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8 January 2020

**Re: Intervention in *Hanan v. Germany*  
Application No. 4871/16  
Written Comments of the Third Party Intervener**

Dear Registrar,

Please find enclosed Rights Watch (UK)'s intervention in *Hanan v. Germany*.

Yours faithfully,

Yasmine Ahmed

Executive Director

Rights Watch (UK)

**BEFORE THE GRAND CHAMBER**  
**OF THE EUROPEAN COURT OF HUMAN RIGHTS**

**BETWEEN:**

**HANAN**

**Applicant**

**-and-**

**GERMANY**

**Respondent**

**RIGHTS WATCH (UK)**

**Third Party Intervener**

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**WRITTEN COMMENTS OF THE THIRD PARTY INTERVENER**

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**Introduction**

1. The Third Party Intervener ('RWUK') submits these written comments pursuant to leave granted by the President of the Grand Chamber under Rule 44 § 3 of the Rules of the Court, by letter dated 12 December 2019, the deadline for which was subsequently extended by the Deputy Grand Chamber Registrar by letter dated 13 December 2019.
2. By this intervention, RWUK draws on its expertise and long history of working upon international law matters to make submissions on the following issues relevant to the application before the Court:
  - 2.1. First, the extent of States' jurisdiction in respect of human rights obligations in respect of targeted uses of force outside their territory are concerned;
  - 2.2. Second, the nature and scope of States' duties to investigate violations of the right to life at international law;
  - 2.3. Third, the nature and scope of States' duties to provide effective remedies for rights violations generally at international law, with specific analysis of the right to truth and its impact on the adequacy of remedies under international law for rights violations.
3. This intervention is focused on relevant and informative elements of public international law, which the Grand Chamber may find valuable in the discharge of its analytical

obligations in respect of the issues directly before it, namely Articles 1, 2 and 13 of the European Convention. Underpinning this approach is the rule of interpretation in Article 31(3) of the Vienna Convention on the Law of Treaties<sup>1</sup> (specifically Article 31(3)(c)), the importance of which the Court has emphasized in its own jurisprudence.<sup>2</sup> It is further relevant so as to ensure fidelity to the European Convention as a ‘living instrument,’ with the Grand Chamber tasked with providing effective and meaningful protection of individual rights in varying and developing factual circumstances.<sup>3</sup>

#### **Submission I: Jurisdiction Where a State Is Capable of Affecting the Right to Life**

4. It is widely recognized that the jurisdiction of States in respect of their obligations owing under human rights treaties may be engaged in a variety of ways. The most obvious basis of jurisdiction is that a violation occurs within the confines of a State’s own territory.<sup>4</sup> But, consistent with the approach under other human rights treaties, this Court has long recognized alternative bases for jurisdiction outside of a State’s territory where a State either: (a) exercises physical control or authority over a person (where they are, for instance, in that State’s custody or a custody of its agent, albeit on foreign soil);<sup>5</sup> or (b) exercises *effective control* over an area outside the State’s territory.<sup>6</sup>
5. These principles have been explicitly endorsed by this Court on multiple occasions, including in *Ilascu v Moldova and Russia* (the presumption of territorial jurisdiction),<sup>7</sup>

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<sup>1</sup> United Nations, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

<sup>2</sup> See, for example: *Hassan v United Kingdom* [2014] ECHR 936 (GC) (*‘Hassan’*), [100]ff; *Bankovic v Belgium and ors* [2001] ECHR 890 (GC) (*‘Bankovic’*), [16] and [18]; and *Mamatkulov and Askaraov v Turkey* [2005] ECHR 64; (2005) 41 EHRR 25 (GC) (*‘Mamatkulov and Askaraