51(3) of *The First Protocol*, which determines:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

As is well known, Israel is not party to *The First Protocol*. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law (HENCKAERTS & DOSWALD-BECK, at p. 20). That position is acceptable to us. It fits the provision Common Article 3 of *The Geneva Conventions*, to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons "[T]aking no active part in the

hostilities." The International Criminal Tribunal for the former Yugoslavia determined that article 51 of *The First Protocol* constitutes customary international law (*see* Struger ICTY IT-OT-42-T-22 (2005)). In military manuals of many states, including England, France, Holland, Australia, Italy, Canada, Germany, the United States (Air Force), and New Zealand, the provision has been copied verbatim, or by adopting its essence, according to which civilians are not to be attacked, unless they are taking a (direct) part in the hostilities. The legal literature sees that provision as an expression of customary international law (*see* DINSTEIN, at p. 11; Kretzmer, at p. 192; Ben-Naftali & Michaeli, at p. 269; CASSESE, at p. 416; *and* Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 411, 418 (2005), hereinafter "Roscini"; Vincent-Jöel Proulx, *If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of Suspected Terrorists*, 56 HASTINGS LAW JOURNAL 801, 879 (2005); George Aldrich, *Laws of War on Land*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 42, 53 (2000)). Respondents' counsel stated before us that in Israel's opinion, not all of the provisions of article 51(3) of *The First Protocol* reflect customary international law. According to the State's position, "all that is determined in customary international law is that it is forbidden to harm civilians in general, and it expressly determines that it is permissible to harm a civilian who 'takes a direct part in hostilities.' Regarding the period of time during which such harm is permitted, there is no restriction" (supplement to summary on behalf of the State Attorney (of January 26 2004), p. 79). Therefore, according to the position of the State, the non-customary part of article 51(3) of *The First Protocol* is the part which determines that civilians do not enjoy protection from attack *"for such time"* as they are taking a direct part in hostilities. As mentioned, our position is that all of the parts of article 51(3) of *The First Protocol* express customary international law. What is the scope of that provision? It is to that question that we now turn.

### C. The Essence of the Basic Principle

31. The basic approach is thus as follows: a civilian – that is, a person who does not fall into the category of combatant – must refrain from directly participating in hostilities (*see* FLECK, at p. 210). A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, *e.g.* those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack (*see* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004), hereinafter "Watkin"). Gasser discussed that, stating:

> "What are the consequences if civilians do engage in combat? . . . Such persons do not lose their legal status as civilians. . . . However, for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile

> acts may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities" (FLECK, at p. 211, paragraph 501).

The Red Cross Manual similarly states:

> "Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity" (MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES, at paragraph 610, p. 34 (1999)).

That is the law regarding unlawful combatants. As long as he preserves his status as a civilian – that is, as long as he does not become part of the army – but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Indeed, terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack. Nor do they enjoy the rights of combatants, *e.g.* the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians "unless and for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). That provision is composed of three main parts. The first part is the requirement that civilians take part in "hostilities"; the second part is the requirement that civilians take a "direct" part in hostilities; the third part is the provision by which civilians are not protected from attack "for such time" as they take a direct part in hostilities. We shall discuss each of those parts separately.

**D. The First Part: "Taking . . . part in hostilities"**

33. Civilians lose the protection of customary international law dealing with hostilities of international character if they "take . . . part in hostilities." What is the meaning of that provision? The accepted view is that "hostilities" are acts which by nature and objective are intended to cause damage to the army. Thus determines COMMENTARY ON THE ADDITIONAL PROTOCOLS, published by the Red Cross in 1987:

> "Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces" (Y. SANDOZ et al. COMMENTARY ON THE ADDITIONAL PROTOCOLS 618 (1987)).

A similar approach was accepted by the Inter-American Commission on Human Rights, and is positively referred to in HENCKAERTS & DOSWALD-BECK (p. 22). It seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition. According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while

gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is their a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all. COMMENTARY ON THE ADDITIONAL PROTOCOLS discussed that issue:

> "It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon" (p. 618-619).

As we have seen, that approach is not limited merely to the issue of "hostilities" toward the army or the state. It applies also to hostilities against the civilian population of the state (*see* Kretzmer, at p. 192).

**E. Second Part: "Takes a Direct Part"**

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict (as adopted in *The First Protocol*, §51(3)), if "they take a direct part in hostilities". That provision differentiates between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking an indirect part in hostilities (who continue to enjoy protection from attack). What is that differentiation? A similar provision appears in Common Article 3 of *The Geneva Conventions*, which uses the wording "active part in hostilities". The judgment of the International Criminal Tribunal for Rwanda determined that these two terms are of identical content (*see* The Prosecutor v. Akayesu, case no. ICTR-96-4-T (1998)). What is that content? It seems accepted in the international literature that an agreed upon definition of the term "direct" in the context under discussion does not exist (*see* DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, REPORT PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (2003); DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2004)). HENCKAERTS & DOSWALD-BECK rightly stated that–

> "It is fair to conclude . . . that a clear and uniform definition of direct participation in hostilities has not been developed in state practice" (p. 23).

In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement (*compare Tadic*). On this issue, the following passage from COMMENTARY ON THE ADDITIONAL PROTOCOLS is worth quoting:

> "Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly" (p. 516).

Indeed, a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities (*see* Watkin, at p. 17). However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities (*see* DUFFY, at p. 230). Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities. The third report of the Inter-American Commission on Human Rights states:

> "Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party" (IACHR THIRD REPORT ON HUMAN RIGHTS IN COLOMBIA, par. 53, 56 (1999)).

And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term "direct" part in hostilities. Professor CASSESE writes:

> "The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*" (p. 421, emphasis original).

On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the "direct" character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible. Schmitt writes:

> "Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted" (Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in H. FISCHERR (ed.), CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSHRIFT FUR DIETER FLECK 505-509 (2004), hereinafter "Schmitt").

35. Against the background of these considerations, the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities (*see* Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVEW 1, 116 (1990), hereinafter "Parks"), or beyond those issues (*see* Schmitt, at p. 511); a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities (*see* Watkin, at p. 17; Roscini). However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage. This was discussed by Gasser:

> "Civilians who directly carry out a hostile act against the adversary may be resisted by force. A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians . . . [N]ot only direct and personal involvement but also preparation for a military operation and intention to take part therein may suspend the immunity of a civilian. All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy . . . However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act. Employment in the armaments industry for example, does not mean, that civilian workers are necessarily participating in hostilities… Since, on the other hand, factories of this industry usually constitute lawful military objectives that may be attacked, the normal rules governing the assessment of possible collateral damage to civilians must be observed" (FLECK, at p. 232, paragraphs 517, 518).

In the international literature there is a debate surrounding the following case: a person driving a truck carrying ammunition (*see* Parks, at p. 134; Schmitt, at p. 507; ANTHONY P. V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996), hereinafter ROGERS; *and* Lisa L. Turner &. Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE LAW REVEW 1, 31 (2001); John R. Heaton, *Civilians At War: Re-examining the Status of Civilians*

*Accompanying the Armed Forces*, 57 AIR FORCE LAW REVEW 155, 171 (2005)). Some are of the opinion that such a person is taking a direct part in the hostilities (and thus he can be attacked), and some are of the opinion that he is not taking a direct part (and thus he cannot be attacked). Both opinions are in agreement that the ammunition in the truck can be attacked. The disagreement regards the attack upon the civilian driver. Those who think that he is taking a direct part in the hostilities are of the opinion that he can be attacked. Those who think that he is not taking a direct part in the hostilities believe that he cannot be attacked, but that if he is wounded, that is collateral damage caused to civilians proximate to the attackable military objective. In our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities (*see* DINSTEIN, at p. 27; Schmitt at p. 508; ROGERS, at p. 7; ANTHONY .P .V. ROGERS & P. MALHERBE, MODEL MANUAL OF THE LAW OF ARMED CONFLICT 29 (ICRC, (1999)).

36. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities (*see* Schmitt, at p. 521 *and* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511, 541 (2004))

37. We have seen that a civilian causing harm to the army is taking "a direct part" in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the "direct" part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) (*see* Schmitt, at p. 529).

**F. The Third Part: "For Such Time"**

38. Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless "and for such time" as they are taking a direct part in hostilities. The provisions of article 51(3) of *The First Protocol* present a time requirement. A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed – the protection granted to the civilian returns. In respondents' opinion, that part of article 51(3) of *The First Protocol* is not of

customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of *The First Protocol* reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?

39. As regarding the scope of the wording "takes a direct part" in hostilities, so too regarding the scope of the wording "and for such time" there is no consensus in the international literature. Indeed, both these concepts are close to each other. However, they are not identical. With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility (*see* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN LAW 179, 195 (2004)).

40. These examples point out the dilemma which the "for such time" requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon, by which each terrorist has "horns of the alter" (1 Kings 1:50) to grasp or a "city of refuge" (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer, at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed (*see* CASSESE, at p. 421). Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities (*see* Ergi v. Turkey, 32 EHRR 388 (2001). CASSESE rightly stated that –

> "[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into

> question and the whole body of law relating to armed conflict would eventually be eroded" (p. 421).

The burden of proof on the attacking army is heavy (*see* Kretzmer, at p. 203; GROSS at p. 606). In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point:

> "[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious" (p. 24).

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed (*see* Mohamed Ali v. Public Prosecutor [1969] 1 A.C. 430). Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. That question arose in McCann v. United Kingdom, 21 E.H.R.R. 97 (1995), hereinafter *McCann*. In that case, three terrorists from Northern Ireland who belonged to the IRA were shot to death. They were shot in the streets of Gibraltar, by English agents. The European Court of Human Rights determined that England had illegally impinged upon their right to life (§2 of the European Convention on Human Rights). So wrote the court:

> "[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk" (p. 148, at paragraph 235).

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required (*see* ALAN DERSHOWITZ, PREEMTION: A KNIFE THAT CUTS BOTH WAYS 230 (2005)). However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (*see* §5 of *The Fourth Geneva Convention*). Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent (*see* Watkin, at p. 23; DUFFY, at p. 310; CASSESE, at p. 419; *see also* Colin Warbrick, *The Principle of the European Convention on Human Rights and the Responses of State to Terrorism*, EUROPEAN HUMAN RIGHTS LAW REVIEW 287, 292

(2002); *McCann*, at pp. 161, 163; *as well as* McKerr v. United Kingdom, 34 E.H.R.R. 553, 559 (2001)). In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian (*see* CASSESE, at pp. 419, 423, *and* §3 of *The Hague Regulations*; §91 of *The First Protocol*). Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. We shall now proceed to the examination of that question.

## 7. Proportionality

### A. The Principle of Proportionality and its Application in Customary International Law

41. The principle of proportionality is a general principle in law. It is part of our legal conceptualization of human rights (*see* §8 of Basic Law: Human Dignity and Freedom; *see also* AHARON BARAK, A JUDGE IN A DEMOCRATIC SOCIETY 346 (2004) [SHOFET BECHEVRA DEMOKRATIT], hereinafter BARAK). It is an important component of customary international law (*see* ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT 219 (1994); Delbruck, *Proportionality*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1144 (1997). It is an integral part of the law of self defense. It is a substantive component in protection of civilians in situations of armed conflict (*see* DINSTEIN, at p. 119; Gasser, at p. 220; CASSESE, at p. 418; BEN-NAFTALI & SHANI, at p. 154; *and* HENCKAERTS & DOSWALD-BECK, at p. 60; Judith Gardam, *Proportionality and Force in International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 391 (1993), hereinafter "Gardam"; J.S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MILITARY LAW REVIEW 91 (1982); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 73 (1989)). It is a central part of the law of belligerent occupation (*see Hass*, at p. 461; *The Municipality of Bethlehem*; *Beit Sourik*, at p. 836; HCJ 1661/05 *Gaza Coast Regional Council v. The Knesset*, 59(2) PD 481, paragraph 102 of the judgment of The Court; *Mara'abe*, paragraph 30 of my judgment; *see also* DINSTEIN, at p. 119; HENCKAERTS & DOSWALD-BECK, at p. 60). In a long list of judgments, the Supreme Court has examined the authority of the military commander in the *area* according to the standards of proportionality. It has done so, *inter alia*, regarding restriction of place of residence (*Ajuri*); regarding encirclement of villages and positioning checkpoints on the access roads to and from them in order to frustrate terrorism (HCJ 2847/03 *Alauna v. The Commander of IDF Forces in Judea and Samaria* (unpublished)); regarding harm to property of protected persons due to army operations (*see* HCJ 9525/00 *Ali Skai v. The State of Israel* (unpublished)); regarding the safeguarding of freedom of worship and the right to access to holy places (*Hass*); regarding demolition of houses due to operational needs (*see* HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip*, 56(4) PD 608); regarding the laying of siege (*Almandi*); regarding the erection of the security fence (*Beit Sourik; Mara'abe*).

### B. Proportionality in an International Armed Conflict

42. The principle of proportionality is a substantial part of international law regarding armed conflict (*compare* §51(5)(b) *and* 57 of *The First Protocol* (*see* HENCKEARTS & DOSWALD-BECK, at p. 46; BEN-NAFTALI & SHANI, at p. 154)). That law is of customary character (*see* HENCKEARTS & DOSWALD-BECK, at p. 53; DUFFY, at p. 235; *and* Prosecutor v. Kupreskic, ICTY Case no. IT-95-16 (2000)). The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate (*see* DINSTEIN, at p. 119). Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.

43. The principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. Judge Higgins pointed that out in the *Legality of Nuclear Weapons* case:

> "The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack" (p. 587).

A manifestation of this customary principle can be found in *The First Protocol*, pursuant to which indiscriminate attacks are forbidden § 51(4)). *The First Protocol* further determines (§51(5)):

> Among others, the following types of attacks are to be considered as indiscriminate:
>
> (a) …
>
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

44. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality *"stricto senso"*, that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. However, the laws of armed conflict include additional components, which are also an integral part of the theoretical principle of proportionality in the

wider sense. The possibility of concentrating that law into the legal category to which it belongs, while formulating a comprehensive doctrine of proportionality, as is common in the internal law of many states, should be considered. That cannot be examined in the framework of the petition before us. We shall concentrate upon the aspect of proportionality which is accepted, without exception, as relevant to the subject under discussion.

**Proper Proportion between Benefit and Damage**

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests (*see Beit Sourik*, at p. 850; HCJ 7052/03 *Adalah – The Legal Center Arab Minority Rights in Israel* (unpublished, paragraph 74 of my judgment, hereinafter *Adalah*). It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. In one case I stated:

> "Basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah - The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense* (unpublished, paragraph 30 of my judgment; *see also* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002)).

As we have seen, this requirement of proportionality is employed in customary international law regarding protection of civilians (*see* CASSESE, at p. 418; Kretzmer, at p. 200; Ben-Naftali & Michaeli, at p. 278; *see also* Gardam; *as well as* §51(2)(III) of *The First Protocol*, which constitutes customary law). When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto senso* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians (*see* § 51(5)(b) of *The First Protocol*). The rule is that combatants and terrorists are not to be harmed if the damage expected to

be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (*see* HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (*compare* DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (*see* §57(2)(iii) of *The First Protocol*). Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted. The Inter-American Court of Human Rights pointed that out, stating:

> "[R]egardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends" (Velasquez Rodriguez v. Honduras, I/A Court H.R. (Ser. C.), No 4, 1, para. 154 (1988)).

However, when hostilities occur, losses are caused. The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems (*see* Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing*, 25 SAIS REVIEW 41 (2005). Despite the difficulty of that balancing, there's no choice but to perform it.

## 8. Jusiticiability

47. A considerable part of the State Attorney's Office's response (of March 20, 2002) was dedicated to preliminary arguments. According to that response, "the IDF combat activity in the framework of the combat events occurring in the *area*, which are of operational character *par excellence*, are not justiciable – and at very least are not institutionally justiciable – and this honorable Court will not judge them" (paragraph 26, p. 7; emphasis original). In explaining this approach, respondents' counsel emphasized that in his opinion "the dominant character of the issue is not legal, and the attribute of judicial restraint requires that the Court refrain from stepping down into the combat zone and from judging the operational acts *par excellence* which are occurring in that zone" (*ibid*, paragraph 36, p. 11; emphasis original). Respondents' counsel emphasized that "clearly, the subject's status as 'non-justiciable' does not mean that means of supervision and control on the part of the executive branch itself are not employed on this issue . . . the units of the army have been instructed by the Attorney General and the Military Advocate General to act on this issue, as in others, strictly according to the provisions of international law regarding laws of conflict, and they comply with that instruction" (*ibid*, paragraph 40, p. 13).

48. As is well known, we differentiate between an argument of normative non-justiciability and an argument of institutional non-justiciability (*see* HCJ 910/86 *Ressler v. The Minister of Defense*, 42(2) PD 441, hereinafter *Ressler*). An argument of normative non-justiciability claims that legal standards for deciding the dispute put before the Court do not exist. An argument of institutional non-justiciability claims that it is not proper that the dispute be decided in Court according to the law. The argument of normative non-justiciability has no legal base: not in general, and not in the issue before us. The argument of non-justiciability has no legal base in general, since there is always a legal norm according to which the dispute can be solved, and the existence of a legal norm provides the basis for the existence of legal standards for such decision. It may be easy to identify the norm and the standards behind it; it may be difficult to do so. However, at the end of the day, a legal norm will always be found, and legal standards will always be found. That norm can be general, *e.g.* "a person is permitted to do everything except that which has been forbidden, and the government is permitted to do only what it has been permitted to do". At times the norm is much narrower. So it is in the case before us. There are legal norms which deal with the case before us, from which we can derive standards which determine what is permitted and what is forbidden. There is thus no foundation to the argument of normative non-justiciability.

49. The second type of non-justiciability is institutional non-justiciability. That non-justiciability deals with the question whether the law and the Court are the appropriate framework for deciding in the dispute. The question is not whether it is possible to decide in the dispute according to the law, in Court. The answer to that question is in the affirmative. The question is whether it is desirable to decide in the dispute – which is normatively justiciable – according to legal standards, in Court (*Ressler*, at p. 488). That type of non-justiciability is recognized in our law. Thus, for example, it was decided that in general, questions of the day to day affairs of the legislature are not institutionally justiciable (*see* HCJ 9070/00 *MK Livnat v. The Chairman of the Constitution, Law, and Justice Committee*, 55(4) PD 800, 812; HCJ 9056/00 *MK Kleiner v. The Chairman of the Knesset*, 55(4) PD 703, 708). Only if it is claimed that the violation of rules regarding internal management harms the parliamentary fabric of life and the foundations of the structure of our constitutional system of government is it appropriate to decide the issue in court (*see* HCJ 652/81 *MK Sarid v. The Chairman of the Knesset*, 36(2) PD 197; HCJ 73/85 *"Kach" Knesset Faction v. The Chairman of the Knesset*, 39(3) PD 141; HCJ 742/84 *Kahane v. The Chairman of the Knesset*, 39(4) PD 85.

50. The scope of the institutional non-justiciability doctrine in Israel is not wide. There is not a consensus about its boundaries. As for me, I am of the opinion that it should be recognized only within very limited boundaries (*see* BARAK, at p. 275). Whatever its boundaries, the doctrine does not apply in this case, for four reasons: first, there is a clear trend in the caselaw of the Supreme Court, according to which there is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights. *Witkon, J.* discussed that in the *Oyeb* case. That case dealt with the legality of a settlement in the *area*. It was argued by the State that the question of the legality of a settlement in the *area* is non-justiciable. In rejecting that claim, *Witkon, J.* wrote:

> "I am not impressed by that argument whatsoever . . . . it is clear that issues of foreign policy – like a number of other issues – are decided by the political branches, and not by the judicial branch. However, assuming . . . that a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations" (HCJ 606/78 *Oyeb v. The Minister of Defense*, 33(2) PD 113, 124).

In *Duikat* the question of the legality of a settlement in the *area* was again decided by the Court. *Landau, V.P.* wrote:

> "A military government wishing to impinge upon the property right of an individual must show a legal source for it, and cannot except itself from judicial supervision over its acts by arguing non-justiciability" (HCJ 390/70 *Duikat v. The Government of Israel*, 34(1) PD 1, 15, hereinafter – *Duikat*).

In *Mara'abe* the legality of the separation fence according to the rules of international law was discussed. Regarding the justiciability of that question, I ruled:

> ". . . the Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiceable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. 'Security considerations' or 'military necessity' are not magic words . . . . This is appropriate from the point of view of protection of human rights" (*Mara'abe*, paragraph 31 of the judgment).

The petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being – the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question.

51. Second, Justices who support the doctrine of institutional non-justiciability note that the test is the dominant character of the disputed question. When the character of the disputed question is political or military, it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional non-justiciability does not apply (*see* HCJ 4481/91 *Bargil v. The Government of Israel*, 37(4) PD 210, 218). The questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes which cause the deaths of terrorists and at times of nearby innocent civilians. The question is – as indicated by the analysis of our judgment – legal; the question is the legal classification of the military conflict taking place between Israel and terrorists from the *area*; the question is the existence or lack of existence of customary international law on the issue raised by the petition; the question is of the determination of the scope of that custom, to the extent that it is reflected in §51(d) of *The First Protocol*; the question is of the norms of

proportionality applicable to the issue. The answers to all of those questions are of a dominant legal character.

52. Indeed, in a long list of judgments the Supreme Court has examined the rights of the inhabitants of the *area*. Thousands of judgments have been handed down by the Supreme Court, which, lacking any other adjudicative instance, has dealt with those issues. That examination has dealt with the powers of the army during times of combat, and with the limitations placed upon on them by international humanitarian law. Thus, for example, the rights of the local population to food, medicine, and similar needs of the population during combat operations have been examined (*see Physicians for Human Rights*); as well as the rights of the local population during the arrest of terrorists (*see The "Early Warning" Procedure*), transport of casualties (*see* HCJ 2117/02 *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank*, 56(3) PD 26), siege on a church (*Almandi*), and detention and interrogation (*Hamoked: Center for the Defense of the Individual*; *Yasin; Marab*). In more than one hundred petitions this Court has examined the rights of the local protected persons according to international humanitarian law as a result of the erection of the separation fence (*see Beit Sourik; Mara'abe;* HCJ 5488/04 *The a-Ram Local Council v. The Government of Israel* (unpublished)). In all these cases, the dominant question of the disputed question was legal. True, the legal answer was likely to have political or military implications. However, it was not those implications which determined the character of the question. It is not the results derived from the judgment which determine its character, rather the questions decided in it and they way they are solved. Those questions were in the past, and are now, of dominant legal character.

53. Third, the types of questions examined by this Court have also been decided by international courts. International law dealing with the army's duties toward civilians during an armed conflict has been discussed, for example, by the international criminal tribunals for the former Yugoslavia and Rwanda (*see* paragraphs 26, 30 & 34 above). These courts have examined the legal aspects of the conduct of armies. Why can't an Israeli court perform that same examination? Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?

54. Last, the law dealing with preventative acts on the part of the army which cause the deaths of terrorists and of innocent bystanders requires *ex post* examination of the conduct of the army (*see* paragraph 40 above). That examination must – thus determines customary international law – be of an objective character. In order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination to judicial review. That judicial review is not review instead of the regular monitoring by the army officials, who perform that review in advance. "According to the structure and role of the Court, it cannot act by way of continuous monitoring and supervision" (*Shamgar, P.* in HCJ 253/88 *Sejdia v. The Minister of Defense*, 42(3) PD 801, 825). In addition, that judicial review is not review instead of *ex post* objective review, after an event in which it is alleged that harm was caused to innocent civilians who were not taking a direct part in hostilities. After the (*ex post*) review, in the appropriate cases, judicial review of the decisions of

the objective examination committee should be allowed. That will ensure its proper functioning.

## 9. The Scope of Judicial Review

55. The Supreme Court, sitting as High Court of Justice, judicially reviews the legality of the use of the discretion of the commanders of the army forces in the *area*. Thus this Court has done since the Six Day War. The starting point which has guided the Court has been that the military commanders and officers who answer to the commander of army forces in the *area* are public officials fulfilling roles pursuant to law (*Jami'at Ascan*, at p. 809). That review preserves the legality of the use of discretion on the part of the military commander.

56. The scope of judicial review of the decision of the military commander to perform a preventative strike causing the deaths of terrorists in the *area*, and at times of innocent civilians, varies according to the essence of the concrete question raised. On the one end of the spectrum stands the question which we have discussed in this petition, regarding the content of international law dealing with armed conflicts. That is a question of determination of the applicable law, *par excellence*. According to our legal outlook, that question is within the realm of the judicial branch. "The final and decisive interpretative decision regarding a statute, as per its wording at any given time, is granted to the Court" (HCJ 306/81 *Sharon v. The Knesset* Committee, 35(4) PD 118, 141, *Shamgar, J.*). The task of interpreting the law is in the hands of the Court. So it is regarding basic laws, statutes, and regulations. So it is regarding the Israeli common law. So it certainly also is regarding the customary international law which applies in Israel. The Court is not permitted to liberate itself from the burden of that authority. The question which the Court must ask itself is not whether the executive branch's understanding of the law is a reasonable understanding; the question which the Court must ask itself is whether it is the correct understanding (HCJ 693/91 *Efrat v. The Population Registry Commissioner in the Ministry of the Interior*, 47(1) PD 749, 762). The expertise in interpreting the law is in the hands of the Court (*see* HCJ 3648/97 *Stamka v. The Minister of the Interior*, 53(2) PD 728, 305; HCJ 399/85 *Kahane v. Broadcasting Agency Executive Committee Chairman*, 41(3) PD 255, 305). As seen, judicial review of the content of the customary international law regarding the issue before us is comprehensive and complete. The Court asks itself what the international law is and whether the understanding of the military commander is in line with that law.

57. On the other end of the spectrum of possibilities is the decision, made on the basis of the knowledge of the military profession, to perform a preventative act which causes the deaths of terrorists in the *area*. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself if a reasonable military commander could have made the decision which was made. The question is whether the decision of the military commander falls within the zone of reasonable activity on the part of the military commander. If the answer is yes, the Court will not exchange the military commander's security discretion with the security discretion of the Court (*see* HCJ 1005/89 *Aga v. The Commander of IDF Forces in the Gaza Strip Area*, 44(1) PD 536, 539; *Ajuri*, at p. 375. In *Beit Sourik*, which dealt with the route of the security fence, we stated:

> "We, the Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours – to the extent that we have a military opinion regarding the military quality of the route. So we act in all questions of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander could have determined the route as this military commander did" (*ibid*, at p. 843).

As seen, judicial review regarding the military means to be taken is regular review of reasonableness. True, "military discretion" and "state security" are not magic words which prevent judicial review. However, the question is not what I would decide in the given circumstances, rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security (*see* 258/79 *Amira v. The Minister of Defense*, 34(1) PD 90, 92; *Duikat*, at p. 25; *Beit Sourik*, at p. 844; *Mara'abe*, at paragraph 32 of the judgment).

58. Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum. Take, for example, the question whether the decision to perform a preventative strike causing the deaths of terrorists fulfills the conditions which customary international law determines on that point (as determined in §51(3) of *The First Protocol*). What is the scope of judicial review of the military commander's decision that these conditions are fulfilled in the specific case? Our answer is that the question of the fulfillment of the conditions determined in customary international law for performing military operations is a legal question, the expertise in which is the Court's. I discussed that in *Physicians for Human Rights*:

> "Judicial review does not review the wisdom of the decision to take military action. The examination in judicial review is of the legality of the military action. Thus, we assume that the operations in Rafiah are necessary from a military standpoint. The question before us is whether these military operations adhere to the national and international standards which determine the legality of that action. The fact that the action is necessary from a military standpoint does not mean, from the standpoint of the law, that it is legal. Indeed, we do not replace the discretion of the military commander regarding the military considerations. That is his expertise. We examine the result from the standpoint of humanitarian law. That is our expertise" (*ibid*, at p. 393).

The approach is similar regarding proportionality. The decision of the question whether the benefit stemming from the preventative strike is proportionate to the collateral damage caused to innocent civilians harmed by it is a legal question, the expertise about which is in the hands of the judicial branch. I discussed that in *Beit Sourik*, regarding the proportionality of the harm which the separation fence causes to the fabric of life of the local inhabitants:

> "The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportionate. That is our expertise" (*Beit Sourik*, at p. 846; *Ma'arabe*, at paragraph 32 of the judgment).

Proportionality is not a standard of precision. At times there are a number of ways to fulfill its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch's decision. That is its margin of appreciation (*see* HCJ 3477/95 *Ben Atiya v. The Minister of Education, Culture, and Sport*, 49(5) PD 1, 12; HCJ 4769/95 *Menachem v. The Minister of Transportation*, PD 57(1) 235, 280; *Adalah*, at paragraph 78 of my judgment).

59. The intensity of judicial review of military decisions to make a preventative strike causing the deaths of terrorists and innocent civilians is, by nature, low. The reason for that is twofold: first, judicial review cannot be performed in advance. Having determined in this judgment the provisions of customary international law on the issue before us, we naturally cannot examine its realization in advance. Judicial review on this issue will, by nature, be retrospective. Second, the principle examination must be performed by the examination committee, which according to international law must perform an objective retrospective examination. The review of this Court can, by nature, be directed only against the decisions of that committee, and only according to the accepted standards regarding such review.

**Implementation of the General Principles in This Case**

60. The *Order Nisi* given at the request of petitioners was as follows:

> "to obligate respondents 1-3 to appear and explain why the 'targeted killing' policy (hereinafter – 'execution policy') should not be annulled, and why they should not refrain from ordering respondents 4-5 to implement that policy, and to obligate respondents 4-5 to appear and explain why they should not refrain from carrying out executions of wanted persons according to said policy."

The examination of the "targeted killing" – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex (for an analysis of the Israeli policy, *see* Yuval Shany, *Israeli Counter – Terrorism Measures: Are They 'Kosher' Under International Law?*, MICHAEL N. SCHMITT & GIAN LUCA BERUTO (eds.), TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 96 (2002); Michael L. Gross, *Fighting By Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy*, 51 POLITICAL STUDIES 360 (2003); Steven R. David, *Debate: Israel's Policy of Targeted Killing*, 17 ETHICS & INTERNATIONAL AFFAIRS 111 (2003); Yael Stein, *Response to Israel's Policy of Targeted Killing: By Any Name Illegal and Immoral*,

17 ETHICS & INTERNATIONAL AFFAIRS 127 (2003); Amos Guiora, *Symposium: Terrorism on Trial: Targeted Killing As Active Self-Defense* 36 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LW 319; Leora Bilski, *Suicidal Terror, Radical Evil, and The Distortion of Politics and Law* 5 THEORETICAL INQUIRIES IN LAW 131 (2004)). The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

**Conclusion**

61.The State of Israel is fighting against severe terrorism, which plagues it from the *area*. The means at Israel's disposal are limited. The State determined that preventative strikes upon terrorists in the *area* which cause their deaths are a necessary means from the military standpoint. These strikes at times cause harm and even death to innocent civilians. These preventative strikes, with all the military importance they entail, must be made within the framework of the law. The saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent" (*silent enim legis inter arma*). Those sayings are regrettable. They reflect neither the existing law nor the desirable law (*see* Re. Application Under s.83.28 of the Criminal Code [2004] 2 S.C.R. 248, 260). It is when the cannons roar that we especially need the laws (*see* HCJ 168/91 *Murkus v. The Minister of Defense*, 45(1) PD 467, 470, hereinafter *Murkus*). Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes" (*see* JOHAN STEYN, DEMOCRACY THROUGH LAW: SELECTED SPEECHES AND JUDGMENTS 195 (2004)). In this case, the law was determined by customary international law regarding conflicts of an international character. Indeed, the State's struggle against terrorism is not conducted "outside" of the law. It is conducted "inside" the law, with tools that the law places at the disposal of democratic states.

62.The State's fight against terrorism is the fight of the state against its enemies. It is also law's fight against those who rise up against it (*see Kawasme*, at p. 132). In one of the cases in which we examined the laws of armed conflict, I stated:

> "This fighting is not taking place in a normative void. It is being conducted according to the rules of international law, which determine

> principles and rules for combat activity. The saying, 'when the cannons roar, the muses are silent,' is incorrect. Cicero's aphorism, that laws are silent during war, does not reflect modern reality. . . . The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it. . . . Moreover, the State of Israel is a state whose values are Jewish and democratic. We established a law abiding state, which realizes its national objectives and the vision of generations, and does so while recognizing human rights in general, and human dignity specifically, and while upholding those rights. Between these — the realization of national objectives and the vision of generations, and human rights — there is harmony and fit, not contradiction and alienation" (*Almandi*, at p. 34; *see also Murkus*, at p. 470; HCJ 1730/96 *Sabih v. The Commander of IDF Forces in the Judea and Samaria Area*, 50(1) PD 353, 369).

Indeed, in the State's fight against international terrorism, it must act according to the rules of international law (*see* Michael Kirby, *Australian Law – After 11 September 2001*, 21 AUSTRALIAN BAR REVIEW 253 (2001)). These rules are based on balancing. They are not "all or nothing". I discussed that in *Ajuri*, stating:

> "In this balancing, human rights cannot receive their full protection, as if there was no terrorism, and state security cannot receive its full protection, as if there were no human rights. A delicate and sensitive balancing is needed. That is the price of democracy. It is a dear price, which is worthwhile to pay. It maintains the strength of the state. It makes the State's struggle worthwhile (*Ajuri*, at p. 383).

Indeed, the struggle against terrorism has turned our democracy into a "defensive democracy" or a "militant democracy" (*see* ANDRAS SAJO, MILITANT DEMOCRACY (2004)). However, we cannot allow that struggle to deny our State its democratic character.

63. The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times it is even a duty to do so. The question is how we respond. On that issue, a balance is needed between security needs and individual rights. That balancing casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law. That balancing casts a heavy load upon the judges, who must determine – according to the existing law – what is permitted, and what forbidden. I discussed that in one case, stating:

> "The role of decision has been placed at our door, and we must fulfill it. It is our duty to preserve the legality of government, even when the decisions are difficult. Even when the cannons roar and the muses are silent, the law exists, and acts, and determines what is permissible and

> what is forbidden; what is legal and what is illegal. As the law exists, so exists the Court, which determines what is permissible and what is forbidden, what is legal and what is illegal. Part of the public will be happy about our decision; the other part will oppose it. It may be that neither part will read our reasoning. But we will do our job" (HCJFH 2161/96 *Sharif v. GOC Home Front Command*, 50(4) PD 485, 491).

Indeed, decision of the petition before us is not easy;

> "We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terrorism. We are aware of the killing and destruction wrought by the terrorism against the State and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against terrorism's severe blow. We are aware that in the short term, this judgment will not make the State's struggle against those rising up against her easier. That knowledge is difficult for us. But we are judges. When we sit in trial, we stand trial. We act according to our best conscience and understanding. Regarding the State's struggle against the terror that rises up against her, we are convinced that at the end of the day, a struggle according to law (and while complying with the law) strengthens her and her spirit. There is no security without law. Satisfying the provisions of the law is a component of national security" (*Beit Sourik*, at p. 861).

64.In one case we decided the question whether the State is permitted to order its interrogators to employ special methods of interrogation which involve the use of force against terrorists, in a "ticking bomb" situation. We answered that question in the negative. In my judgment, I described the difficult security situation in which Israel finds itself, and added:

> "We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties (HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 845).

Let it be so.

**Vice President E. Rivlin**

1. I concur in the important and comprehensive judgment of my colleague President A. Barak.

The spread of terrorism in recent years – a spread in scope and in intensity – has raised difficult questions regarding the way a democratic state should, and is permitted, to struggle against those rising up against it and its citizens in order to destroy them. Indeed, it is uncontroversial that a state is permitted to, and must, fight against terrorism. Nor is it controversial that not all means are legal. The outline of the fight against terrorism, and of self defense against terrorism, is difficult to draw. The usual means with which a state defends itself and its citizens are not necessarily effective against terrorist organizations and their members. Nor do policing and enforcement means which characterize the struggle against "conventional" illegal phenomena fit the needs of the fight against terrorism (*see also* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN LAW 179 (2004), hereinafter "Statman"). Thus, the State of Israel (like other states) takes, and has taken throughout the years, various actions in order to confront terrorism, and this Court, on various occasions, has dealt with the question of the delicate balances involved in such actions.

The petition before us regards the "targeted killing" policy. In the framework of that policy, the State of Israel strikes at persons whom it identifies as involved in the planning and execution of terrorist attacks. The goal is: on the one hand, to protect the civilians and soldiers of the State of Israel; and on the other hand, to prevent harm, or minimize collateral damage, to the Palestinian civilian population. My colleague President A. Barak is of the opinion that the issue before us should be examined in light of international law regarding armed conflict of an international character. I share that position (*see* Nicholas J. Kendall, *Israeli Counter-Terrorism: 'Targeted Killings' under International Law*, 80 NORTH CAROLINA LAW REVIEW 1069 (2002)). For years there has been a continuous state of armed conflict between Israel and the various terrorist organizations active in the *area*. That conflict, notes my colleague President Barak, does not exist in a normative void. Two legal systems apply here, and in the words of my colleague President Barak: "alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier 'carries in his pack' and which go along with him wherever he may turn, may apply." Indeed, two normative systems require examination on the issue before us – one, the rules of international law, and the other, the legal rules and moral principles of the State of Israel in general, including the basic value of human dignity.

2. During a discussion of the normative system within international law, my colleague President Barak deals with the question of the correct classification of the terrorist organizations and their members: are they to be seen as combatants, as civilians, or as a separate group of unlawful combatants? My colleague's conclusion is that, as far as existing law is concerned, "we were [not] presented with data sufficient to allow us to say . . . that such a third category [of unlawful combatants] has been recognized in customary international law," and since such combatants do not fulfill the conditions for entry into the category of "combatant", they are to be classified as civilians. That classification, he clarifies, does not, according to international law, grant protection to civilians taking a direct part in hostilities; accordingly, they are not protected from attack at such time as they take a direct part in terrorist acts.

The issue of the correct, proper classification of terrorist organizations and their members raises difficult questions. Customary international humanitarian law obligates the parties to the conflict to differentiate between civilians and combatants and between military objectives and civilian objectives, and to refrain from causing extensive damage to enemy civilians. The question is whether *reality* hasn't created, *de facto*, an additional group, with a special legal status. Indeed, the scope of danger posed to the State of Israel and the security of her civilians by the terrorist organizations, and the fact that the means usually employed against lawbreaking citizens are not suitable to meet the threats posed by terrorist activity, make one uneasy when attempting to fit the traditional category of "civilians" to those taking an active part in acts of terrorism. They are not "combatants" as per the definition in international law. The way in which "combatants" were defined in the relevant conventions actually stemmed from the desire to deny "unlawful combatants" certain protections granted to legal combatants (especially protections regarding the issues of prisoner of war status and criminal prosecution). The latter are "unprivileged belligerents" (*see* Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 BRITISH YARBOOK OF INTERNATIONAL LAW 323 (1951)). However, the very characteristics of the terrorist organizations and their members that exclude them from the category of "combatants" – lack of fixed distinctive emblems recognizable at a distance and noncompliance with the laws and customs of war – create difficulty. Awarding a preferential status, even if only on certain issues, to those who choose to become "unlawful combatants" and do not act according to the rules of international law and the rules of morality and humanitarianism might be undesirable.

The classification of members of terrorist organizations under the category of "civilians" is not, therefore, an obvious one. DINSTEIN wrote, on this point, that:

> "…a person is not allowed to wear simultaneously two caps: the hat of civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)" (YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29-30 (2004)).

Elsewhere it was written that "if it is not proper to see terrorists as combatants, and as a result to grant them the protections to which combatants are entitled, they should even less be seen as civilians who are not combatants, and thus granted many more rights" (EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL

ASPECTS 76 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATI'IM VE'MUSARI'IM]; *also see* Yoram Dinstein, *Unlawful Combatancy* 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 249 (2002), *and* Baxter, at p. 342). Those of the opinion that the third category of unlawful combatants exists emphasize that its members include those who wish to blur the boundaries between civilians and combatants (John C. Yoo & James C. Ho, *The New York University – University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists*, 33 VIRGINIA JOURNAL OF INTERNATIONAL LAW 217 (2003)). The difficulty intensifies when we take into account that those who differentiate themselves from legal combatants on the one hand, and from innocent civilians on the other, are not homogenous. They include groups which are not necessarily identical to each other in terms of the willingness to abide by fundamental legal and human norms. It is especially appropriate, in this context, to differentiate between unlawful combatants fighting against an army and those who purposely act against civilians.

It thus appears that international law must adapt itself to the era in which we are living. In light of the data presented before us, President Barak proposes to perform the adaptation within the framework of the existing law, which recognizes, in his opinion, two categories – combatants and civilians. (Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong*, 38 ISRAEL LAW REVIEW 378 (2005)). As stated, other approaches are possible. I do not find a need to expand on them, since in light of the rules of interpretation proposed by President Barak, the theoretical distinction loses its sting.

The interpretation proposed by my colleague President Barak in fact creates a new group, and rightly so. It can be derived from the combatant group ("unlawful combatants") and it can be derived from the civilian group. My colleague President Barak takes the second path. If we go his way, we should derive a group of international-law-breaking civilians, whom I would call "uncivilized civilians". In any case, there is no difference between the two paths in terms of the result, since the interpretation of the provisions of international law proposed by my colleague President Barak adapts the rules to the new reality. That interpretation is acceptable to me. It is a dynamic interpretation which overcomes the limitations of a black letter reading of the laws of war.

3. Against the background of the differences between "legal" combatants and "international-law-breaking combatants", an analogy can be made between the means of combat permitted in a conflict between two armies, and "targeted killing" of terrorists (*see also* Statman). The attitude behind the "targeted killing" policy is that the weapons should be directed exclusively toward those substantially involved in terrorist activity. Indeed, in conventional war combatants are marked and differentiated from the civilian population. Those combatants can be harmed (subject to the restrictions of international law). Civilians are not to be harmed. Similarly, in the context of the fight against terrorism, it is permissible to harm international-law-breaking combatants, but harm to civilians should be avoided to the extent possible. The difficulty stems, of course, from the fact that the unlawful combatants, by definition, do not act according to the laws of war, often disguising themselves within the civilian population, in contradiction to the express provisions of *The First*

*Protocol* of *The Geneva Conventions*. They do so in order to gain an advantage from the fact that their opponent wishes to honor the rules of international law (*see* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004)).

However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeting" in "targeted killing". That is the meaning of the proportionality requirement with which my colleague President Barak deals with extensively.

4. Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians. The State of Israel has a duty to honor the lives of the civilians of the other side. She must protect the lives of her own citizens, while honoring the lives of the civilians who are not subject to her effective control. When the rights of the civilians are before our eyes, it becomes easier for us to recognize the importance of placing restrictions upon the conduct of hostilities. (*see* Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians*, 39 ISRAEL LAW REVIEW 81, 96 (2006), hereinafter "Benvenisti").

That duty is also part of the additional normative system which applies to the armed conflict: it is part of the moral code of the state and the fundamental principle of protecting human dignity. I discussed this when dealing with the issue of "early warning" ("the neighbor procedure"):

> "On one issue there are clear and sharp lines – the safeguarding of human dignity, of every person, as a person. It is the duty of an army occupying territory in belligerent occupation to protect the life of the local resident. It must also preserve his dignity. The very presentation of the choice given to such a resident, who has happened upon a battle zone, whether or not to grant the request of the army to relay a warning to the wanted person, puts that resident in an impossible dilemma. The choice itself is immoral. The presentation of it violates human dignity" (HCJFH 10739/05 *The Minister of Defense v. Adalah – The Legal Center for Arab Minority Rights in Israel* (unpublished)).

Both normative systems applicable to the armed conflict are united, in that they place in their centers the principle of human dignity. That principle feeds the interpretation of international law, just as it feeds the interpretation of internal Israeli public law. It expresses a general value, from which various specific duties stem. (On the status of this principle in international law, *see* Benvenisti; it should be noted that Benvenisti identifies two principles which are relevant to the implementation of the principle of preserving human dignity in the context under discussion: the individuality principle, according to which every person is responsible only for his own actions; and the universality principle, according to which all of the individuals are entitled to the same rights, be their group identification as it may. The latter principle is not expressly recognized in the laws of armed conflict. That does not negate the duty regarding enemy civilians. The scope of the duty varies, but the very existence of the duty does not (*ibid*, at p. 88.))

5. The proportionality principle, which is a general principle entrenched in various provisions of international law, is intended to fulfill that duty. That principle prohibits excessive damage to innocent civilians. The principle requires that the attainment of a worthy military objective be proportional to the damage caused to innocent civilians. This demands that the collateral damage not be excessive under the particular circumstances. Some see the placing of the benefit opposite the damage as a concretization of the provision regarding the duty to refrain from exaggerated harm to civilians. Although the link between the two is clear, it seems that there can be collateral damage to the civilian population which is so severe that even a military objective with very substantial benefit cannot justify it. In any case, these are values based requirements. "That is a values based test" notes my colleague President Barak, "it is based upon a balancing between conflicting values and interests." That values based attitude is accepted in customary international law regarding the protection of civilians (§51 of *The First Protocol*). It is also accepted in the national legal systems of many states. As President Barak wrote in one case,

> "basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel* (unpublished)).

The duty to honor the lives of innocent civilians is thus the point of departure. Stemming from it is the requirement that collateral damage to civilians not be exaggerated, and that it be proportional to the benefit which will result from the operation. This values based attitude produces restrictions on the attack upon the unlawful combatants. The restrictions may relate to the type of weapons used during the targeted killing. The restrictions might lead to a decision to employ a means which presents less danger to the lives of innocent civilians. The restrictions might relate to the level of caution required regarding identification of the target. All these are restrictions which strive to fulfill the duty to honor the lives of the innocent civilians, and will be interpreted accordingly.

The point of departure is, thus, the rights of the innocent civilians, but it is not the endpoint. It cannot negate the human dignity of the unlawful combatants themselves. Indeed, international law does not grant them rights equal to those granted to lawful combatants or to innocent civilians. However, human dignity is a principle which applies to every person, even during combat and conflict. It is not dependent upon reciprocity. One of the conclusions stemming from that – which the State does not dispute – is where it is possible to arrest a terrorist taking a direct part in hostilities and to put him on trial, he will not be targeted. To bring him to trial is a possibility which should always be considered. However, as my colleague President Barak notes, at times that possibility might be completely impractical, or put the soldiers at too high a risk.

6. The principle of proportionality is easy to phrase but difficult to implement. When dealing with it in advance, under time constraints, and in light of a limited amount of information, the decision is likely to be difficult and complex. It is often

necessary to consider values and attributes which are not easily compared. Moreover, each of the competing considerations is itself subject to relative variables. None of them can be considered standing alone. The proportionate military need includes humanitarian elements. The scope of the humanitarian consideration often includes existential military need. As my colleague President Barak notes, courts determine the law applying to the decision of the military commander. The professional military decision is the responsibility of the executive branch, and the court will ask whether a reasonable military commander would have made the decision which was actually made, in light of the normative systems which apply to the case. (*compare*: FINAL REPORT TO THE PROSECUTOR OF THE ICTY BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL RPUBLIC OF YUGOSLAVIA, June 2000.)

7. To conclude, like my colleague President Barak, I am of the opinion that one cannot determine in advance that targeted killing is always illegal, just as one cannot determine in advance that under any circumstances it is legal and permissible. In order to be legal, such an act must comply with the rules of law, including the proportionality requirement, as discussed above, in light of the view which grants central weight to the right of the State of Israel to defend itself and the lives of its citizens, and at the same time holds the principle regarding human dignity as a fundamental principle.

Thus, I concur in the judgment of my colleague President Barak.

**President D. Beinisch:**

I concur in the judgment of President (emeritus) Barak, and wish to emphasize a number of aspects regarding the difficult issue which was placed before us.

In the petition before us, petitioners requested that we order respondents to cancel the "targeted killing" policy, and order that they refrain from acting according to that policy. That is a petition for all-encompassing and wide relief, on the basis of petitioners' argument that Israel's policy on this issue is "totally illegal". Among their arguments on the basis of international and internal Israeli law, petitioners also based their arguments upon specific examples from the past, which in their opinion indicate the illegality of that policy. Those specific examples show the problematic nature of the "targeted killings" policy and the risks which accompany it, however they cannot decide the legal question of the legality of the policy in its entirety.

For the reasons detailed in the opinion of my colleague President Barak, I concur with the conclusion that the issue before us is controlled by the laws applying to international armed conflict, and thus that the sweeping stance of petitioners is not the necessary conclusion from international humanitarian law. The conclusion reached by President Barak, with which I concur, is that it cannot be said that this policy is always prohibited, just as it cannot be said that it is permitted in all circumstances according to the discretion of the military commander. The legal issue before us is complex, and cannot be exhausted in the all-encompassing and wide fashion claimed by petitioners.

This Court has repeatedly ruled in the past that even combat operations are conducted according to norms entrenched in both international and internal law, and that military activity does not take place in a normative void. The legal difficulties with which we must contend stem primarily from the fact that international law has not yet developed the laws of armed conflict to respond to combat against terrorist organizations, as opposed to a regular army. Therefore, we must use interpretational tools in order to adapt the existing humanitarian laws to the difficult reality which the State of Israel confronts. It should be noted that the spread of the affliction of terrorism in recent years has occupied legal thinkers in various countries, and experts in the field of international law, in an attempt to determine the norms of what is permissible and forbidden against terrorists who obey no law. Against the background of this normative reality, I also accept that in the framework of the existing law, terrorists and their organizations are not to be categorized as "combatants", rather as "civilians". In light of that, §51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 – an arrangement which is part of customary international law – applies to them. That provision states:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

In his judgment, President Barak extensively discussed the interpretation of the main components of said §51(3), in light of the need to define civilians who "take a direct part in hostilities", and to clarify what "for such time" means. As it appears from the interpretation in the President's judgment, there are qualifications and limitations on the power of the state to carry out acts of "targeted killing". It appears, from those qualifications, that not all involvement in terrorist activity constitutes taking "a direct part in hostilities" pursuant to §51(3), which is limited to activity at the core of the hostilities themselves – activity which, on the one hand, is not limited merely to the physical attack itself, but on the other hand does not include indirect aid (*see* paragraph 35 of the President's decision). I agree that the dilemmas that arise in light of the interpretation of the components of said §51(3) require specific examination in each single case. It must be remembered that the purpose of "targeted killing" is to prevent harm to human life as part of the State's duty to protect its soldiers and civilians. Since §51(3) is an exception to the duty to refrain from causing harm to innocent civilians, great caution must be employed when removing the law's protection of the lives of civilians in the appropriate circumstances. In the framework of that caution, the extent of information for categorization of a "civilian" as taking a direct part in hostilities must be examined. The information must be well based, strong, and convincing regarding the risk the terrorist poses to human life – risk including continuous activity which is not merely sporadic or one-time concrete activity. I should like to add that in appropriate circumstances, information about the activity of the terrorist in the past might be used for the purposes of examination of the danger he poses in the future. I further add that in the framework of estimating the risk, the level of probability of life threatening hostilities is to be taken into account. On that point, a minor possibility is insufficient; a significant level of probability of the existence of such risk is required. I of course accept the determination that a thorough and independent (retrospective) examination is required, regarding the precision of the identification of the target and the circumstances of the damage

caused. Two additional requirements are to be added to all those: first, "targeted killing" is not to be carried out when it is possible to arrest a terrorist taking a direct part in hostilities, without significant risk to the lives of soldiers; and second, the proportionality principle accepted as customary international law, according to which collateral damage must not be disproportionate, is to be adhered to. When the damage to innocent civilians is not of proper proportion to the benefit from the military activity (the test of "proportionality *stricto senso*"), the "targeted killing" is disproportionate. Vice President Rivlin extensively discussed that issue, and I concur in his opinion as well. Ultimately, when an act of "targeted killing" is carried out in accordance with the said qualifications and in the framework of the customary laws of international armed conflict as interpreted by this Court, it is not an arbitrary taking of life, rather a means intended to save human life.

Thus, I too am of the opinion that in Israel's difficult war on terrorism which is plaguing her, it should not be sweepingly said that the use of "targeted killing" as one of the means for war on terrorism is prohibited, and the State should not be denied that means which, according to the opinion of those responsible for security, constitutes a necessary means for protection of the lives of its inhabitants. However, in light of the extreme character of "targeted killing", it should not be employed beyond the limitations and qualifications which have been outlined in our judgment, according to the circumstances of the merits of each case.

Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it.

Given today, 23 Kislev 5767 (13 December 2006)

# England and Wales Court of Appeal (Civil Division) Decisions



**Neutral Citation Number: [2016] EWCA Civ 811**
Case No: C1/2015/1613, C1/2015/1620 & C1/2015/2006

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**MR. JUSTICE LEGGATT**
**CO/5608/2008 & hq13x01841**

Royal Courts of Justice
Strand, London, WC2A 2LL
09/09/2016

B e f o r e :

**LADY JUSTICE ARDEN**
**LORD JUSTICE TOMLINSON**
**and**
**LORD JUSTICE LLOYD JONES**

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**Between:**

| | |
|---|---|
| **AL-SAADOON & ORS** | **Appellants** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR DEFENCE** | **Respondent** |
| **- and -** | |
| **RAHMATULLAH & ANR** | **Appellant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR DEFENCE & ANR** | **Respondents** |

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**Michael Fordham QC, Dan Squires QC, Jason Pobjoy and Flora Robertson (instructed by Public Interest Lawyers Limited) for the Appellants in Al-Saadoon**

**Phillippa Kaufmann QC and Adam Straw (instructed by Leigh Day Solicitors) for the Appellant in Rahmatullah**
**James Eadie QC, Karen Steyn QC and Kate Grange (instructed by Government Legal Department) for the Respondents on both cases**
**Hearing dates : 16th - 19th May 2016**

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## HTML VERSION OF JUDGMENT

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**LORD JUSTICE LLOYD JONES :**

## I. INTRODUCTION

1. British military involvement in Iraq between 2003 and 2009 has given rise to a large number of civil claims before the courts of this jurisdiction, most involving allegations of ill-treatment, unlawful detention and, in some cases, unlawful killing of Iraqi civilians by British soldiers.

2. One group of claims consists of claims for judicial review in which the claimants seek orders requiring the Secretary of State for Defence ("the Secretary of State") to investigate alleged human rights violations ("the public law claims"). There are currently 1,282 public law claims in which the claimants were represented at the time of the hearing before us by Public Interest Lawyers. In addition separate judicial review proceedings have been brought by Yunus Rahmatullah and Amanatullah Ali who are represented by Leigh Day.

3. A second group of claims consists of claims for compensation brought against the Ministry of Defence ("the private law claims"). There are currently approximately 646 such claims pending, approximately 257 claims having been settled.

4. The extent to which the European Convention on Human Rights ("ECHR") applies to the conduct of British forces in Iraq remains highly controversial. There are two particular areas of controversy.

> (1) The first concerns the question of the scope of application of the Convention and when individuals are to be considered to be within the "jurisdiction" of a contracting State within Article 1 of the Convention. This issue has been much litigated and it is now established, at least, that persons taken into the custody of British forces in Iraq had certain rights under the Convention which the United Kingdom was bound to respect, in particular the right to life under Article 2, the right not to be tortured or subjected to inhuman or degrading treatment under Article 3 and the right to liberty under Article 5. However, the question whether, and if so in what circumstances, the Convention applies to the use of force against Iraqi civilians who were not in the custody of British forces remains controversial.
>
> (2) The second major area of controversy concerns the extent to which there is a duty on the United Kingdom to investigate alleged violations of the ECHR rights of Iraqi civilians who were within the jurisdiction of the United Kingdom. Here it is clearly established that where a person who is within the jurisdiction of a contracting State is killed by agents of the State, dies in State custody or makes a credible allegation of torture or other serious ill-treatment by State agents, the State has a duty to carry out an independent and effective investigation. However, it remains in dispute whether a procedural duty of investigation arises into allegations of a violation of Article 3 where the allegation is that the claimant was transferred to United States or Iraqi authorities in circumstances where there was allegedly a real risk that they would subject the claimant to torture or mistreatment. Furthermore, there remains a

dispute as to whether, and if so in what circumstances, there is a duty to investigate allegations that a claimant was unlawfully detained in violation of Article 5.

5. In his judgment of the 17 March 2015 ([2015] EWHC 715 (Admin)) Leggatt J. has included (at [21] to [31]) an account of the two public inquiries established by the Secretary of State to investigate particular incidents, the establishment by the Secretary of State of the Iraq Historic Allegations Team ("IHAT") and the legal challenges to the independence of IHAT, an account which I gratefully adopt.

6. In its judgment in *R (Ali Zaki Mousa) v Secretary of State for Defence (No. 2)* [2013] EWHC 1412 (Admin) the Divisional Court recognised that there were unresolved issues of law relating to the applicability of the ECHR. Following its further judgment in that case [2013] EWHC 2941 (Admin) the Divisional Court gave directions for the identification of appropriate preliminary issues in test cases to resolve those issues. These are the issues which were decided by Leggatt J. in his judgment of 17 March 2015 and which are now before this court. The issues relate to four matters:

   (1) The scope of application of the Convention;

   (2) The extent to which there is an investigative obligation in respect of handover cases within Article 3 ECHR;

   (3) The extent to which there is an investigative obligation in respect of cases within Article 5 ECHR;

   (4) The impact, if any, on investigative duties under Articles 2 and 3 of the United Kingdom's obligations under the United Nations Convention Against Torture ("UNCAT").

7. The first preliminary issue asks whether Article 1 ECHR applies to the assumed facts of a number of test cases. By the time of the hearing before Leggatt J. the Secretary of State accepted that on the assumed facts of ten of these test cases, involving individuals whose rights were allegedly violated while they were in the custody of British forces, the claimants were at the relevant time within the jurisdiction of the United Kingdom for the purpose of Article 1.

8. In addition, the Secretary of State applied to have the claims of Mr. Rahmatullah and Mr. Ali dismissed on the ground that they were outside the scope of Article 1. A direction was given that this issue should be considered at the same time. The Secretary of State subsequently made the same concession in relation to these claims, namely that the claimants were within the United Kingdom's Article 1 jurisdiction during any period when they were in the custody of British forces.

## II. JURISDICTION UNDER ARTICLE 1 ECHR

9. The first preliminary issue is whether Article 1, European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") applies in the test cases. Article 1 makes provision for the extent of the application of ECHR.

   "The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."

10. In *Soering v United Kingdom* (1989) 11 EHRR 439 the Strasbourg Court stated at [86]:

    "Article 1 … sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "secure" ("reconnaître" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of states not parties to it, nor does it purport to be a means of requiring contracting states to impose Convention standards on other states."

*Bankovic v Belgium*

11. *Bankovic & Others v Belgium & Ors* (App No. 52207/99) (2001) 44 EHRR SE5 concerned an application to the European Court of Human Rights arising out of the bombing of the Federal Republic of Yugoslavia by NATO forces during the Kosovo conflict. The applicants sought to invoke Articles 2, 10 and 13 ECHR. The respondent governments contended that the applicants and their deceased relatives were not, at the relevant time, within the jurisdiction of the respondent states and that the application was therefore incompatible with the provisions of the Convention. The Grand Chamber held that it lacked jurisdiction *ratione loci* over the claim. It explained the concept of jurisdiction under the ECHR as primarily territorial:

> "59. As to the "ordinary meaning" of the relevant term in article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states…
>
> 60. Accordingly, for example, a state's competence to exercise jurisdiction over its own nationals abroad is subordinate to that state's and other states' territorial competence… In addition, 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…
>
> 61. The court is of the view, therefore, that article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case…"

12. The Grand Chamber referred (at [62]) to state practice and the application of the Convention since its ratification which it considered indicated a lack of any apprehension on the part of the contracting states of their extra-territorial responsibility in contexts such as that under consideration in that case. In particular, although there had been a number of military missions involving contracting states acting extra-territorially since their ratification of the Convention, no state had indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within Article 1 by making a derogation pursuant to Article 15.

13. Furthermore, the court found confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* of the Convention which showed that the expert intergovernmental committee had replaced a reference to "all persons residing within their territories" by a reference to persons "within their jurisdiction" with a view to expanding the Convention's application to others who may not reside in a legal sense but were, nevertheless, on the territory of the contracting state.

14. It is also significant that in coming to its conclusion as to the scope of Article 1 the Grand Chamber rejected the view that Article 1 should be interpreted as a living instrument in the light of changing conditions. In doing so the Grand Chamber considered (at [65]) that the scope of Article 1 was "determinative of the very scope of the contracting parties' positive obligations and, as such, of the scope and reach of the entire convention system of human rights' protection". The Grand Chamber affirmed the principle stated in *Soering v UK* at [88], set out above.

15. The Grand Chamber went on to consider those cases in which extra-territorial acts of contracting states could be recognised as constituting an exercise of jurisdiction within Article 1. Having surveyed the previous case law of the Strasbourg court, it summarised the position as follows (at [71]):

> "In sum, the case law of the court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent 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 country, exercises all or some of the public powers normally to be exercised by that government."

16. The Grand Chamber rejected a submission that the positive obligation under Article 1 extends to securing Conventional rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. While it accepted that jurisdiction and any consequent Convention responsibility of a contracting state would be limited to the circumstances of the commission and consequences of a particular act, it continued:

> "However, the court is of the view that the wording of Art. 1 does not provide any support for the applicants' suggestion that the positive obligation in Art. 1 to secure "the rights and freedoms defined in Section 1 of this lower case convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question…" (at [75])

17. In response to a submission that a failure to accept that the applicants fell within the jurisdiction of the respondent states would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection, the Grand Chamber stated (at [80]):

> "In short, the convention is a multi-lateral treaty operating, subject to art 56 of the convention, 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. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the convention."

*Al-Skeini v United Kingdom*

18. In the years immediately following the decision in *Bankovic*, the Strasbourg court considered the question of jurisdiction under Article 1 in a number of cases, including *Issa v Turkey* (2005) 421 EHRR 27; *Ocalan v Turkey* (2005) 421 EHRR 45; *Isaak v Turkey* [2008] ECHR 553; *Al-Saadoon v United Kingdom* (2009) 49 EHRR SE11 and *Medvedyev v France* (2010) 51 EHRR 39. In *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, a Grand Chamber of the Strasbourg court took stock of these developments. The applicants in those cases were the relatives of persons who had been shot and killed by British soldiers, in the context of exchanges of fire between British soldiers and insurgents, or who had died in the custody of British troops, following the invasion of Iraq on 20 March 2003 and prior to the passing of authority to the interim Iraqi Government on 28 May 2004.

19. The Grand Chamber emphasised that jurisdiction under Article 1 is a threshold criterion in that the exercise of jurisdiction is a necessary condition for a contracting state to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of the rights and freedoms set out in the Convention (at [130]). It reaffirmed that a state's jurisdictional competency under Article 1 is primarily territorial and is presumed to be exercised normally throughout the state's territory. Conversely, acts performed or producing effects extra-territorially can constitute an exercise of jurisdiction within Article 1 only in exceptional cases. The Grand Chamber noted that the Court in its case law had recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries. In each case the question whether exceptional circumstances existed which required and justified a finding by the Court that the state was

exercising jurisdiction extra-territorially had to be determined with reference to the particular facts. In this regard the Grand Chamber identified three categories of case.

20. The first category was labelled by the Grand Chamber "state agent authority and control". The Grand Chamber noted that the Court had recognised in its case law that a contracting state's jurisdiction under Article 1 may extend to the acts of its authorities which produce effects outside its own territory. It examined the case law and identified the following "defining principles".

> "134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.
>
> 135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a contracting state when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government. Thus where, in accordance with custom, treaty or other agreement, authorities of the contracting state carry out executive or judicial functions on the territory of another state, the contracting state may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state.
>
> 136 In addition, the Court's case law demonstrates that, in certain circumstances, the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's art.1 jurisdiction. This principle has been applied where an individual is taken into the custody of state agents abroad. For example, in *Öcalan v Turkey (2005) 41 E.H.R.R.* 45 at [91], the Court held that:
>
> > "[D]irectly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory."
>
> In Issa v Turkey, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In Al-Saadoon v United Kingdom (2009) 49 EHRR SE11 at [86]–[89], the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev v France (2010) 51 EHRR 39* , the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."

The Grand Chamber then concluded:

> "137. It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under art. 1 to secure to that individual the rights and freedoms under s. 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, Convention of Rights can be "divided and tailored."

21. The second category of extra territorial jurisdiction identified by the Grand Chamber, it described as "effective control over an area".

> "138. Another exception to the principle that jurisdiction under art. 1 is limited to a state's own territory occurs when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting state's own armed forces, or through a subordinate local administration. Where the fact of such domination over the territory is established, it is not necessary to determine whether the contracting state exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the contracting state's military and other support entails that state's responsibility for its policies and actions. The controlling state has the responsibility under art. 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violation of those rights."

The Grand Chamber went on to state that it is a question of fact whether a contracting state exercises effective control over an area outside its own territory. In determining this question the court will primarily have regard to the strength of the state's military presence in the area but other indicators may also be relevant such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.

22. In considering the third category, which it described as relating to the Convention legal space ("*espace juridique*") the Grand Chamber emphasised that the Convention is a constitutional instrument of the European public order. It does not govern the actions of states which are not parties nor does it purport to be a means of requiring the contracting states to impose Convention standards on others. In this regard the Grand Chamber explained that where the territory of one Convention state is occupied by the armed forces of another, the occupying state should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would result in a vacuum of protection within the Convention legal space. The Grand Chamber went on to say (at [142]):

> "However, the importance of establishing the occupying state's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Art. 1 of the Convention can never exist outside the territory covered by the Council of the Europe Member States. The Court has not in its case law applied any such restriction."

23. When the Grand Chamber came, however, to apply these principles to the facts of the individual cases before it, it expressed its conclusion as regards jurisdiction in terms which do not exactly correspond with the principles stated earlier in its judgment. It will be necessary to consider the precise basis on which these individual cases were decided.

> "149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South-East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of art.1 of the Convention.
>
> 150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on May 8, 2003; the first

> and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of art.1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a UK security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also."

*The judge's decision*

24. In the court below, the claimants did not pursue an argument that the United Kingdom had sufficient control over any part of Iraq at the relevant times to give rise to jurisdiction on this ground. Their claims both below and on appeal were, accordingly, founded entirely on the principle of state agent authority and control over individuals and they relied both on the exercise of public powers by the United Kingdom and on the exercise of physical power and control.

25. In the course of his most impressive judgment, the judge came to the following conclusions on the issue of jurisdiction.

> (1) The test of control over individuals, like the test of control over an area, is a factual one which depends on the actual exercise of control and not on its legal basis or legitimacy (at [74]).
>
> (2) The Secretary of State had accepted that during the occupation period the United Kingdom was exercising public powers which would normally be exercised by the government of Iraq. With regard to the invasion period, the judge accepted that issues with regard to the exercise of authority and control over an individual by virtue of exercising public powers which would normally be exercised by the government of Iraq were questions of fact which could only be answered by considering what function the soldiers concerned were actually performing in any given case (at [77]). With regard to the post-occupation period the judge held that through the consent, invitation or acquiescence of the government of Iraq the United Kingdom exercised some or all of the public powers normally to be exercised by the government of Iraq (at [86]).
>
> (3) With regard to the exercise of physical power and control by the agents of a state, the judge held that once it was accepted that the exercise of physical control over an individual outside the state's own territory was sufficient to bring that individual within the scope of the Convention, it was impossible to say that shooting them dead was not such an exercise of physical control. Following *Al-Skeini* it was established that Convention rights could be divided and tailored. Whether a person had been taken into custody was only relevant to the extent of the rights which must be secured. Where an individual was not in the state's custody and the state was not exercising any governmental powers in the territory, there would, nevertheless, be a negative obligation under Article 2 to refrain from unlawful killing (at [95]-[98]).
>
> (4) The essential principle to be derived from *Al-Skeini* is that whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights (at [106]).

*The exceptional nature of extra-territorial jurisdiction*

26. On behalf of the Secretary of State for Defence Mr. James Eadie QC, referring to the language of *Al-Skeini*, which reflects that of earlier cases, and to more recent decisions of the Strasbourg court (see, in particular *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 at [73]; *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE15 at [70], [71]), submits that the judge failed to recognise the "exceptional" nature of extra-territorial jurisdiction and that he erred in failing to require some special justification to establish extra-territorial jurisdiction.

27. It is a curious feature of the Grand Chamber's analysis in *Bankovic* that it draws on different concepts of jurisdiction. In particular, as Lord Collins of Mapesbury pointed out in his judgment in *R (Catherine Smith) v Oxfordshire Assistant Deputy Coroner* ("*Catherine Smith*") [2011] 1 AC 1 at [259] and following, the passage in *Bankovic* at [59] mixes two entirely different concepts of extra-territorial jurisdiction. The reference to "nationality, flag, diplomatic and consular relations" refers to the fiction of the extra-territoriality of ships and aircrafts and diplomatic and consular premises. The reference to "effect, protection, passive personality and universality" is a reference to those grounds on which states frequently claim to exercise criminal curial jurisdiction in respect of acts committed abroad. However, in the present context "jurisdiction" is used in a specialised sense. We are not concerned with the appropriate scope in international law of the legislative, executive or curial jurisdiction of a state, but with the circumstances in which a State can be expected in compliance with its ECHR treaty obligations to protect the human rights of persons outside its territory. These will necessarily be limited and may, therefore, fairly be described as exceptional. However, as Lord Hope of Craighead explained in *Smith v Ministry of Defence* ("*Susan Smith*") [2013] UKSC 41; [2014] AC 52 (at [30] and [46]) this does not mean that the word "exceptional" sets an especially high threshold for circumstances to cross before a finding of extra-territorial jurisdiction can be justified. It simply means that the presumption that a state's power is exercised normally within that state's territory does not apply. The judge did not fall into error by failing to consider whether some further hurdle could be cleared. The question for consideration is whether, having regard to the body of case law which has developed in relation to the scope of the Convention, any given case falls within an established exception to the presumption of its territorial application.

28. Nevertheless, it is important to acknowledge that we are concerned here with the fundamental issue of the ambit of the application of the ECHR system. As a result there is a particular need for care. In particular, the House of Lords and the Supreme Court have emphasised that Article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach (*Al-Skeini* [2007] UKHL 26; [2008] AC 153 per Lord Brown at [107], *Catherine Smith* per Lord Hope at [93], *Susan Smith* per Lord Hope at [44]). This does not mean that courts in this jurisdiction can hold that extra-territorial jurisdiction exists only in factual situations which have already been recognised by the Strasbourg court as qualifying. Rather, it is necessary to identify the principles underlying the decisions of the Strasbourg court and not to go beyond them. (See *Susan Smith* per Lord Hope at [46].) This, however, is not an easy task in the present circumstances where the formulations of extra-territorial jurisdiction by the Strasbourg court are open to competing interpretations and, in particular, where that court has failed to provide any guidance as to whether the principles laid down in *Bankovic* remain good law.

*Departures from Bankovic*

29. At the hearing of this appeal, considerable attention was devoted to the question whether the decision of the Grand Chamber in *Bankovic* on the scope of jurisdiction under the Convention had been impliedly overruled by the decision in *Al-Skeini*. It does appear, however, that, despite its failure to acknowledge the fact, the Grand Chamber in *Al-Skeini* has departed from the principles laid down in *Bankovic* in at least two important respects. First, in *Bankovic* the Court made clear that Article 1, unlike other provisions of ECHR, was not to be treated as a living provision to be interpreted in the light of present day conditions. (*Bankovic* at [64], [65]; *Catherine Smith* per Lord Collins at [303]). By contrast, the statement of the Strasbourg court in *Al-Skeini* (at [132]) that "to date, the court in its case law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries" indicates that as new factual circumstances arise the scope of Article 1 may evolve in order to accommodate them. (See *Susan Smith* per Lord Hope at [30].) That this

has already occurred is apparent from the fact that the categories of exception to the general rule of the territorial jurisdiction acknowledged in *Al-Skeini* are clearly wider than those acknowledged in *Bankovic*. In particular, the exceptional category of "state agent authority and control" is significantly wider than the principles stated in *Bankovic*.

30. Secondly, in its discussion of cases where the use of force by a state's agents operating outside its territory may bring an individual under the control of the state's authorities, the Grand Chamber in *Al-Skeini* expressly accepted (at [137]) that the extent of the state's obligation under Article 1 to secure to that individual rights and freedoms under the Convention will depend on the situation of that individual and that, accordingly, Convention rights can be divided and tailored. This is a significant departure from *Bankovic* where the Court had rejected (at [75]) a submission that the positive obligation under Article 1 could be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. This second departure is of vital significance in the context of the present case because it acknowledges that a contracting state may now be held liable for its extra-territorial conduct in circumstances where it is not able to secure to the individual concerned the full range of rights and freedoms under the Convention. The non-divisibility of Convention rights and freedoms can therefore no longer operate as a limitation on the scope of jurisdiction under Article 1. The reach of the Convention will now vary depending on which Convention right is invoked.

31. The Grand Chamber in *Al-Skeini* clearly intended that its formulation of the exceptional cases of extra-territorial jurisdiction should be an authoritative restatement of the governing principles. It has certainly been regarded as such in the subsequent Grand Chamber decisions in *Hassan v United Kingdom* [2014] ECHR 9936 and *Jaloud v The Netherlands* (2015) 60 EHRR 29 where, in each case, the Grand Chamber set out the text of paragraphs [130] to [139] of *Al-Skeini* before applying those principles to the facts before them. It is clear that *Al-Skeini* must now be taken as the starting point for any consideration of the extra-territorial application of the Convention.

32. Furthermore, the content of the exceptions identified by the Grand Chamber in *Al-Skeini* under the heading "state agent authority and control", and in particular its approval of the decision in *Issa v Turkey* (2005) 41 EHRR 27, represent a major extension of jurisdiction beyond the principles stated in *Bankovic*. In *Issa* the applicants alleged that their family members, Iraqi shepherds, had been beaten, detained and killed in Iraq by Turkish soldiers. The Chamber which heard the application expressed the view that a state may be held accountable for violation of Convention rights of persons in the territory of another state "but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state". It explained that:

> "Accountability in such situations stems from the fact that Art. 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory" (at [71]).

However, the Chamber considered that it had not been established on the facts that the Turkish armed forces conducted operations in the area in question at the relevant time. Whether this decision is consistent with that in *Bankovic* had been much commented upon. (See, in particular, *Al-Skeini* (House of Lords) per Lord Rodger at [71] – [75]; *Catherine Smith* per Lord Collins at [307].) In *Al-Skeini*, however, the Grand Chamber (at [136]) cited *Issa* with approval as authority for the proposition that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the solders' authority and control over them. As Lord Hope concluded in *Susan Smith* (at [47]), the fact that *Issa* is referred to in *Al-Skeini* as an example of cases that fall within the general principle of state agent authority and control is particularly noteworthy because it anchors *Issa* firmly in the mainstream of the Strasbourg court's jurisprudence on this topic.

33. More generally, the combined effect of the exceptional cases of extra-territorial jurisdiction accepted by the Grand Chamber in *Al-Skeini* represents a potentially massive expansion of the scope of application of

the Convention, the full implications of which remain to be worked out. It is already apparent that the Convention has, as a result, entered a field which was already regulated by international humanitarian law. In *Hassan v United Kingdom* a Grand Chamber has had to consider the compatibility of these two systems of law and the implications of their co-existence for substantive Convention rights under Article 5 ECHR. Whether in future *Al-Skeini* may come to be considered a false step in the development of the law remains to be seen. For present purposes it is sufficient to state that it is an authoritative decision of a Grand Chamber of the Strasbourg court on the scope of the application of the Convention which has been accepted as such by the Supreme Court in *Susan Smith*. Our role on this appeal is to seek to ascertain the precise scope of extra-territorial jurisdiction under the Convention and to apply it accordingly to the test cases. The answer to the question whether the jurisdiction issue in *Bankovic* would be decided in the same way following the decision in *Al-Skeini* will depend on the precise scope of the exceptions acknowledged in *Al-Skeini*.

*Effective control over an area*

34. In *Al-Skeini* (at [138] to [140]) the Grand Chamber described the exception to the principle that jurisdiction under Article 1 is limited to a state's own territory, which applies "when, as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory". The judgment makes clear that the controlling state has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified and that it will be liable for any violations of those rights. The Grand Chamber's acceptance that Convention rights may be divided and tailored for the purposes of the exception applicable in cases of state agent authority and control (at [137]) therefore has no application to this exception. Accordingly, before this exceptional ground of jurisdiction can apply, the contracting state must have a degree of control over the area in question which enables it to secure the full range of ECHR rights to its occupants. This is an important limitation on this exception.

35. This exception has been given a specific application in cases where an individual has been held by military forces within a military establishment which is under its total and exclusive control. (See *Al-Saadoon (Admissibility)* (2009) 49 EHRR SE11 at [88].) This particular application is, perhaps, now of less importance as a result of the development in *Al-Skeini* of the principle of state agent authority and control.

36. It was common ground before us that this exception can have no application to the present case. The Grand Chamber in *Al-Skeini* set out at length (at [80]) the reasoning of Brooke and Sedley L.JJ. in the Court of Appeal in *Al-Skeini* which led that court to the conclusion that, while the United Kingdom was an occupying power for the purposes of the Hague Regulations and the fourth Geneva Convention ("Geneva IV"), it was not in effective control of Basrah City for the purposes of ECHR jurisprudence during the period of military occupation ([2005] EWCA Civ 1609; [2007] QB 140 per Brooke L.J. at [119]-[124], per Sedley L.J. at [194]). It also referred to the conclusion of Lord Rodger in the House of Lords in *Al-Skeini* (at [83]), with whom three of the other four Law Lords agreed, that the United Kingdom was not in effective control of Basrah City and the surrounding area for purposes of jurisdiction under Article 1 at the relevant time. The Grand Chamber did not suggest that there was any reason to disagree with this conclusion. Similarly, in *Susan Smith* Lord Hope observed (at [31]) that during the post-occupation period the United Kingdom was not in effective control of an area outside its territory. In *Hassan* the Grand Chamber observed (at [75]) that in *Al-Skeini* it was unnecessary for the Strasbourg court to determine whether jurisdiction arose on the ground that the United Kingdom was in effective military control of south east Iraq during the occupation period. However, it noted that the statement of facts in *Al-Skeini* included material which tended to demonstrate that the United Kingdom was far from being in effective control of the south eastern area which it occupied. To the extent that this is a question of fact, a matter considered further below, these conclusions are not binding in this litigation. However, there has been no attempt to argue to the contrary.

*Espace juridique*

37. The principle of espace juridique has been developed to prevent a vacuum of protection from arising within the Convention legal space (*Loizidou* (1997) 23 EHRR 513 at [78]; *Bankovic* (2007) 44 EHRR SE5 at [80]). It applies where the territory of one Convention state is occupied by the forces of another and holds the occupying state accountable for breaches of human rights within the occupied territory. As Iraq is not a Convention state, it can have no application in the circumstances of the present case.

*State agent authority and control*

38. We are, therefore, concerned in this case solely with the exceptional category described by the Grand Chamber in *Al-Skeini* as "state agent authority and control". This category is divided further by the Grand Chamber into sub-categories: acts of diplomatic and consular agents, the exercise of public powers and exercise of physical power and control over individuals. Before considering in detail these sub-categories, the second and third of which are potentially directly relevant in the present case, it is necessary to consider some preliminary issues.

39. First, in its judgment in *Al-Skeini* the Grand Chamber stated (at [137]) that it was clear that whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation to secure to that individual the rights and freedoms under Article 1 of the Convention that are relevant to the situation of that individual. I agree with Lord Hope (*Susan Smith* at [37], [46]) that the Grand Chamber was not adding a further example of the application of the principle of state agent authority and control but was describing a particular feature of all three sub-categories which it had already identified. Accordingly, in any given situation extra-territorial jurisdiction on the basis of state agent authority and control may exist in respect of certain Convention rights but not others.

40. Secondly, having set out the principles of extra-territorial jurisdiction, the Grand Chamber in *Al-Skeini* proceeded (at [149] and [150]) to state its conclusion that all of the claims before it fell within jurisdiction. The Grand Chamber did not specify which of the categories of extra-territorial jurisdiction applied in these cases but it appears – and was common ground before us – that its conclusions were founded on the public powers exception stated at [135]. This was also the view of Lord Hope in *Susan Smith* (at [40]). The matter has now been placed beyond doubt by the Grand Chamber in *Hassan* which explained (at [75]) that in *Al-Skeini* the court found that the applicants' relatives fell within United Kingdom jurisdiction because during the period 1 May 2003 to 28 June 2004 the United Kingdom had assumed authority for the maintenance of security in south east Iraq and the relatives were killed in the course of security operations carried out by United Kingdom troops pursuant to that assumption of authority.

41. Thirdly, the question arises as to the relevance to the jurisdictional issue of the legality of the conduct of the acting contracting state. It was established at an early stage in relation to the exception based on effective control of an area that it was immaterial whether the basis of effective control was lawful or unlawful. In *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, the court found that the responsibility of a contracting state was capable of being engaged when as a consequence of military action, whether lawful or unlawful, it exercised effective control of an area outside its national territory. It explained that the obligation to secure Convention rights and freedoms in such an area derived from the fact of such control, whether it was exercised directly through that state's armed forces or through a subordinate local administration. (See also *Cyprus v Turkey* (2001) 11 BHRC 45.) This approach was approved by the Grand Chamber in *Bankovic* (at [70], [71]). This approach conforms to that of international humanitarian law.

42. The same approach has been adopted by the Strasbourg court in relation to the exceptions falling within the category of state agent authority and control. In *Issa* the Court explained that a contracting state may be held accountable for violations of the Convention rights of persons who are in the territory of another state "but who are found to be under the former state's authority and control, through its agents operating – whether lawfully or unlawfully – in the latter state" (at [71]). Statements to similar effect appear in other Strasbourg decisions including *Isaak v Turkey (Preliminary Issues)* (Application No. 44587/98, at p. 19) and *Andreou v Turkey (Preliminary Issues)* (Application No. 45653/99, at p. 10).

43. Similarly, in *Al-Skeini* the Grand Chamber, in applying the exception founded on public powers, addressed the facts – in particular, the assumption by the United Kingdom in Iraq of the exercise of some of the public powers normally to be exercised by a sovereign government – and not the legality of that occupation in international law. More recently in *Jaloud* the Grand Chamber rejected an argument by the Netherlands that the death complained of did not occur within its jurisdiction because the Netherlands was not an occupying power in Iraq. The Grand Chamber considered that although Netherlands troops were stationed in an area of south eastern Iraq where SFIR forces were under the command of an officer from the United Kingdom, the Netherlands had assumed responsibility for providing security in that area to the exclusion of other participating states and retained full command over its contingent there. The Grand Chamber was satisfied that the Netherlands exercised its jurisdiction within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.

44. In all these instances, what mattered was the fact that the state concerned was purporting to exercise public powers normally to be exercised by the government of the territory in question as opposed to the legal basis of its operations. This approach makes excellent sense. As the judge pointed out in the present case, it would be perverse if a state were bound to secure an individual's right to life when its soldiers are conducting security operations or exercising other public powers lawfully on foreign territory whereas the Convention would not apply if the state were able to show that it was not acting lawfully ([2015] EWHC 715 (Admin) at [74]).

*(1) Diplomatic and consular agents*

45. This sub-category has no direct application to the present case. However, the court's attention was drawn to *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 WLR 2697. In that case the claimant, a British national, had been convicted in Indonesia of drug trafficking offences and sentenced to death. She received consular assistance and the Foreign Office made diplomatic representations on her behalf to the Indonesian authorities. A legal challenge to its refusal to fund her legal expenses failed. The Supreme Court considered that the claimant was not, by virtue of the exception in the case of diplomatic and consular agents stated in *Al-Skeini* at [134] within the jurisdiction of the United Kingdom. In particular, that passage states that the acts of diplomatic or consular agents present in foreign territory may amount to an exercise of jurisdiction "when these agents exert authority and control over others". Lord Carnwath and Lord Mance (with whom Lord Clarke of Stone–cum-Ebony and Lord Toulson agreed) considered (at [32]) that by reference to any common sense formulation, the claimant was under the authority and control of the Indonesian authorities.

*(2) Public powers*

46. The applicability of the public powers exception has to be considered against the background of the United Kingdom's involvement in Iraq. The judgment of the Grand Chamber in *Al-Skeini* includes a detailed account of the history (at [9] to [23]) which was uncontroversial before us. I would draw attention to the following matters.

> (1) On 20 March 2003 a coalition of armed forces led by the United States with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By 5 April 2003 the British had captured Basrah and by 9 April 2003 US troops had gained control over Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. Thereafter, other states sent personnel to help with the reconstruction efforts.
>
> (2) From 1 May 2003 onwards British forces in Iraq carried out two main functions. The first was to maintain security in the south eastern area, in particular in Al-Basrah and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British troops was the support of the

civil administration in Iraq in a variety of ways, from liaison with the Coalition Provisional Authority and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.

(3) On 8 May 2003 the Permanent Representatives of the United Kingdom and the United States at the United Nations wrote a joint letter to the President of the United Nations Security Council which stated that the United States, the United Kingdom and coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, had created the Coalition Provisional Authority, to exercise powers of government temporarily and, as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.

(4) On 22 May 2003 the United Nations Security Council adopted Resolution 1483 which, inter alia, noted the letter of 8 May 2003 from the Permanent Representatives and recognised the specific authorities, responsibilities and obligations under applicable international law of the states as occupying powers under unified command ("the Authority").

(5) On 16 October 2003 the United Nations Security Council adopted Resolution 1511 which, under-scoring that the sovereignty of Iraq resided in the State of Iraq, called upon the Authority to return governing responsibilities and authorities to the people of Iraq as soon as practicable and authorised a multi-national force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

(6) On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period ("the Transitional Administrative Law") which provided a temporary legal framework for the administration of Iraq for the Transitional Period which was due to commence by 13 June 2004 with the establishment of an interim Iraqi Government ("the Interim Government") and the dissolution of the Coalition Provisional Authority.

(7) On 8 June 2004 the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1546 which endorsed the formation of a sovereign Interim Government of Iraq which was to assume full responsibility and authority by 30 June 2004 for governing Iraq.

(8) On 28 June 2004 full authority was transferred from the Coalition Provisional Authority to the Interim Government and the Coalition Provisional Authority ceased to exist.

(9) Subsequently the Multi-National Force, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the United Nations Security Council.

47. In international law occupation is determined by the fact of the occupying power's effective territorial control and not by any right to exercise control. Article 42 of the Hague Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907) provides:

> "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Occupation is essentially a matter of fact. (See, for example *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, p. 168 at [173], [176]-[180]). As to what will constitute effective control for this purpose, Professor Benvenisti writes:

> "Because the test is a test of effective territorial control, the territorial and temporal scopes of occupation depend on the facts. It makes no sense to require occupants to be actually able "to enforce immediately and on the very spot the authority of an occupant" but instead, the effective control test requires "the presence of sufficient force following on the cessation of local resistance".
>
> …
>
> The determination whether the conditions for occupation have been met at the relevant times and in the relevant place will be based on a case-by-case factual analysis. Effective control does not require that occupation forces are present in all places at all times. It is generally accepted that it is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied area. The number of troops necessary to maintain effective occupation will depend on various factors such as the disposition of the inhabitants, the number and spread of the population, and the nature of the terrain. Battle areas may not be considered as occupied, but sporadic local resistance, even successful at times, will not render the occupation ineffective. But obviously, if the sending of troops requires them to engage in battle to recapture an area from the enemy, the area will not be considered occupied until the troops actually manage to establish control over it."
> (Benvenisti, The International Law of Occupation, 2nd Ed., (2012), 3.1.1)

*(i) The occupation period*

48. It was common ground before us that the occupation period ran from 1 May 2013 to 28 June 2004. The Secretary of State accepts, following the decision of the Grand Chamber in *Al-Skeini*, that throughout this period the United Kingdom (and the United States of America) were occupying powers and that Article 1 ECHR applies during the occupation period to all acts of UK armed forces performed in the exercise of any of the public powers ordinarily pertaining to the sovereign government of Iraq. If the matter is examined in terms of the Grand Chamber's statement of principle at [135] of *Al-Skeini*, the United Kingdom was not exercising public powers normally exercised by the government of Iraq through the consent, invitation or acquiescence of the government of Iraq. However, it was an occupying power carrying out executive functions in accordance with custom. As the Grand Chamber explained (at [149]) the United Kingdom (with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular it assumed authority and responsibility for the maintenance of security in south east Iraq.

49. The public powers exception as formulated in *Al-Skeini* at paragraph [135] applies "when, through the consent, invitation or acquiescence of the government of that territory, it exercises all or some of the public powers normally to be exercised by that government" (emphasis added). On behalf of the Secretary of State Mr. Eadie submits that these final words are an important limitation to the exception. I consider that these words are intended to be descriptive of the sort of activity which will fall within the exception and are not intended to impose a requirement relating to the source of any lawful authority to act. This head of extra-territorial jurisdiction is not founded on any lawful authority derived from Iraq. Rather, it is founded on an assumption of authority and the exercise by an occupying power of a sufficient degree of control and authority. These are essentially matters of fact.

50. In these circumstances, in company with the judge (at [100]), I can see no good reason why this exception to the principle of territorial jurisdiction should apply only where state agents purport to exercise powers normally exercised by the occupied state. I doubt that it can have been the intention of the Strasbourg court that the Convention should apply to conduct purportedly in the exercise of powers which normally would have been exercised by the sovereign government of the territory but that extra-legal acts of kidnapping or killing should fall outside the scope of the Convention. This is an issue on which clarification from the Strasbourg court is urgently required.

*(ii) The invasion period*

51. The Secretary of State submits that the United Kingdom did not become an occupying power until the major combat operations were declared complete on 1 May 2003. He points to the fact that the Strasbourg cases consistently take this date as the start of the period of occupation. He further submits that prior to that date British armed forces in Iraq were clearly not exercising public powers but were engaged in fighting an armed conflict against Iraqi forces and that, accordingly, this exception to the principle of territorial jurisdiction can have no application to that period.

52. On behalf of the claimants Mr. Fordham submits that although combat operations were not formally declared complete until 1 May 2003 actual fighting had ceased some time previously and that British troops had been in control of Basrah for several weeks and were effectively acting as a police force seeking to maintain order. The factual question whether the United Kingdom was exercising authority and control over an individual by virtue of exercising public powers which would normally be exercised by the government of Iraq was not conclusively answered by identifying the date when major combat operations were formally declared complete or when the Coalition Provisional Authority was established or when the United Kingdom became an occupying power within the Hague Regulations.

53. In *Hassan* the Grand Chamber considered (at [75]) the issue of jurisdiction in this invasion period "before the United Kingdom and its coalition partners had declared that the active hostilities phase of the conflict had ended and that they were in occupation, and before the United Kingdom had assumed responsibility for the maintenance of security in the south east of the country". However, it decided the issue of jurisdiction not on the basis of public powers but on the basis that state agents had taken the applicant into the custody of the United Kingdom. The Grand Chamber rejected a submission that this basis of jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the contracting state are operating in territory of which they are not the occupying power, and where, it was submitted, the conduct of the state would instead be subject to the requirements of international humanitarian law. The Grand Chamber observed that *Al-Skeini* was also concerned with a period in respect of which international humanitarian law was applicable, namely the occupation period.

54. To my mind, the answer to this question turns on the facts. For the reasons set out earlier in this judgment I consider that the question whether the United Kingdom is exercising authority and control by virtue of exercising public powers normally exercised by the government of Iraq will depend on the facts of each case. What gives rise to this exception to the general rule of territorial jurisdiction under the Convention is not the existence in international law of a state of occupation but the facts of control and the exercise of authority. These may exist, as a matter of fact, in advance of a formal declaration of occupation. As the judge put it, the question whether British forces were exercising powers of a kind which would normally be exercised by the government of Iraq can only be answered by considering what function the soldiers concerned were actually performing in any given case.

*(iii) The post-occupation period*

55. Mr. Eadie on behalf of the Secretary of State draws attention to the fact that on 28 June 2004 sovereign authority was transferred by the Coalition Provisional Authority to a new Iraqi government. Thereafter, during the post-occupation period (28 June 2004 to 31 December 2008), British forces remained in Iraq as part of the multi-national force, pursuant to United Nations Security Council resolutions and with the consent of the government of Iraq. He submits that during this period UK armed forces did not exercise any powers pertaining to the Iraqi government but, rather, fulfilled a mandate given to them by the United Nations. He further submits that this has been established by the decision of the Supreme Court in *Susan Smith* which is binding on this court.

56. In *Susan Smith* Lord Hope did indeed observe (at [41]) with regard to events on 16 July 2005 and 28 February 2006:

> "By that stage the occupation of Iraq had come to an end and the Coalition Provisional Authority had ceased to exist. Full authority for governing the country had passed to the Interim Iraqi Government. The United Kingdom was no longer exercising the public powers normally to be exercised by that country's government."

However, these observations were purely *obiter dicta*. The question whether the United Kingdom exercised public powers within Iraq during this post-occupation phase was not in issue in that case.

57. Moreover, I can see no reason in principle why the public powers exception should not apply during the post-occupation period. First, that British armed forces were no longer an occupying force in Iraq is not determinative of the issue. The Grand Chamber in *Jaloud* demonstrated that soldiers who are not an occupying force may nevertheless trigger the public powers exception to the territoriality principle. What mattered there was that the Netherlands assumed responsibility for providing security and exercised its jurisdiction within the limits of its mission for the purpose of asserting authority and control over persons passing through the checkpoint under its control. Secondly, the multi-national force of which British forces were part was asked by the government of Iraq to remain in order to undertake a range of activities relating to the maintenance of security in Iraq. Thirdly, it is immaterial that there was a UN mandate in force in respect of the post-occupation period. The public powers exception continued to apply throughout the occupation period notwithstanding that there was a UN mandate in force during the latter stages of the occupation (United Nations Security Council resolution 1511, 16 October 2003). On the contrary, to my mind the circumstances prevailing during the post-occupation period fall squarely within the public powers exception as formulated by the Grand Chamber in *Al-Skeini* (at [135]). The British armed forces, as part of the multi-national force, remained in Iraq at the request of the Iraqi government in order to perform security functions. They were "through the consent, invitation or acquiescence" of the government of Iraq exercising some of the public powers normally to be exercised by that government.

*(3) Exercise of physical power and control*

58. The scope of this third sub-category of state agent authority and control was hotly contested before us. On behalf of the claimants Mr. Fordham submitted that in any case of an individual shot by a British soldier, even if the soldier was not exercising authority and control by reason of exercising public powers, the shooting was an exercise of physical power and control which brought the individual within the jurisdiction of the United Kingdom. He submitted that lethal or potentially lethal use of force brings such a case within the principle as formulated in *Al-Skeini*. In addition, he relied on a line of authority in Strasbourg ("the *Isaak* line of authority") where the Court held that cases of shooting without prior detention fell within the scope of the Convention. (*Isaak v Turkey* (Application 44587/98) 28 September 2006; *Pad v Turkey* (Application No. 60167/00), 27 June 2007; *Andreou v Turkey* (Application No. 45653/99), 3 June 2008; *Solomou v Turkey* (Application 36832/ 97), 24 September 2008). Mr. Eadie on behalf of the Secretary of State accepted that jurisdiction exists where a claimant was in the custody of British armed forces but did not accept that jurisdiction exists on the basis of physical power and control over individuals in non-custody cases. (See, in this regard, the position of the respondent States in *Bankovic* at [36] and [37].)

59. The judge approached the issue as a matter of principle. He observed that it was far from obvious whether the exercise of physical control over an individual outside a state's own territory should be sufficient to bring that individual within the scope of the Convention. However, once that principle was established he found it impossible to say that shooting someone dead did not involve the exercise of physical power and control over that person. Indeed, he considered using force to kill to be the ultimate exercise of physical control over another human being. In his view, a principled system of human rights law could not distinguish between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life and in the second there is not. Once it was accepted that Convention rights can be "divided and tailored", the fact that an individual is taken into custody can only be relevant to the extent of the rights which must be secured. In a case where an individual is not in a state's custody and the state is not exercising any

governmental powers in the territory, the only relevant obligation would be the negative obligation under Article 2 to refrain from unlawful killing.

60. The judge referred to *Al-Skeini*, noting that on the Secretary of State's submission only those cases where the victim was in custody would fall within the scope of the Convention on this ground whereas the Grand Chamber had found a sufficient jurisdictional link in all six cases on the ground that the individuals were killed in the course of security operations which involved the exercise of public powers. He questioned whether a general principle of jurisdiction based on the exercise of control and authority over individuals could rationally be confined to circumstances where the soldiers were at the time exercising powers normally exercised by the Iraqi government. Once the concept of jurisdiction was understood to be concerned with what a state actually did rather than with the legal basis or legitimacy of its activities, it made no sense to limit the concept to some subset of circumstances in which the state exercises extraterritorial force over individuals.

61. The judge considered that *Al-Skeini* had had the effect of overruling *Bankovic*. In his view the conclusion that people killed by bombing carried out by agents of a contracting state on the territory of another state cannot be considered to be within the jurisdiction of the contracting state cannot stand with the principle of jurisdiction based on physical power and control recognised in *Al-Skeini*. In the judge's view it is not any adverse effect which, on the approach adopted in *Al-Skeini*, brings the person affected within the jurisdiction of a contracting state, but only the exercise of powers normally exercised by the government of the territory concerned or the exercise of physical power and control over that person. Nevertheless, he derived from *Al-Skeini* the essential principle that whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights.

62. The Strasbourg court in *Al-Skeini* has departed from *Bankovic* in accepting a ground of extra-territorial jurisdiction founded on state agent authority and control which is, on any view, of enormous breadth. I accept that once this exception is admitted it becomes acutely difficult to distinguish between differing degrees of authority and control which may or may not as a result give rise to extra-territorial jurisdiction. As the judge demonstrated in his powerful judgment, the genie having been released from the bottle, it may now prove impossible to contain. Yet, in my view, this is what the Grand Chamber has attempted to do in *Al-Skeini*.

63. The principle of state agent authority and control is an attempt to rationalise different lines of authority. If it had been the intention of the Grand Chamber to create an all-embracing principle of extra-territorial jurisdiction of the breadth of that accepted by the judge, it would have been an even greater departure from the previous authorities, requiring a particularly clear, express statement. On the contrary, all the indications are that the Grand Chamber intended to set limits on the scope of this exception. The relevant paragraph ([136]) begins with the statement that the Court's case law demonstrates that "in certain circumstances" the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's Article 1 jurisdiction. It then states that this principle has been applied where an individual is taken into the custody of state agents abroad and proceeds to give four examples: *Ocalan v Turkey*, *Issa v Turkey*; *Al-Saadoon v United Kingdom*; *Medvedyev v France*. All are cases in which the individual was held in the custody of agents of the respondent state. The Grand Chamber points out that what is decisive in each of these cases is physical power and control over the person in question. From this alone, it derives the principle that whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation to secure to that individual the rights which are relevant to his situation.

64. The careful use of language in *Al-Skeini* at [136] is striking and a marked contrast to that in *Issa v Turkey* where the Court stated (at [76]) in much more general terms that a state may be held accountable for violation of the Convention rights and freedoms of persons in the territory of another state but who are found to be under the former state's authority and control through its agents operating – lawfully or unlawfully – in the latter state. Moreover, unlike the relevant passage in *Al-Skeini*, the judgment in *Issa* -

and paragraph [76] in particular - places no emphasis on the victim being in the custody of the respondent state.

65. The passage in *Al-Skeini* at [136] in which an exception in the case of physical power and control over the person is expounded did not form the basis of the Grand Chamber's decision. As explained above, the conclusion at paragraphs [149] and [150] applies the public powers exception. If it had been the intention of the Grand Chamber to lay down an exception based on physical power and control of the breadth of that found by the judge, it would have provided an alternative basis for finding jurisdiction in all the cases before the court. However, there is no hint of this in the judgment. Similarly, in *Jaloud* the Grand Chamber, having set out in their entirety paragraphs [130] to [139] of *Al-Skeini* examined at length the applicability of the public powers exception to the conduct of the Netherlands soldiers at the checkpoint (at [140] to [153]) concluding that the matter was within the jurisdiction of the Netherlands on the basis of that exception. If *Al-Skeini* were authority for the proposition that whenever and wherever a contracting state uses physical force it must do so in a way that does not violate Convention rights, this would have provided a simple and direct route to the same conclusion. Once again, there is no suggestion in the judgment that such a principle could provide the answer.

66. In coming to his conclusion on the scope of the physical power and control exception the judge appears to have attached little weight to the *Isaak* line of authority relied on by the claimants. Although these cases appear, on one reading at least, to support the view that the use of lethal or potentially lethal force by a state's agent of itself is sufficient to establish jurisdiction, on closer examination, with one exception, they add little to the debate on the breadth of the exception.

    (1) In *Pad v Turkey* (Application No. 60167/00, Judgment 27 June 2007) relatives of the Iranian applicants were killed by gunfire from a Turkish helicopter near the Iranian/Turkish border. The Chamber, referring to *Issa*, considered that the killings, even if they took place in Iran, occurred within the jurisdiction of Turkey on the basis that a state is accountable for violation of the Convention rights of individuals who are found to be under the state's authority and control through its agents operating, whether lawfully or unlawfully, in the territory of another state. However, in this case Turkey had conceded jurisdiction so this authority carries little weight.

    (2) *Andreou v Turkey* (Application No. 45653/99, Judgment 3 June 2008) concerned a shooting incident at the UN buffer zone between Cyprus and the Turkish Republic of Northern Cyprus ("TRNC"). The applicant, while standing outside the neutral buffer zone in Cypriot territory, was shot by Turkish soldiers firing from within the TRNC. The Chamber identified a number of exceptions to the basic rule of territoriality including where persons are found to be under the State's authority and control through its agents operating in a second State (at p. 10). The applicant was held to be within the jurisdiction of Turkey. The Chamber observed that although the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey. However, because the soldiers fired from the territory of TRNC this case is explicable as an application of the principle of subjective territoriality.

    (3) *Solomou v Turkey* (Application No. 36832/97, Judgment 24 June 2008) also concerned a shooting by Turkish forces at the buffer zone between the TRNC and Cyprus. The Chamber considered (at [51]) that the deceased was under the authority and/or effective control of Turkey through its agents and concluded that the matters complained of therefore were within the jurisdiction of Turkey. However, it appears that the victim was shot within the TRNC by soldiers at an observation post which was also within the TRNC. (See [48]-[51], [70].) On this basis it would not be an extra-territorial act.

    (4) *Isaak* (Application No. 44587/98, Judgment 28 September 2006) is the strongest case in this line. The deceased took part in a demonstration at the UN buffer zone between Cyprus

and TRNC and was beaten to death by a mob, which included Turkish-Cypriot police officers. The Chamber referred (at p. 19) to *Issa* and considered a state's authority and control through its agents to be a basis of extra-territorial jurisdiction. It concluded that "even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents" and was therefore within the jurisdiction of Turkey.

67. *Isaak* is the high water mark of the authorities in support of the claimants. It finds jurisdiction on the basis of authority and control by a State's agents in circumstances where there is no prior arrest or detention and it justifies the conclusion by reference to *Issa*. The Grand Chamber in *Al–Skeini* was clearly aware of this line of authority; it referred to *Andreou* and to *Solomou* in an earlier passage. (See footnote 49 to [122].) *Isaak*, however, does not appear to have been referred to in *Al-Skeini*. It is, to my mind, significant that the Grand Chamber did not at paragraph [136] of *Al-Skeini* formulate a principle by reference to *Isaak*. This suggests that it did not intend to extend this category of extra-territorial jurisdiction to cases where the only jurisdictional link was the use of lethal or potentially lethal force and that this is, therefore, insufficient to bring the victim into the acting State's jurisdiction for this purpose.

68. Mr Eadie submitted on behalf of the Secretary of State that *Bankovic* is cited as authority at a number of points in *Al-Skeini* and that it cannot, therefore, be regarded as impliedly overruled in the later case. It follows, he submits, that the use of lethal or potentially lethal force cannot, of itself, give rise to a sufficient jurisdictional link for such a link would otherwise have existed in *Bankovic* as a result of the NATO bombing raid. Mr. Fordham for the claimants, on the other hand, showed a certain reluctance to submit that *Bankovic* had been impliedly overruled, pointing out that his case did not require him to establish that it had. He submitted that the test cases involve encounters far more immediate and similar to those which have previously been held to fall within Article 1 than aerial bombing from an aircraft thousands of feet above a city. I am unable to conclude, simply on the basis of sporadic references to *Bankovic* in footnotes in *Al-Skeini*, that the Grand Chamber must be taken to have intended that the conclusion in the earlier case that the bombing was outside the scope of the Convention should stand. *Al-Skeini* certainly departs from *Bankovic* in a number of important respects but there is no recognition of this or consideration of the present status of *Bankovic* in the text. It would not be appropriate to speculate as to the reason for this failure.

69. In these circumstances, I am unable to agree with the judge that the effect of *Al-Skeini* is to establish a principle of extra-territorial jurisdiction under Article 1 to the effect that whenever and wherever a state which is a contracting party to the Convention uses physical force it must do so in a way that does not violate Convention rights. (C.f. *obiter dicta* in *Serdar Mohammed v Ministry of Defence* [2015] EWCA Civ 843; [2016] 2 WLR 247 at [93] and [95], where this point was not argued.) The concept of physical power and control over a person will necessarily cover a range of situations involving different degrees of power and control. However, for the reasons set out above, I consider that in laying down this basis of extra-territorial jurisdiction the Grand Chamber required a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. In other words, I believe that the intention of the Strasbourg court was to require that there be an element of control of the individual prior to the use of lethal force.

70. The test of physical power and control is inherently imprecise. It may well be that it will be difficult to draw sensible distinctions between different types or degrees of power and control. However, if the logical consequence of the principle stated in *Al-Skeini* is that any use of extra-territorial violence is within the acting state's jurisdiction for this purpose, I believe that that is a conclusion which must be drawn by the Strasbourg court itself and not by a national court. I have referred earlier in this judgment to the particular need for care in determining this fundamental issue of the ambit of application of the ECHR system and the principle, repeatedly stated in the House of Lords and the Supreme Court, that Article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. In view of the controversial nature of the *Al-Skeini* decision, the uncertainty surrounding its effect and the

breadth of the extension of extra-territorial jurisdiction for which the claimants contend, it is for the Strasbourg court to take this further step, if it is to be taken at all.

71. I accept that if I am correct as to the approach required by the statement of principle in *Al-Skeini* it will be necessary to attempt to distinguish between different types and degrees of physical power and control and that this will result in fine and sometimes tenuous distinctions. Thus, for example, on the facts alleged in *Issa*, had the Turkish troops simply shot the victims without first exercising any physical power or control over them, the case would not fall within this exception to extra-territorial jurisdiction. However, I consider the necessity of drawing such distinctions an inevitable consequence of the principle formulated by the Grand Chamber in *Al-Skeini*. Moreover, I can see that difficulties will arise in defining the degree of physical power or control which must be exercised. In this regard, I note that Mr. Eadie does not submit that an individual must be formally detained before this exception can apply and accepts that there may be more difficult cases which do not strictly involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the state as to bring it within its jurisdiction for this purpose. I consider that this concession was correct. Furthermore, it is clear from the assumed facts of *Issa v Turkey* that this exception applies regardless of whether the exercise of control was lawful.

72. The judge did not shrink from acknowledging the consequences of his conclusion as to the breadth of this exceptional head of jurisdiction. He noted (at [106]) that it creates "real and difficult problems as to how human rights law under the Convention can be accommodated to the realities of international peacekeeping operations and situations of armed conflict". He considered that there are strong policy reasons for seeking to interpret the territorial scope of the Convention in a way which limits the extent to which it impinges on military operations in the field. He also expressed concern that once the Convention was held to apply to the use of force in overseas military operations, the inevitable consequence of any major foreign intervention would be a flood of claims before the courts. I share the judge's concern at these consequences which flow, to a greater or lesser extent, from any reading of *Al-Skeini*. I also agree with the judge that these consequences do not provide a legitimate reason for declining to give effect to the expanded scope of application of ECHR if that is the clear intention of the Strasbourg court. However, for the reasons which I have attempted to explain, I consider that the expanded scope of application of ECHR is not as expansive as that acknowledged by the judge.

73. In these circumstances, while acknowledging the force of the judge's reasoning, I am unable to agree with his conclusion as to the scope of the exception to territorial jurisdiction founded on physical power and control exercised by a state agent.

*Application to test cases*

*The PIL cases*

74. Against this background I now turn to consider the assumed facts of the test cases.

*PIL 6: Atheer Karim Khalaf.*

75. On 29 April 2003, during the invasion period, Uday Karim Khalaf drove his car to a petrol station in Basra to queue for petrol. When he reached the head of the queue Mr. Khalaf opened the door to get out but was ordered by a British soldier to pull back. Mr Khalaf forgot that his car door was open and when he reversed it hit a British soldier standing by the side of the car and knocked him down. Mr. Khalaf was unaware of what happened and continued to reverse. The soldier stood up, pointed his gun through the driver's side window and shot Mr. Khalaf in the stomach. He then pulled Mr. Khalaf out of the car, held his head and started hitting it against the pavement while another soldier started smashing the car window with his rifle. A female soldier intervened. Mr. Khalaf was taken to a military hospital but later died of his wounds.

76. In a parallel civil claim it is averred by the Ministry of Defence that two Warrior armoured vehicles containing seven soldiers from the Black Watch were at the petrol station supporting three staff and three

auxiliary policemen in implementing the supply of rationed fuel to Iraqi civilians.

77. Notwithstanding that this incident occurred during the invasion period, I consider that these soldiers had assumed responsibility for the performance of a function, namely policing the supply of rationed fuel to civilians, in the exercise of public powers normally exercised by the Iraqi police on behalf of the government of Iraq. Accordingly I consider that this case falls within the public powers exception and that Mr. Khalaf was within the jurisdiction of the United Kingdom.

78. With regard to the exception based on the exercise of control, I consider that Mr. Khalaf was not covered by this exception at the time of the shooting. However, it is possible that thereafter the soldier exercised a degree of control over him which would bring the subsequent conduct within this exception. This will require further investigation of the facts.

*PIL 82: Captain Taleb.*

79. On 17 December 2004, during the post-occupation period, Captain Taleb was driving his wife and infant child in his car. As he approached cross roads, British soldiers attempting to stop the car shone a blinding spotlight into the car and almost immediately began shooting. Numerous bullets hit the car and Captain Taleb was hit. After some time a passing driver came to his assistance and took him to hospital where he was declared dead on arrival.

80. I consider that the British forces were exercising police or military powers which would normally be exercised by the Iraqi government's security forces. Accordingly, this case falls within the public powers exception.

81. However, I do not consider that this case falls within the exception based on control of an individual because there was no element of prior control.

*PIL 129: Raad Karim*

82. In the early hours of 15 November 2006, during the post-occupation period, the claimant's brother was shot and killed by British soldiers during a raid on his family home in Basra.

83. I consider that this case falls within the public powers exception because the British forces were exercising police or military powers which would normally be exercised by the Iraqi government's own security forces. Whether there was a sufficient degree of prior control so as to bring this case within the exception based on control of the individual would require further investigation of the facts.

*PIL 156: Yousif Naser.*

84. This claim concerns the claimant's nephew, Ali Salam, who on 10 April 2007, during the post-occupation period, was walking to work when he heard gun shots. He ran to take cover and was killed by shots fired from a British tank.

85. In this case British forces were exercising police or military powers which would normally be exercised by the Iraqi government's own security forces and the case therefore falls within the public powers exception. I do not consider that the case falls within the exception based on control of the individual.

*PIL 73: Maytham To-ma Dahir Al-Salami.*

86. This claim concerns the claimant's brother, Qassim, who was shot in the head and killed by British soldiers when they raided his family home in Basra on 23 April 2007, during the post-occupation period.

87. I consider that the British forces were exercising police or military powers which would normally be exercised by the Iraqi government's own security forces and that the case accordingly falls within the

public powers exception. Whether the case falls within the exception based on control of the individual would require further investigation of the facts.

*PIL 3: Maytham Jaber, Ati Al-Mayahi*

*PIL 7: Salam Khadim Badan Al-Maliki*

88. These two cases may conveniently be considered together.

89. PIL 3. On 23 March 2003 the Claimant's brother Nadhim was hit by a bullet which the claimant believes was fired by British troops. He was driven, still alive, to a medical facility in Kuwait. The claimant last saw Nadhim being anaesthetised and taken by stretcher onto a military helicopter which then took off. This was the last time Nadhim was seen by his family.

90. PIL 7. On 29 April 2003 the claimant's 12 year old son, Memmon, was playing outside his home in Basra when he picked up a munition which exploded and seriously injured him. He was taken by a British Army patrol to a military hospital on a British Army base. The claimant went to the hospital on several occasions but was not permitted to see his son and later understood that he had been taken to a US field hospital in Kuwait. He has not been able to establish Memmon's whereabouts since.

91. In the court below it was submitted on behalf of the Secretary of State that these individuals were not within the jurisdiction of the United Kingdom because they were never taken into custody. It is not entirely clear whether this submission is maintained in the light of Mr Eadie's modified stance on the scope of the control exception. In any event, I agree with the judge that the fact that the purpose of exercising control is benign cannot affect the question of jurisdiction. These individuals were undoubtedly under the physical power and control of agents of the United Kingdom. This conclusion is supported by *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 where Somalian and Eritrean nationals seeking to reach the Italian coast were intercepted at sea, transferred to Italian military vessels and returned to Libya. The Strasbourg court rejected Italy's argument that as the purpose of the operation was to save human lives on the high seas, the individuals concerned did not fall within its jurisdiction. Accordingly, I agree with the judge that in each of these test cases the individual concerned was within the Article 1 jurisdiction of the United Kingdom when last seen.

*PIL 176: Oasim Sahib, Talib Al-Kharsa.*

92. The claimants allege that a number of unarmed Iraqi civilians were deliberately killed by British forces during a security operation in the town of Majar-al-Kabir on 17 June 2007, during the post-occupation period. The incident included shooting at close range on the ground and shooting from a helicopter. The claimant's 18 year old son was shot dead whilst standing at the door of the family home after being woken by gunfire.

93. The Secretary of State's case is that the operation was US-led and that the UK supporting role was limited. He maintains that British armed forces were not present during the operation, had no control over the actions of personnel who were there and provided limited logistical support. It was accepted that because the operation took place within the United Kingdom's area of operations, it was consulted on the planning of the operation and provided a refuelling point for US helicopters 40 kilometres away from Majar-al-Kabir.

94. I agree with the judge that, although it is arguable that the planning of the operation and the provision of logistical support involve the exercise of governmental powers, this limited role does not involve the exercise of authority or control over individuals killed by US forces in the course of the operation so as to bring them within the jurisdiction of the United Kingdom for this purpose.

*PIL 45: Ahmed Awdeh.*

95. The claimant's son, Lafteh, then aged 22, was killed on 4 September 2003 by a British Army truck. Lafteh was on a dirt road track close to an asphalt road on which the convoy was travelling. In trying to avoid a ditch on the road a truck swerved and hit Lafteh who died immediately from his injuries. The truck sped away and the rest of the column of vehicles followed.

96. The claimant submits that the case falls within the public powers exception because the purpose of the troops driving in convoy was to help to provide security and therefore exercise powers that would normally be exercised by the Iraqi government. The claimant submits that Lafteh's death occurred in the course of the exercise of public powers or, in the terms employed by the Strasbourg court in *Al-Skeini* at [150], was "contiguous" to the exercise of such functions so that he was within the jurisdiction of the United Kingdom.

97. The judge at [130], drew attention to the fact that the public powers exception is founded on the exercise by State agents of authority and control over an individual. In his view, British troops were not exercising authority and control over individuals simply by driving along a road, even when that caused an accidental death. In my view, the victim was not within the jurisdiction of the United Kingdom at the material time because the United Kingdom was not exercising a governmental function involving public powers in relation to him, nor was he under the authority and control of an agent of the United Kingdom.

*Rahmatullah and Ali*

98. The facts relating to Yunus Rahmatullah and Amanatullah Ali are set out by the judge at [131] and [132] of his judgment. These claimants were detained by British forces in February 2004 in an area of Iraq which was under US authority. Shortly afterwards they were transferred into the custody of US forces in accordance with a Memorandum of Understanding signed in 2003 (the "2003 MoU") which established arrangements for the transfer of detainees between the armed forces of the United States, the United Kingdom and Australia. The 2003 MoU included a provision for the state into whose custody an individual was transferred to return a detainee to the original detaining power without delay upon request. By the end of June 2004 Mr. Rahmatullah and Mr. Ali had been transported by US forces to Bagram Airbase in Afghanistan. They allege that, while detained there, they were subjected to torture and other serious mistreatment.

99. In May 2011, an application was made in this jurisdiction on behalf of Mr. Rahmatullah for a writ of habeas corpus directed to the Secretary of State for Defence and the Secretary of State for Foreign and Commonwealth Affairs. By this date Mr. Rahmatullah had been imprisoned in Bagram Airbase without charge or trial for over seven years. The application was refused by a Divisional Court but was granted on appeal. The Court of Appeal considered that there was sufficient reason to believe that Mr. Rahmatullah's continued detention by the United States was unlawful and that the United States would return him upon a request from the UK government to justify the issue of the writ (*Rahmatullah v Secretary of State for Defence* [2012] 1 WLR 1462). However, when a request to return Mr. Rahmatullah was made to the US authorities, they did not return him to the United Kingdom and in these circumstances no further order was made on the writ. Both the decision of the Court of Appeal to issue the writ of habeas corpus and the subsequent decision to make no further order on the writ were upheld on an appeal to the Supreme Court (*Rahmatullah v Secretary of State for Defence* [2013] 1SC 614). Mr. Rahmatullah was not released from custody until June 2014. Mr. Ali remains imprisoned.

100. The Secretary of State accepts that, on the assumption that the facts are as pleaded by the Claimants, Mr. Rahmatullah and Mr. Ali were within the jurisdiction of the United Kingdom for the purposes of Article 1 during the initial period when they were in the custody of British forces before they were transferred to the custody of US forces. However he denies that they remained within the jurisdiction of the United Kingdom for the purposes of Article 1 in any period after the transfer to US forces had taken place. Miss Phillippa Kaufmann QC, on behalf of Mr. Rahmatullah and Mr. Ali, submits that by virtue of the 2003 MoU and by virtue of international humanitarian law, the United Kingdom retained a degree of control over Mr. Rahmatullah and Mr. Ali which resulted in their remaining within the jurisdiction of the United Kingdom for this purpose, notwithstanding that they had been transferred to the custody of US forces. The

substantive complaints brought by Mr. Rahmatullah and Mr. Ali are that the United Kingdom failed to take steps to avert a real and immediate risk of ill treatment (Article 3) or arbitrary detention (Article 5) by a third party.

101. Miss Kaufmann placed at the forefront of her submissions the decision of the Grand Chamber in *Hassan v United Kingdom* [2014] 38 BHRC 358. Mr. Tarek Hassan was arrested by members of British forces in the region of Basra on 23 April 2003. He was taken by British forces to Camp Bucca which had been established on 23 March 2003 as a UK detention facility but which officially became a US facility on 14 April 2003. For reasons of operational convenience, the United Kingdom continued to detain individuals they had captured at Camp Bucca. The 2003 MoU referred to above applied to this use of shared facilities. Mr. Hassan was interviewed, following which the UK authorities decided he was a civilian who did not pose a threat to security and ordered that he be released as soon as practicable. On 2 May 2003 he was taken by bus and released at a drop off point near where he had been arrested. He did not contact his family. Four months later his body was discovered in a remote area of Iraq some seven hundred kilometres from Camp Bucca. The Grand Chamber held that Mr. Hassan was within the jurisdiction of the United Kingdom throughout the whole period from the time of his capture by British troops until his later release from detention, even though he was held at a detention facility which was officially a US facility and was guarded by US troops. The basis of this decision was that the United Kingdom was responsible for deciding whether he should be released. The Grand Chamber (at [78]) considered that the United Kingdom retained authority and control over all aspects of his detention relevant to his complaints under Article 5.

102. I consider that *Hassan* is clearly distinguishable from the facts relating to Mr. Rahmatullah and Mr. Ali. Notwithstanding the fact that the same MoU applied in the case of Mr. Hassan, the arrangements operating at Camp Bucca were such that Mr. Hassan remained under the direct authority and control of British forces. He was admitted to the camp as a UK prisoner. Shortly after his admission he was taken to a compound which was entirely controlled by British forces. In accordance with the MoU, the United Kingdom had responsibility for the classification of UK detainees under Geneva III and IV and for deciding whether they should be released. It was the UK authorities who decided that he should be released. On this basis the Grand Chamber concluded that while certain operational aspects of his detention were transferred to US forces, in particular guarding him when outside the compound in which he was held, the United Kingdom retained authority and control over all aspects of his detention relevant to his complaints under Article 5.

103. The judge in the present case, correctly in my view, considered that what matters for the purpose of establishing jurisdiction under Article 1 is whether the contracting state has the power to decide whether the individual should be kept in detention or released and the power to dictate how the individual is treated while in custody. This is a question of fact and legal rights and obligations are relevant only insofar as they are evidence of what the position is in practice. For the purposes of extra-territorial jurisdiction on grounds of state agent authority and control over an individual, Convention rights can now be divided and tailored. Accordingly, for the purposes of Article 5 what matters is whether the UK authorities had the power to decide whether a person should be kept in custody and for the purposes of Article 3 what matters is whether the UK authorities had the power to decide how they were treated while in custody. In the case of Mr. Rahmatullah and Mr. Ali neither of these conditions is satisfied.

104. Miss Kaufmann submitted, however, that this is too narrow an approach. She submitted that the United Kingdom retained a sufficient degree of authority and control over Mr. Rahmatullah and Mr. Ali even after they had been transferred to the custody of US forces with the result that they remained in the jurisdiction of the United Kingdom for this purpose. Here she relied, initially at least, on the 2003 MoU and in particular Article 4 which provides that any prisoners of war, civilian internees and civilian detainees transferred by a detaining power will be returned by the accepting power to the detaining power without delay upon request by the detaining power. However she later accepted that this is of limited effect because it is not legally binding. She latterly based her submission on Article 12 of Geneva III which provides that when prisoners of war are transferred by a detaining power to an accepting power,

responsibility for the application of the Geneva Convention III rests on the accepting power while they are in its custody. Article 12 continues:

> "Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with."

Article 45 of Geneva IV makes corresponding provision in respect of protected persons. Miss Kaufmann submits that this gives rise to a sufficient degree of authority and control by the United Kingdom over the individuals concerned to establish jurisdiction for the purposes of Article 1.

105. I consider that this submission casts the net of jurisdiction too wide. The exception to the territoriality principle acknowledged in *Al-Skeini* in the case of physical power and control over a person depends on the fact of such physical power and control. Its significance is that it enables the contracting state to act to secure certain Convention rights depending on the circumstances and the degree of physical power and control it possesses. It simply is not present in the cases now under consideration. The power and duty of the United Kingdom arising under the Geneva Conventions to take corrective measures or to request the return of the individuals concerned are no substitute because they are too remote. The history of Mr. Rahmatullah's application for habeas corpus reveals what Lord Neuberger M.R. described as the melancholy truth that, in reality, the United Kingdom did not possess such power or control while he was detained by the US authorities. (See *Rahmatullah* [2012] 1 WLR 1462 at [109].) He and Mr. Ali were undoubtedly under the physical power and control of the United States.

## III. ARTICLE 3 ECHR: INVESTIGATIVE OBLIGATIONS

Article 3

106. Article 3 ECHR provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 imposes three types of duty. First it imposes a negative duty on the State not to subject anyone within its jurisdiction to torture or to inhuman or degrading treatment or punishment. Secondly it imposes a positive obligation to take steps to protect an individual within its jurisdiction who is exposed to a real and imminent risk of serious harm of which the State authorities are aware. In addition, it has become established, thirdly, that Article 3 gives rise to an obligation not to send an individual to another State where there are substantial grounds for believing that he would face a real risk of being subjected to torture or other prohibited treatment. This third duty was recognised by the Strasbourg court in *Soering v United Kingdom* (1989) 11 EHRR 439 and I shall refer to it as "the *Soering* obligation".

107. We are concerned in this part of the case with the question whether, and if so in what circumstances, an investigative obligation may arise in *Soering*–type cases. In particular we are here concerned with an alleged adjectival duty on a contracting state to investigate allegations of breach of the *Soering* duty under Article 3 after the event, as opposed to an obligation on a contracting state to investigate as part of the substantive *Soering* obligation. (C.f. *R (Nasseri) v Secretary of State for the Home Department* [2010] 1 AC 1, per Lord Hoffmann at [9]-[15].) The issues are formulated as follows:

> "(2) Whether there is an investigative obligation which arises in all handover (*Soering*–type) cases where there is an arguable breach of the principle that detainees will not be transferred if, at the time of transfer, there was a real risk of torture or serious mis-treatment.
>
> (3) If the answer to (2) is yes, what is the content of that investigative obligation?

> (4) If the answer to (2) is no, are there other circumstances in which an investigative duty arises in handover (*Soering*–type) cases and if so, what are the features necessary to trigger that investigative duty? What would the content of any such investigative obligation be?"

108. In *Soering* the Grand Chamber of the Strasbourg court described the obligation which it derived by implication from Article 3 in the following terms:

> "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment." (at [91])

109. The principle is not limited to extradition but applies generally to removal from the territory of a contracting state. It has also been applied to the transfer of individuals arrested by UK forces in Iraq to the custody of the Iraqi authorities (*Al-Saadoon v United Kingdom* (2010) 51 EHRR 9).

110. The *Soering* duty conforms with basic principles of jurisdiction under the Convention in that a contracting state is required to secure the corresponding right to those within its jurisdiction. It is a duty on a contracting state not to expose a person within its jurisdiction to a risk outside its jurisdiction. Nevertheless, it is directly concerned with risk arising outside the territory of a contracting state and it therefore adds very significantly to the protection afforded by Article 3.

111. On behalf of the claimants Mr. Fordham submits that there is a duty to investigate any arguable breach of Article 3. He submits that an investigative duty arises in all *Soering*–type cases where there is an arguable claim that the person transferred to the custody of another State faced a real risk of torture or serious mistreatment. In the court below the Secretary of State submitted that the duty to investigate arguable breaches of Article 3 was limited to cases where there was an arguable claim that an individual within the jurisdiction of the United Kingdom was subjected to torture or inhuman or degrading treatment. However, on this appeal, Mr. Eadie has supported the conclusion of the judge below on this issue.

112. The judge rejected the submission that there is an investigative obligation which arises in all *Soering*–type cases where there is an arguable breach of the principle that detainees must not be transferred if, at the time of transfer, there was a real risk of torture or other serious mistreatment. He considered that the submission that an investigative obligation arises in all such cases was inconsistent with principle and with authority. He did conclude, however, that there were two situations in which, in principle, a violation of a *Soering* obligation under Article 3 could give rise to a duty to investigate: cases in which a contracting state perpetrated mistreatment and cases in which a contracting state aided or assisted mistreatment.

113. The judge included in his judgment a particularly helpful survey of the Strasbourg case law on investigative obligations arising in general in connection with Article 3. He identified two bases on which the Strasbourg court had found a duty to investigate arguable violations of Article 3. The first is founded on Article 13 ECHR which confers a right to an effective remedy:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In *Aksoy v Turkey* (1996) 23 EHRR 553, the Strasbourg court held that Turkey's failure to investigate whether the applicant had been tortured while in detention, despite the fact that the prosecutor had been made aware of his injuries, violated Article 13.

> "Accordingly, as regards Art. 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure." (at [98])

The court considered that such a requirement was implicit in the notion of an effective remedy under Article 13. (See also *Aydin v Turkey* (1997) 25 EHRR 251 at [103]).

114. A second line of authority has founded an investigative obligation on Article 3 itself. In *Assenov v Bulgaria* (1998) 28 EHRR 652 the Strasbourg court considered that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision read in conjunction with the duty under Article 1 required by implication that there should be an effective official investigation, which should be capable of leading to the identification and punishment of those responsible (at [101], [102]). There the court also held that the failure to hold a thorough and effective investigation constituted a violation of Article 13 (at [118]). (See also *Labita v Italy* [2000] ECHR 161 at [131]).

115. In *Ilhan v Turkey* (2002) 34 EHRR 44 the Grand Chamber attempted to reconcile these two lines of authority. It stated that Article 13 would generally provide the necessary procedural safeguards and suggested that there would be a procedural breach of Article 3 only if the court was unable to determine whether there had been a substantive breach of Article 3 at least in part as a result of the failure of the authorities to conduct an effective investigation. I share the judge's puzzlement as to why the existence of a procedural obligation to investigate an allegation of ill-treatment can depend on whether the court was able to conclude beyond reasonable doubt that ill-treatment in fact took place. Moreover, as the judge demonstrated, this distinction has not been consistently followed since the decision in *Ilhan*. (See the authorities referred to by the judge at [148].) However, nothing turns on this for the purposes of the present case.

116. The above cases are concerned with a duty to investigate an arguable claim or credible assertion of ill-treatment by State agents contrary to Article 3. An investigative obligation has also been held to arise in certain cases where the ill-treatment was inflicted by third parties who were not agents of the state. Such cases are the counterpart under Article 3 of authorities under Article 2. (See, for example, *Edwards v United Kingdom* (2002) 35 EHRR 487; *R (Amin) v Secretary of State for the Home Department*; [2003] UKHL 51; [2004] 1 AC 653.) In *Edwards* the Strasbourg court held that the failure of the United Kingdom to provide an effective investigation into the killing of a prisoner by his cell mate was a breach of its investigative obligation under Article 2.

117. In *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30, an Article 3 case, the applicants, who were members of the congregation, were attacked in the theatre in which they were meeting by a group of Orthodox believers. The Strasbourg court referred to the positive duty of protection which arises under Article 3 which calls for reasonable and effective measures in order to prevent ill-treatment of which the authorities were or ought to have been aware. It then continued:

> "97. Furthermore, Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see Assenov and Others v Bulgaria, …, § 102). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see M.C. v Bulgaria, … § 151). Thus, the authorities have an obligation to take action as soon as an official complaint has been lodged. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred. A requirement of promptness

> and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law (see Bati and Others v Turkey, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts); Abdülsamet Yaman v Turkey, no. 32446/96, § 60, 2 November 2004; and, mutatis mutandis, Paul and Audrey Edwards v the United Kingdom, no. 46477/99, § 72, ECHR 2002-II)."

118. The court concluded (at [111]) that the authorities failed to take action promptly to end the violence and to protect the victims. It also concluded (at [124]) that the applicants were subsequently faced "with total indifference on the part of the relevant authorities who, for no valid reason, refused to apply the law in their case". The court therefore concluded that Georgia had failed to comply with its positive obligations under Article 3. (See also *MC v Bulgaria* (2005) 40 EHRR 20 at [151]; *Secic v Croatia* [2007] ECHR 1159 at [53]; *D v Commissioner of Police for the Metropolis* [2015] EWCA Civ 646; [2016] QB 161; *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB), Green J. at [211]-[255].)

119. It should be noted, however, as the judge pointed out in the present case (at [171]), that what is engaged in such cases is the positive obligation of a contracting state to protect those within its jurisdiction from treatment prohibited by Article 3 and that this may require the state to investigate a credible complaint of such ill-treatment with a view, inter alia, to identifying and punishing those responsible. The duty is one to investigate alleged ill-treatment. It is not a duty to investigate the conduct of state officials in exposing individuals to the risk of ill-treatment. (See *Gldani* at [97] and [124].) In this regard I would draw attention to two further matters. The first is the observation of the Strasbourg court in *Edwards v United Kingdom* at [74] that there was a duty to investigate because the deceased was a prisoner under the care and responsibility of the authorities when he died from acts of violence of another prisoner and that in this situation it was irrelevant whether state agents were involved by acts or omissions in the events leading to his death. Secondly, whereas a breach of the substantive *Soering* duty is committed where a contracting state exposes an individual to a risk of ill-treatment contrary to Article 3 (*Mamatkulov v Turkey* (2005) 41 EHRR 25 at [69]), an investigative duty in conjunction with the positive duty of protection under Article 3 arises only where the prohibited ill-treatment has occurred (See, by analogy, *R (Amin) v Secretary of State for the Home Department* per Lord Bingham at [31]).

120. In his judgment Leggatt J. observed (at [169]) that no case had been cited in argument before him in which the Strasbourg court, let alone any domestic court, had said that there is a duty to investigate not just an allegation of ill-treatment committed by state agents but an allegation that state agents have exposed an individual to a risk of ill-treatment by others.

121. In support of his submission that all breaches of the *Soering* duty attract an investigative obligation, Mr. Fordham on behalf of the claimants places particular emphasis on the decision of the Grand Chamber of the Strasbourg court in *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25. In that case the Grand Chamber found that the applicant was detained in Macedonia on 31 December 2003 and subjected to incommunicado detention in a hotel until 23 January 2004. During his detention he was guarded, repeatedly interrogated and threatened with a gun. On 23 January 2004 he was handcuffed, blindfolded and driven to Skopje Airport where he was placed in a room with a number of masked men, assaulted, hooded and chained before being placed on an aircraft that was surrounded by armed Macedonian security guards. During the flight he was anaesthetised. A Macedonian exit stamp dated 23 January 2004 was affixed to his passport. The applicant alleged that his pre-flight treatment was at the hands of a special CIA rendition team. He was flown to Afghanistan where he was detained in a small cell, assaulted and interrogated at a CIA facility called the "Salt Pit" in Kabul. His requests to meet a representative of the German government were ignored. He began a hunger strike, his health deteriorated and he was denied medical treatment. He was force fed on 10 April 2004, became extremely ill and

received medical attention. On 28 May 2004, hooded and chained, he was flown back to Europe and released in Albania near the border with Macedonia/Serbia.

122. The Grand Chamber (at [168]) summarised the alleged violation of Article 3 in the following terms

> "The applicant complained that the respondent State had been responsible for the ill-treatment to which he had been subjected while he was detained in the hotel and for the failure to prevent him from being subjected to "capture shock" treatment when transferred to the CIA rendition team at Skopje Airport. He further complained that the respondent State had been responsible for his ill-treatment during his detention in the "Salt Pit" in Afghanistan by having knowingly transferred him into the custody of US agents even though there had been substantial grounds for believing that there was a real risk of such ill-treatment. In this latter context, he complained that the conditions of detention, physical assaults, inadequate food and water, sleep deprivation, forced feeding and lack of any medical assistance during his detention in the "Salt Pit" amounted to treatment contrary to Art. 3 of the Convention. Lastly, he complained that the investigation before the Macedonian authorities had not been effective within the meaning of this article."

123. The violation of Article 3 alleged by the applicant therefore included breaches of all three substantive limbs of Article 3. In addition there was an allegation of a breach of the procedural obligation to conduct an effective investigation. It is apparent from paragraph [172] that this last allegation related generally to the alleged breaches of the substantive obligation. It simply states that the authorities had conducted a cursory and grossly inadequate investigation into "his arguable allegations".

124. The Grand Chamber considered the procedural aspects of Article 3 first. It began by stating that

> "where an individual raises an arguable claim that he has suffered treatment infringing Art. 3 at the hands of the police or other similar agents of the State, that provision read in conjunction with the State's general duty under Article 1 … requires by implication that there should be an effective official investigation." (at [182]).

At this point the matter stated to give rise to an investigative obligation is an arguable claim that he has suffered treatment by the State infringing Article 3 i.e. a breach of the State's negative obligation to abstain from such conduct. This formulation does not support the view that a breach of the *Soering* obligation can trigger such an investigative obligation. The Grand Chamber's consideration of what the procedural duty requires – including "a serious attempt to find out what happened" (at [183]) – may be wide enough to include an investigation into a breach of the *Soering* obligation but it is also expressed in terms of investigating the incident which are not apt in the case of a breach of the *Soering* obligation (see [183]).

125. At paragraph [186] the Grand Chamber applied the legal principles to the facts of the case. It observed that the applicant had brought to the attention of the public prosecutor his allegations of ill-treatment by State agents and their active involvement in his subsequent rendition by CIA agents. It was this which the court considered "laid the basis of a prima facie case of misconduct on the part of the security forces of the respondent State, which warranted an investigation by the authorities in conformity with the requirements of Art. 3 of the Convention". A later passage (at [188]) considers the circumstances of the applicant's rendition and concludes that "[a]n investigation of the circumstances regarding the aircraft and the passenger would have revealed relevant information capable of rebutting or confirming the well-foundedness of the applicant's account of events." However, it is clear from paragraph [186] that the allegations which required investigation went far beyond violation of the *Soering* obligation and involved criminal wrongdoing by agents of the State. Accordingly, I agree with the judge that nothing in this decision justifies an inference that a duty to investigate arises whenever an arguable claim is made that a person was exposed to a real risk of treatment contrary to Article 3 by reason of their transfer to another State. In any event, even if the breach of the *Soering* obligation established in *El-Masri* could be taken, of itself, as triggering an investigative obligation, *El-Masri* was a case in which the Macedonian authorities

knowingly exposed him to a real risk of ill-treatment (see in particular [168] and [220]) and the case provides no support for the view that all breaches of the *Soering* obligation necessarily give rise to such an investigative obligation.

126. The claimants also rely, in this regard, on *Dzhurayev v Russia* (2013) 57 EHRR 22. There the Strasbourg court found (at [138]) that the applicant was kidnapped by unidentified persons in Moscow, detained there by his captors for one or two days, then forcibly taken by them to an airport and put on board a flight to Tajikistan, where he was immediately placed in detention by the Tajik authorities. The court considered the applicant's allegation that the Russian authorities were involved in his forcible transfer to Tajikistan in connection with issues arising under Article 3.

127. First, the court concluded (at [176]) that the applicant's forcible return to Tajikistan exposed him to a real risk of treatment contrary to Article 3. It then went on to consider whether the Russian authorities complied with their positive obligation to protect the applicant against the real and immediate risk of forcible transfer to Tajikistan. The court considered that where the authorities of a contracting state are informed of a real and immediate risk of torture and ill-treatment through transfer by any person to another state, "they have an obligation under the Convention to take, within the scope of their powers, such preventive operational measures that, judged reasonably, might be expected to avoid that risk" (at [180]). It found that the authorities were well aware or ought to have been aware of the real and immediate risk but, nevertheless, failed to take any timely preventive measure and were accordingly in breach of the state's positive obligations under Article 3 (at [183] – [185]).

128. Secondly, the court, referring to *Assenov* and *El Masri*, reiterated that Article 3 requires "that there should be an effective official investigation into any arguable claim of torture or ill-treatment by state agents" (at [187]). It considered (at [190]) that "these well-established requirements of the Convention fully apply to the investigation that the authorities should have conducted into the applicant's abduction and his ensuing exposure to ill-treatment and torture in Tajikistan". The relevant information was brought to the attention of the authorities immediately after the abduction.

> "It became obvious at a certain stage that under Article 3 of the Convention the applicant had a prima facie case that warranted an effective investigation at the domestic level. While the role played by Russian state agents in the incident might have been questionable immediately after the applicant's abduction in Moscow by unidentified persons, the complaint about his ensuing transfer to Tajikistan through a Moscow airport in breach of all legal procedures must have triggered the authorities' utmost attention, inasmuch as the applicant's representatives claimed that state agents had been actively or passively involved in that operation." (at [191])

The court concluded, on this basis, that the numerous flaws in the investigation were manifestly inconsistent with Russia's obligations under Article 3.

129. Thirdly, the court considered the claim that Russia was liable on account of the passive or active involvement of its agents in the applicant's forcible return to Tajikistan. In its view it would not normally be possible, under normal circumstances, for a person to be taken to an airport and removed from the country without the authorisation or at least the acquiescence of state agents in charge of the airport. Furthermore, Russia had not provided any explanation as to how the applicant could have been taken onto an aircraft and removed from Russia without accounting to any state official. In these circumstances it concluded (at [203]) that Russia was responsible for the applicant's forcible removal to Tajikistan on account of the involvement of agents of the Russian state in that operation.

130. To my mind, *Dzhurayev* does not support the claimants' submission that an investigative obligation arises in all cases where there is an arguable case that a contracting state has exposed an individual to a real risk of ill-treatment in another state to which he was removed. The investigative duty which was held to apply in *Dzhurayev* was expressly founded on the principle that there should be an effective official investigation into any arguable claim of torture or ill-treatment by state agents and, on the facts of that

case, clearly arose from the involvement of agents of the Russian state in the applicant's abduction and transfer to Tajikistan.

131. Accordingly, I agree with the judge that these decisions do not support the proposition that an investigative obligation arises in all handover cases where there is an arguable breach of the *Soering* principle. Moreover, I can see no reason in principle why such a broad investigative obligation should be considered necessary in order to give effect to the prohibitions imposed by Article 3.

132. Mr Eadie, on behalf of the Secretary of State drew attention to the fact that the *Soering* duty itself arises by implication from the express terms of Article 3. He submitted that to impose a further investigative obligation in *Soering*-type cases would be to impose implication on implication. While I would accept that the process of implication of obligations into the Convention is to be carried out with caution, lest the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept (see *Brown v Stott* [2003] 1 AC 681 per Lord Bingham at p. 703 E-G), there are many instances in which the Strasbourg court has developed the scope of Convention duties beyond the express provisions of the Convention text, where it was necessary or plainly right to do so. The fact that the implication of an investigative duty in conjunction with the *Soering* duty, which is itself implied, would be a second layer of implication would not, of itself, be an obstacle if the implication were otherwise justified.

133. The judge, however, (at [165] – [167]) identified three important differences in principle between the infliction of torture or inhuman or degrading treatment and a breach of the *Soering* obligation. They may be summarised as follows:

> (1) In terms of harm, exposing someone to a risk of ill treatment cannot reasonably be equated with actually subjecting a person to such treatment.
>
> (2) In terms of culpability, a breach of the *Soering* obligation can be committed without any *mens rea* or personal liability on the part of any state official. A breach may be established simply by showing the existence of substantial grounds for believing that the individual in question would face a real risk of being subjected to treatment contrary to Article 3 if sent to the receiving state. There is no requirement that state officials should have knowledge of the risk.
>
> (3) Whereas subjecting a person to torture or other inhuman or degrading treatment is contrary to the criminal laws of civilised societies, the same cannot be said of a breach of the *Soering* obligation.

On these grounds the judge concluded that the *Soering* obligation cannot be regarded as having the same fundamental status as the prohibition against torture and inhuman or degrading treatment itself.

134. On behalf of the claimants Mr. Fordham submits that these three matters cannot form the basis of a distinction between those rights which give rise to an investigative obligation and those which do not because they apply equally to the protective obligation in respect of which there is an investigative obligation. However, as indicated above, the duty to carry out an investigation in connection with the protective obligation is a duty to investigate a credible claim of ill-treatment with a view to identifying and punishing those responsible and not a duty to investigate the conduct of state officials in exposing the individuals concerned to the risk of ill-treatment. Once it is established that the investigative obligation in connection with the positive protective duty under Article 3 is a duty to investigate the ill-treatment, the attempted analogy with *Soering*-type cases breaks down. In the latter situation it is the alleged mistreatment by the foreign state which is comparable to the conduct which must be investigated in the former. Moreover, a contracting state's obligation to conduct an effective official investigation into ill-treatment in such cases applies only in relation to ill-treatment alleged to have been committed within its jurisdiction (*Al-Adsani v United Kingdom* (2002) 34 EHRR 11, at [38]). Where alleged ill-treatment occurs outside the jurisdiction of the contracting state it has no power and no obligation to investigate it.

135. I consider the judge's analysis to be highly persuasive. *Soering*-type cases are distinguishable in this way from the other two categories of substantive obligations under Article 3 and are likely, in practice, to lead to the conclusion that it is not necessary, in order to make Article 3 effective, to impose an ancillary investigative obligation in such cases.

136. For these reasons I agree with the judge in response to issue (2) that neither on the authorities nor in principle is there to be found any support for the proposition that there is an investigative obligation which arises in all *Soering*-type cases where there is an arguable breach of the principle that detainees will not be transferred if, at the time of transfer, there was a real risk of torture or serious mistreatment. Accordingly, issue (3) does not arise for consideration.

137. The judge then turned to issue (4) which asks whether there are any circumstances in which an investigative duty arises in *Soering*-type cases. As his conclusions on this point were not controversial before us and as I am in total agreement with them, they can be dealt with briefly. The judge identified two bases on which, in principle, a violation of Article 3 could occur in a *Soering*-type case which would give rise to a duty to investigate. The first is a situation in which an individual is handed over by a contracting state to agents of another state who torture or mistreat him under the direction or at the instigation of the contracting state. In such circumstances the contracting state which instructs or procures such treatment should be responsible in the same way as the state which carries it out. Furthermore, in such circumstances the contracting state could be said to exercise physical power and control over the victim with the result that he remained within the state's jurisdiction for the purpose of Article 1. The judge concluded (at [188]) that in such circumstances the same duty of investigation would arise as in any other case where there is an arguable claim that an individual has been subjected to ill-treatment by agents of the state within its jurisdiction.

138. The second situation identified by the judge (at [189] et seq.) is one in which it cannot be said that the contracting state which handed over the detainee continues to exercise control over him but there is nevertheless a sufficient level of involvement in torture or other serious mistreatment to which the detainee is subsequently subjected to amount to complicity in such treatment on the part of the contracting state. So far as the existence of an investigative duty is concerned, the judge considered this situation indistinguishable from that where the contracting state itself inflicts the ill-treatment. The need to expose the facts and punish those responsible is the same in both cases. He concluded, therefore, that if in any handover case there is an arguable claim that the state which transferred the detainee is responsible for violating Article 3 through complicity in torture or other serious mistreatment inflicted by agents of the receiving state, an investigative duty would arise.

139. So far as concerns the content of any investigative obligation arising in a *Soering*–type case the judge considered that the obligation would be to conduct an investigation which is effective in the sense of being designed to find out the true facts and identify those responsible for any criminal conduct, as well as being independent. I agree and would simply add that in those circumstances in which an investigative duty arises, precisely what is required of an investigation will depend on the particular circumstances of each case. As Lord Phillips of Worth Matravers observed in *R(L) v Secretary of State for Justice* [2008] UKHR 68; [2008] 3 WLR 1325 at [31]:

> "The duty to investigate imposed by Article 2 covers a very wide spectrum. Different circumstances will trigger the need for different types of investigation with different characteristics. The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual State to decide how to give effect to the positive obligations imposed by Article 2".

(See to similar effect *Armani Da Silva* (Application 5878/08, Judgment of 30 March 2016, at [234]; *R(AM) v Secretary of State for the Home Department* [2009] EWCA Civ 219 per Elias L.J. at [101] et seq.) In the same way I consider that investigations under Article 3 will necessarily be highly fact-sensitive in nature. What is required of an inquiry under Article 3 is likely to vary considerably from case to case.

Article 3 Test Cases

140. There are two test cases under this head. In the first the claimant, Ali Lafteh Eedan (PIL 11) was arrested twice by British forces, first on 9 May 2003 and secondly on 11 August 2008. He claims that following his first arrest he was taken by British soldiers to Camp Bucca where he was detained for 45 days. He claims that he was ill-treated at Camp Bucca which at the relevant time was administered by the US army. His second arrest in August 2008 followed a raid on his home by UK and US forces. He claims that he was badly beaten by the soldiers and taken to a British operating base at Basra Airport. From there he claims that he was flown to a US base, Camp Cropper, in Baghdad where he was detained for ten days before being released. He alleges that at Camp Cropper he was subjected to serious ill-treatment.

141. In the second case the claimant Ahmed Abdul-Sadeh (PIL 168) was arrested in a raid by US and UK forces in August 2008. He claims to have been badly assaulted and abused at the time of his arrest. He was taken to the British operating base in Basra before being transported to US custody at Camp Cropper where he alleges that he suffered serious ill-treatment.

142. In both of these cases the allegations of ill-treatment by British forces at the time of arrest or while in the custody of British forces may require investigation under Article 3. However, for the reasons set out above, the complaint that the claimant in each case was handed over to US forces and then allegedly suffered serious ill-treatment while in US custody is not a complaint requiring an investigation under Article 3. There is no factual basis in the statements of assumed facts for an arguable claim that British forces were complicit in the ill-treatment allegedly perpetrated by US forces.

**IV ARTICLE 5: DETENTION**

143. We are here concerned with the question whether, and if so when, there is a duty to investigate alleged violations of Article 5 ECHR. The specific issues are as follows:

> (5) Does an investigative obligation arise in respect of all cases of detention which are arguably in violation of Article 5 ECHR?
>
> (6) If the answer to (5) is yes, what is the content of that investigative obligation?
>
> (7) If the answer to (5) is no, are there other circumstances in which an investigative duty arises in cases involving arbitrary detention in violation of Article 5 and, if so, what are the features necessary to trigger that investigative duty? What would the content of any such investigative obligation be?

144. In the court below the claimants' primary case was that there is a duty to investigate all cases of detention which are arguably in violation of Article 5 ECHR. In rejecting this submission, the judge observed that, as a matter of principle, he could see no need or justification for interpreting Article 5 as imposing on a contracting state a duty to investigate every arguable claim that a person has been detained in violation of Article 5. Where an investigation is required into a possible violation of Article 2 or Article 3, its primary purposes are to bring to light serious wrongdoing and to ensure that those guilty of criminal conduct were identified and punished. However, in most Article 5 cases there is no dispute about the fact or circumstances of the individual's detention. Rather, the issue is whether the detention is lawful. The remedies established by Article 5(4) to take proceedings to challenge the lawfulness of detention and Article 5(5) which confers an enforceable right to compensation for unlawful detention are express remedies which would in normal circumstances be sufficient. Furthermore, as a finding that a person has been detained unlawfully by the State does not generally imply that any official is or may be guilty of a crime, it cannot be said that an investigation is needed in order to ensure that the individuals responsible were punished. The judge also considered that there is no domestic authority or any decision of the Strasbourg court which supports the proposition that there is a duty on the State to hold an investigation whenever an arguable claim is made that the detention of an individual violates Article 5.

145. On this appeal the claimants do not seek to challenge the judge's decision on what was their primary case below. In agreement with the judge, whose reasoning of this point I find compelling, I would answer "No" to the question raised by issue (5). In this circumstance issue (6) does not arise.

146. Before us Mr. Fordham on behalf of the claimants concentrated on what was his alternative case below, namely that the circumstances in which a duty to investigate an alleged violation of Article 5 arises are not limited to cases of enforced disappearance but that an investigative duty arises in all cases where detention takes place beyond the reach of the courts, even if such detention is not secret or unacknowledged.

*Enforced Disappearance*

147. It was common ground before us that a procedural duty to investigate arises under Article 5 in cases where there is an arguable claim that a person within the jurisdiction of a Contracting State has been the subject of enforced disappearance.

148. In international law the term "enforced disappearance" describes a deprivation of liberty outside the protection of law where the state responsible refuses to acknowledge the detention or disclose the fate of the person detained. I am unable to improve on the judge's description (at [209]) that its cruelty and vice lie in the facts that the disappeared person is completely isolated from the outside world and at the mercy of his captors and that his family is denied knowledge of what has happened to him.

149. In determining the extent of obligations arising under Article 5 ECHR it is relevant to have regard to other applicable rules of international law (Article 31(3)(c), Vienna Convention on the Law of Treaties). Thus, in *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 the Grand Chamber stated (at [55]):

> "The Convention … cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a Human Rights Treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part."

150. In 1992 the United Nations General Assembly adopted the UN Declaration on the Protection of All Persons from Enforced Disappearance which declared:

> "The systematic practice of disappearance is of the nature of the crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture: it also violates or constitutes a grave threat to the right to life."

151. The Parliamentary Assembly of the Council of Europe in Resolution 1463 of 3 October 2005 defined enforced disappearance as follows:

> ""Enforced disappearances" entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law."

The Parliamentary Assembly condemned enforced disappearance as a very serious human rights violation on a par with torture and murder.

152. The International Convention for the Protection of All Persons from Enforced Disappearance ("the CED") was adopted by the United Nations General Assembly on 20 December 2006 and entered into force for the States party to the Convention on 23 December 2010. Fifty two States, including many members of the Council of the Europe but not the United Kingdom, are currently parties to the CED.

153. Article 1 provides that no one shall be subjected to enforced disappearance and stipulates that no exceptional circumstances whatsoever may be invoked as a justification. Article 2 includes the following

definition:

> "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

154. Article 4 provides that each state party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law. Article 5 declares that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law. Article 6 provides that each state party shall take the necessary measures to hold criminally responsible at least any person who commits, or solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance and in certain defined circumstances a superior of such a person. Article 7 provides that each state party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness. Article 12 provides, in relevant part:

> "1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation.
>
> 2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this Article shall undertake an investigation, even if there has been no formal complaint…"

155. Article 5 ECHR should, so far as possible, be interpreted in harmony with these instruments and in particular the CED which has substantial and growing international support.

*Strasbourg Case Law*

156. It was not in dispute before us that the Strasbourg court has consistently held that Article 5 requires the authorities of contracting states to investigate an arguable claim of enforced disappearance.

157. *Kurt v Turkey* (1998) 27 EHRR 373 concerned the disappearance of the applicant's son (K). The applicant complained that in November 1993 Turkish Security Forces carried out an operation in the village in south east Turkey where she lived with K. He was arrested. On the following day she saw him surrounded by soldiers and showing injuries as though he had been beaten. She had not seen him since. The Turkish Government admitted that security operations took place in that village on the dates in question and alleged that clashes occurred with suspected terrorist members of the PKK. It denied that K had been taken into custody by the security forces and maintained that there were strong grounds for believing that he had joined or had been kidnapped by the PKK.

158. The Strasbourg court referred to the guarantees provided by Article 5 and in particular the requirements of Article 5(3) and (4) with their emphasis on promptitude and judicial control. It noted that what was at stake was both the protection of the physical liberty of individuals and their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection (at [123]). It continued

> "124. The Court emphasises in this respect that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to

> take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."

159. The Court had accepted that K was held by soldiers on the morning of 25 November 1993. It referred to the fact that his detention at that time was not logged and that there existed no official trace of his subsequent whereabouts or fate.

> "That fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention." (at [125])

The Court found there had been a particularly grave violation of Article 5.

160. In addition the applicant complained that she had been denied an effective remedy under Article 13. In finding a violation of Article 13 the Court observed:

> "In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Seen in these terms, the requirements of Article 13 are broader that a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible." (at [140])

161. Similarly, in *Cyprus v Turkey* (2002) 35 EHHR 30 a Grand Chamber of the Strasbourg court heard an application by the Republic of Cyprus which included a claim that some 1,491 Greek Cypriots were still missing twenty years after the Turkish invasion of Northern Cyprus in 1974. The Grand Chamber found no substantive violation of Article 5 since there was no concrete evidence that the missing persons had ever been in Turkish custody. However, referring to *Kurt* the Grand Chamber found that there had been a continuing violation of Article 5 by virtue of the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there was an arguable claim that they were in custody at the time they disappeared (at [150]). (See, to similar effect, the following cases involving allegations of enforced disappearance, referred to by the judge at [224], where the Strasbourg court held that failure to conduct an effective investigation constituted a violation of Article 5 and/or Article 13: *Cakici v Turkey* (2001) 31 EHRR 133; *Timurtas v Turkey* (2001) 33 EHRR 6; *Tas v Turkey* (2001) 33 EHRR 15; *Cicek v Turkey* (2003) 37 EHRR 20; *Bazorkina v Russia* [2006] ECHR 751; *Luluyev v Russia* [2006] ECHR 967; *Varnava v Turkey* [2009] ECHR 1313; *Er v Turkey* (2013) 56 EHRR 13.)

162. The judge drew the following conclusions from these authorities:

> (1) Where there is an arguable claim that a person has been taken into state custody and has not been seen since, there is a duty on the state under Article 5 to investigate what has happened to that person.
>
> (2) The cases also support the proposition that, in such a case, there is a duty of investigation with the wider purpose of leading to the identification and punishment of those responsible

> for the disappearance, albeit that the source of this duty is said to be Article 13 rather than Article 5.

I agree with these conclusions which were not challenged on the appeal.

163. These authorities must be contrasted with another line of Strasbourg authority concerning detention contrary to Article 5 where no duty to investigate has been held to arise. Indeed, Mr Eadie relied on these further authorities as setting the limit of the investigative duty by restricting it to cases of enforced disappearance.

164. In *Gisayev v Russia* [2011] ECHR 76 the First Section of the Strasbourg Court was satisfied that the applicant had made a prima facie case that on 23 October 2003 he had been abducted by a large group of state agents who had held him in unacknowledged detention and had tortured him on a permanent basis until his release on 7 November 2003, with a view to obtaining information on, among other things, Chechen rebel fighters. The court concluded that during that period the applicant had been held in unacknowledged detention in complete disregard of the safeguards provided by Article 3 and that that constituted a particularly grave violation of his right to liberty and security under Article 5. The applicant does not appear to have argued that there was in his case a breach of an investigative duty under Article 5. However, he did complain that there had been no effective remedies in respect of the violations of his rights secured by Articles 3 and 5 of the Convention, contrary to Article 13. The court held that the applicant had an arguable claim that he had been ill-treated by representatives of the authorities and that the domestic investigation into that matter had been inadequate. It considered that, as a result, any other remedy available to the applicant including a claim for damages had limited chances of success. It therefore held that there had been a violation of Article 13 in conjunction with Article 3 (at [159], [160]). However, when it came to consider the failure to investigate the alleged violation of Article 5, the court held that there had been no breach of an investigative duty.

> "161. As regards the applicant's reference to Article 5 of the Convention, the Court notes that according to its established case-law the more specific guarantees of Article 5(4) and (5), being a *lex specialis* in relation to Article 13, absorbed its requirements (see, among other authorities, *Medova v Russia* ...). It also notes that it has found a violation of Article 5 of the Convention as a whole on account of the applicant's unacknowledged detention. Accordingly, it considers that no separate issue arises in respect of Article 13 read in conjunction with Article 5 of the Convention in the circumstances of the present case."

165. In both *Medova v Russia* [2009] ECHR 70, (referred to in *Gisayev* at [161]) and *Chitayev and Chitayev v Russia*, Application No. 59334/00, judgment 18 January 2007, the First Section of the Strasbourg court applied the same reasoning, namely that Article 5(4) and (5) absorbed the requirements of Article 13, in concluding that there had been no separate violation of Article 13 read in conjunction with Article 5.

166. In the present case the judge stated that he was unable to reconcile this reasoning with the decision in *Kurt* which requires a thorough and effective investigation into the disappearance of a person under the control of the State which is capable of leading to the identification and punishment of those responsible. Furthermore, he expressed himself unable to see how, in cases where the State is denying that the person was ever detained, it can be said that the specific guarantees of Article 5(4) and (5) absorb the requirements of Article 13 for an effective remedy. I agree with the judge that in such circumstances Article 5(4) will be unable to operate and that there is unlikely to be an effective right to compensation under Article 5(5) without a meaningful investigation (Judgment at [229]). In these circumstances it is the State's denial of any detention and the concealment of its circumstances which will prevent Article 5(4) and (5) from providing any effective remedy. By contrast, in most cases where an allegation is made of detention which is arguably in violation of Article 5, there would be no such denial or concealment by the State, there would be no dispute about the fact or circumstances of the detention, and Article 5(4) and (5) will normally be able to operate to provide an effective remedy.

167. It is, however, clear that a duty to investigate does not arise in all cases where there is an arguable violation of Article 5.

168. On this appeal Mr Fordham has restricted himself to his alternative case below. He maintains that there is a general duty of investigation under Article 5, although the remedy under Article 5(4) will almost invariably obviate any need for independent investigation. He submits, however, that insofar as there is an investigative sub-set, an investigative duty arises where detention arrangements are implemented by the State authorities with the result that detention takes place beyond the reach of the courts, even if such detention is not secret or unacknowledged.

169. In support of this contention Mr Fordham criticises the judge's failure to recognise the fundamental nature of Article 5 and the guarantee against arbitrary detention. In this regard he draws attention to many decisions of high authority which emphasise the fundamental importance of the guarantees contained in Article 5, both in Strasbourg (e.g. *Kurt* at [122], *Al Jedda* (2011) 53 EHRR 23 at [99], *Medvedyev* at [117], *El-Masri* at [230]) and in this jurisdiction (*A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68). He submits that it is this fundamental nature of the right in question which explains the incidence of the investigative duty.

170. While I readily accept the fundamental importance of the guarantees provided by Article 5, it does not follow that Article 5 must be equated for all purposes with Articles 2, 3 and 4. On the contrary, the structure of Article 5 and, in particular, the remedies provided by Article 5(4) and (5) run contrary to Mr Fordham's submission and indicate that the machinery of Article 5 need not be identical to that of other Articles guaranteeing fundamental rights. This is apparent from the approach of the Strasbourg court.

171. The only authority cited by the appellants in support of their alternative case is *El-Masri*. Mr Fordham submits that it was the refusal of access to legal counsel and to the courts, combined with the concept of arbitrary detention, which lay at the heart of *El-Masri* and which would be sufficient to justify imposing an investigatory obligation. In its discussion of the alleged violation of Article 5 in *El-Masri*, the facts of which have been referred to in detail earlier in this judgment, the Grand Chamber of the Strasbourg court drew attention to the following features of the applicant's detention. There was no court order for his detention as required under domestic law. His confinement in the hotel was not authorised by a court. His detention had not been substantiated by any custody records. During his detention the applicant did not have access to a lawyer, nor was he allowed to contact his family or a representative of the German Embassy. He was deprived of any possibility of being brought before a court to test the lawfulness of his detention. The court observed that his unacknowledged and incommunicado detention meant that he was left completely at the mercy of those holding him and that it was wholly unacceptable that in a State subject to the rule of law a person could be deprived of his liberty in an extraordinary place of detention outside any judicial framework. His detention in such a highly unusual location added to the arbitrariness of the deprivation of liberty. The court concluded that during the period of his detention in Skopje he was held in unacknowledged detention in complete disregard of the safeguards contained in Article 5. With regard to his subsequent detention the Grand Chamber found (at [239]) that the Macedonian authorities not only failed to comply with the positive obligation to protect him from being detained in contravention of Article 5 but they actually facilitated his subsequent detention in Afghanistan by handing him over to the CIA despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Grand Chamber referred to its earlier conclusion that Macedonia had not conducted an effective investigation into the applicant's allegations of ill-treatment. For the same reasons it found that no meaningful investigation was conducted into his credible allegations that he was detained arbitrarily and accordingly found that Macedonia had violated Article 5 in its procedural aspect.

172. The justification given by the Grand Chamber for its conclusion that there was a duty to conduct an investigation in these circumstances is its statement, earlier in the judgment, of the applicable legal principle.

> "The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having

> assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt, effective investigation into an arguable claim that a person has been taken into custody and has not been seen since." (at [233])

173. This passage is in almost identical terms to the passage from the judgment in *Kurt* (at [124]) set out earlier in this judgment. As the judge pointed out (at [238]) there are difficulties in applying the principle stated in *Kurt* directly to the facts of *El-Masri* because *El-Masri* was not a case where the person taken into custody had not been seen since. On the contrary, the detention of Mr El-Masri was temporary, and following his release he was able to give a very full account of the facts and circumstances of his detention. *El-Masri* does, therefore, involve an extension of the principle applied in the earlier Strasbourg cases.

174. Nevertheless, the facts of *El-Masri* are very close to earlier cases of enforced disappearance in which the Strasbourg Court had held that an investigative duty arose. It is true that denial of access to a lawyer or to a court were important features of the violation of article 5 in *El-Masri*. However, there is to my mind no justification for the significance which Mr Fordham seeks to confer on them as, of themselves, giving rise to an investigative obligation. Rather, the court (at [240]) approached the facts of *El-Masri* on the basis that it concerned enforced disappearance in international law.

> "Having regard to the above, the Court considers that the applicant's abduction and detention amounted to "enforced disappearance" as defined in international law. The applicant's "enforced disappearance", although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity".

175. Furthermore, the reliance by the Grand Chamber in *El-Masri* on the reasoning in *Kurt* provides further support for the view that it was addressing issues arising in cases of enforced disappearance. The decision in *El-Masri* should be seen therefore as an extension of the enforced disappearance line of authority to cases of temporary disappearance. I do not consider that it provides any support for the broader proposition contended for by Mr Fordham that an investigative obligation will arise under Article 5, or Article 5 in conjunction with Article 13, whenever detention is beyond the reach of the courts, even if such detention is not secret or unacknowledged.

176. In the present state of the Strasbourg jurisprudence, enforced disappearance cases are acknowledged to give rise to an investigative obligation because where agents of the State have assumed control over an individual it is incumbent on the authorities to account for his or her whereabouts. This is the justification expressly stated in *Kurt* (at [124]) in relation to enforced disappearance cases where a person has been arrested and has not been seen since and repeated in the rather wider circumstances of *El-Masri* (at [233]). In my view it remains a valid reason for requiring an investigation in the particular circumstances of *El-Masri*, notwithstanding the reappearance of the victim, because of the unacknowledged, covert nature of the detention, the fact that the victim was held incommunicado and the refusal of the authorities to acknowledge the fact of detention by agents of the State or to account for what has happened. These factors combine in *El-Masri* to create a compelling case for requiring a prompt and effective investigation into what has taken place. Furthermore, in both situations an investigation is also required to meet the purpose of identifying and punishing those responsible for the disappearance.

177. It remains to be seen whether the Strasbourg court may extend this sub-set of Article 5 cases which give rise to an investigative obligation to other situations where only some of the features of *El-Masri* are present. However, I can see no reason in principle why it should be extended to all cases in which a person has been detained in the absence of judicial scrutiny or control, even if the detention is not secret or unacknowledged. In such cases where the detention has not been concealed or wilfully denied by the State, the procedures under Article 5(4) and (5) will normally provide a suitable remedy.

*Issue 7(A): The effect of international humanitarian law.*

178. A further issue 7(A) relating to Article 5 has been added to the list of issues. It reads:

> "Is Article 5 ECHR modified or displaced by international humanitarian law during an international armed conflict?"

179. In his judgment, the judge explains that this issue was added to the list of preliminary issues at a time when the Secretary of State was seeking to argue, with regard to activities by British forces in Iraq during the invasion and occupation periods, that detention was governed by international humanitarian law applicable to international armed conflicts and belligerent occupation, operating as a *lex specialis* which displaced or modified Article 5. If the Secretary of State was right in either of these alternative contentions, it would have an obvious bearing on the issue of the procedural duties owed by the United Kingdom under Article 5.

180. The implications of the decision of the Grand Chamber in *Al-Skeini* are likely to be very wide-ranging and, I suspect, are at this time only beginning to emerge. The massive extension of the scope of application of the Convention into new fields not originally contemplated by its framers, will call for refinement of concepts and accommodations between the Convention and other legal systems. This is already apparent in the decision of the Grand Chamber of the Strasbourg court in *Hassan v United Kingdom* (App No. 29750/09; (2014) 38 BHRC 358).

181. The facts of *Hassan* have been referred to earlier in this judgment at [101] and following. In that case the United Kingdom requested the Strasbourg court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. The Grand Chamber, after referring to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which provides that in the interpretation of a treaty there shall be taken into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, considered that it was the practice of the contracting States to ECHR not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions ("Geneva III and Geneva IV") during international armed conflicts. (*Bankovic v Belgium* at [62].) The Grand Chamber then went on to note that the Convention must be interpreted in harmony with other rules of international law of which it forms part. The Grand Chamber, referring to decisions of the International Court of Justice, considered that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict. (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004 ] ICJ Rep 136 at [106]; *Armed Activities on the Territory of Congo (Democratic Republic of Congo v Uganda*) [2005] ICJ Rep 168 at [215] – [216]).

182. The Grand Chamber considered (at [104]) that even in situations of armed conflict the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. Accordingly, by reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in times of armed conflict, the grounds of permitted deprivation of liberties set out in sub-paragraphs (a)–(f) of Article 5 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under Geneva III and Geneva IV The Grand Chamber explained (at [105]) that deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5(1). The Grand Chamber considered that that meant the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5(1) which is to protect the individual from arbitrariness.

183. The Grand Chamber then went on to address the question of procedural safeguards under Article 5 in terms which are of particular relevance to the present issue.

> "106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of

> international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, *Reinprecht v Austria*, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. While the applicant in addition relies on Article 5 § 3, the Court considers that this provision has no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1(c) of Article 5."

184. It appears therefore that in a situation of international armed conflict Article 5 ECHR and the provisions of international humanitarian law will co-exist and will both apply to issues of detention. Because the provisions of these two regimes are very different, no doubt reflecting the different fields in which they were originally intended to operate and the different purposes they were originally intended to achieve, it is necessary to effect an accommodation between the two. (This co-existence may also have certain unintended practical consequences such as that identified by Arden L.J. in *Al-Jedda v Secretary of State for Defence (No. 2)* [2011] QB 773 at [108].) In *Hassan* this resulted in a striking modification of the procedural obligation under Article 5. As a result, in an international armed conflict a system of judicial control over detention may not always be required. In the present case, as the judge pointed out, this further undermines the appellants' attempt to found an investigative obligation under Article 5 on an absence of judicial control.

185. I would answer Issue (7A) in the affirmative.

*Application to the test cases.*

186. The judge set out his conclusions on the application of these principles to the test cases at [243] to [248] of his judgment, where he summarised the facts in some detail. As I am in total agreement with his conclusions I can set out my conclusions very briefly

> (1) Shawkat Mahmoud Ibrahim Al-Nadawi (PIL 1), a conscript in the Iraqi army, surrendered to British forces in the first few days of the war in March 2003 and was detained for about three months before being released. The International Committee of the Red Cross ("ICRC") monitored his detention after about two weeks. In my view there is no duty under Article 5 to conduct an investigation into his detention.
>
> (2) Haidar Abdul Karim Al-Doori (PIL 57) was arrested by British forces on suspicion of hiding weapons and imprisoned in a British military detention facility for six months before being released in June 2004. For the first 28 days he was held in solitary confinement but after that was permitted visits by his parents. In my view there is no duty under Article 5 to conduct an investigation into his detention.
>
> (3) Hamid Dinar Hussein Alloui Al-Khafaji (PIL 121) was detained at a British military base on suspicion of being a member of a terrorist organisation. For the first 29 days of his detention he was held in solitary confinement and interrogated on several occasions. Thereafter he was held with other inmates and received visits from his family. On one such visit in April 2007 he swapped places with his brother and walked out of the base. He was given documents which explained the reason for his detention and that his status was subject to regular reviews. In my view there is no duty under Article 5 to conduct an investigation into his detention.

(4) Adil Abid-ali Jurayyah (PIL 143) and Hmood Khalil Hmood (PIL 144) were both arrested on 11 January 2007 and taken to a British facility at Basra Airport for questioning. They were released later the same day. In my view there is no duty under Article 5 to conduct an investigation into their detention.

(5) Shakir Hilal Al-Fahdawi (PIL 182) and his son were stopped and arrested by British soldiers on 12 April 2003 i.e. during the invasion period. They claimed they were taken to a facility known as "Station 22". They were released after 22 days. There was no official place of detention of that name and the Secretary of State has found no record of their detention. I agree with the judge that the absence of a record of his detention is not sufficient to trigger a duty to investigate the claim of unlawful detention. I agree with the judge that even on the assumed facts this case does not have the characteristics of an enforced disappearance.

187. In none of the test cases, therefore, does an investigative duty arise in relation to detention. I note, however, that in a number of the test cases the claimants complain of ill-treatment during their detention. This is a distinct matter. If these allegations are credible they may well require investigation.

**V UNITED NATIONS CONVENTION AGAINST TORTURE**

188. Issues (8) and (9) relate to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 ("UNCAT").

(8) Does UNCAT and/or customary international law give rise to domestically enforceable legal rights?

(9) If the answer to (8) is yes,

When do those rights arise i.e. is there any limitation on the scope of those rights?

Do those rights make a difference to the scope of an investigative obligation arising under the ECHR; and if so in what respect?

(i) If so what is the content of that investigative obligation?

(ii) Does the scope of any investigative obligation go beyond the scope of any investigative obligation which would arise under Article 3 ECHR; and if so, in what respects?

189. The judge concluded on Issue (8) that neither on the basis of its effect as a treaty nor on the basis of customary international law is it tenable that the provisions of UNCAT give rise to domestically enforceable legal rights. Moreover, he concluded that, in any event, it would not lead to the appellants' desired conclusion as to the content of any duty to investigate allegations of mis-treatment, because even if UNCAT gives rise to domestically enforceable rights, there is nothing to suggest that Article 12 UNCAT imposes a broader investigative duty on a State party under Article 3 ECHR. The judge refused permission to appeal against his decision on these issues.

190. The appellants now renew their application for permission to appeal against the judge's decisions on these issues, although they no longer maintain their case on customary international law. As I am in complete agreement with the judge on these issues and would refuse permission to appeal on this ground, I will state my conclusions relatively briefly.

191. UNCAT entered into force on 26 June 1987. It currently has 159 parties including the United Kingdom which ratified the Convention on the 8 December 1988. UNCAT provides in relevant part:

*"Article 1*

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

*Article 2*

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

...

*Article 10*

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

*Article 11*

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

*Article 12*

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

192. The appellants seek to rely on these provisions in two ways.

(1) First, they seek to rely on UNCAT as an alternative source of a duty to investigate allegations of torture or other inhuman or degrading treatment carried out by British forces in Iraq in any circumstances where Article 3 ECHR does not apply, in particular by reason of the circumstances falling outside the jurisdiction of the United Kingdom for this purpose.

(2) Secondly, they seek to establish that any investigation of alleged ill- treatment by British forces in Iraq should include an inquiry into whether the United Kingdom complied with its obligations under Articles 10 and 11, UNCAT.

193. The judgment below drew attention to a disagreement between the parties as to the meaning of the words "in any territory under its jurisdiction" in Articles 2, 11, 12 and 13 UNCAT. The Secretary of State contended that it did not have the effect of extending the application of UNCAT to any part of Iraq when British forces were present there. The appellants, on the other hand, relied on the opinion of the CAT Committee, established under Article 16, UNCAT, that the words include "all areas where the State exercises, directly or indirectly, in whole or in part *de jure* or *de facto* effective control in accordance with international law". (CAT Committee, General Comment No. 2 (2008) at [16]). The CAT Committee went on to express the view that the words would be wide enough to include prohibited acts "during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities or other areas over which a State exercises factual or effective control". The judge (at [265]) assumed, without deciding the point, that the interpretation by the UNCAT Committee was correct and that the United Kingdom's relevant obligations under UNCAT were therefore applicable throughout the period of UK operations in Iraq in places where persons captured or arrested by British forces were detained. I am content to make the same assumption.

194. The central issue for consideration here is whether UNCAT confers rights which are directly enforceable by individuals in domestic law. As treaty making and the conduct of international relations are executive functions under our constitution, a treaty provision does not become part of domestic law unless it is implemented by Parliament (*J.H. Rayner v Department of Trade and Industry* [1990] 2 AC 418 at 476-7, 500). Save that section 134, Criminal Justice Act 1988 creates an offence of torture in compliance with Article 4 UNCAT, the provisions of UNCAT have not been implemented into the domestic law of the United Kingdom by the UK Parliament. Nevertheless, the appellants submitted below that the provisions of UNCAT on which they seek to rely have effect in domestic law within the United Kingdom on two alternative grounds. First they submitted that under the principle of legality UK public authorities owe a duty in domestic public law not to override fundamental rights including those contained in international human rights treaties. Secondly they submitted that the relevant provisions of UNCAT have the status of customary international law which automatically forms part of domestic law in the United Kingdom. The judge rejected those submissions.

195. The appellants now seek to appeal against the judge's conclusion that the provisions of UNCAT do not confer rights on individuals in domestic law. They, quite correctly in my view, no longer seek to rely on their argument that the relevant provisions of UNCAT form part of domestic law by virtue of being rules of customary international law. However they maintain their submission on the principle of legality.

196. Here the appellants make two linked submissions.

(1) The principle of legality, properly understood, has the effect that the United Kingdom's human rights obligations under Articles 10 and 11, UNCAT are enforceable public law obligations owed by domestic public authorities in domestic law, provided that their violation has not been mandated or empowered by Parliament through clear primary legislation.

(2) The United Kingdom's duty of effective independent investigation under Article 3 ECHR, triggered by credible claims of torture and inhuman and degrading treatment of Iraqi civilians in British military detention in Iraq, must therefore as a matter of legal duty extend to an investigation into whether there was compliance with those obligations.

197. I consider that these submissions are fundamentally flawed for the following reasons.

198. First, the principle of legality is a principle of statutory interpretation. In the absence of express language or necessary implication to the contrary, general words in legislation must be construed compatibly with fundamental human rights because Parliament cannot be taken to have intended by using general words to override such rights. (See, for example, *Ex parte Simms* [2000] 2 AC 115 at [131]; *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 at [111]-[112]; *Axa General Insurance Ltd and others v HM Advocate and others* [2012] 1 AC 868; *Guardian News and Media Ltd v City of Westminster Magistrates' Court* [2013] QB 618; *Evans v Attorney General* [2015] AC 1787.) Once again, the judge in the present case expressed the matter with total clarity when he observed (at [269]) that "the principle of legality … is a principle of statutory interpretation, not a broad principle as to how the courts should develop the common law."

199. Secondly, the principle depends for its application on the fundamental rights in question already being part of domestic law. (See, for example, *Yam v Central Criminal Court* [2016] 2 WLR 19 per Lord Mance at [36].) It does not operate by reference to rights and duties between States on the international plane, nor can it transform such rights into domestic law.

200. Thirdly, although international treaty obligations may sometimes guide the development of the common law (*FG v Work and Pensions Secretary* [2015] 1 WLR 1449 per Lord Hughes at [137]), this is inappropriate where the proposed development would conflict with the principle of Parliamentary sovereignty, in particular where Parliament has decided not to implement the provision into domestic law (*Re McKerr* [2004] 1 WLR 807) or has already entered the field to strike the appropriate balance (*Keyu v Foreign Secretary* [2015] 3 WLR 1665 at [118]). In the present case Parliament has implemented Article 4 UNCAT, but must be taken to have decided not to implement its other provisions. Moreover, Parliament has implemented into domestic law the highly sophisticated body of human rights protections contained in the ECHR by the Human Rights Act 1998. It would not be appropriate to modify its scheme in relation to procedural investigative obligations under the guise of developing the common law.

201. Finally I should record my agreement with the judge on three further issues.

202. First, I agree with the judge that Article 12 UNCAT does not appear to impose a broader duty of investigation than Article 3 ECHR. The requirement of reasonable grounds to believe that an act of torture has been committed under Article 12 UNCAT seems to set a higher hurdle than the test of credible assertion or arguable claim under Article 3 ECHR. Furthermore Article 12 does not on its face require an investigation under that provision to examine whether there has been a failure to comply with Article 10 or Article 11 UNCAT. Accordingly, even if the appellants are able to establish that the provisions of UNCAT on which they seek to rely do have effect in domestic law, it is difficult to see how this might assist them.

203. Secondly, the provisions of ECHR must be interpreted in harmony with rules of international law of which it forms part (*Al-Adsani v United Kingdom* at [55]) and therefore the development of Article 3 ECHR may in certain circumstances be influenced by UNCAT. I have referred earlier in this judgment to an example of such a process whereby the interpretation of Article 5 ECHR has been influenced by international instruments on enforced disappearance. However, nothing in UNCAT supports the appellant's contention that an investigation under Article 12 UNCAT is required to examine whether there has been compliance with Article 10 or Article 11 UNCAT.

204. Thirdly, when there is a duty to investigate an allegation of torture or other serious ill-treatment under Article 3 ECHR the circumstances to be investigated will often include the instructions, training and supervision given to those persons to whom the custody of the individual was entrusted. (See *R (Ali Zaki Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin); [2013] HRLR 32, at [148]). In such an investigation the obligations of the United Kingdom under Articles 10 and 11 UNCAT will form a relevant part of the background and the investigator may think it appropriate to examine what steps were taken to comply with those international obligations.

205. For these reasons I would refuse permission to appeal on this ground.

**LORD JUSTICE TOMLINSON :**

206. I agree.

**LADY JUSTICE ARDEN :**

207. I also agree.

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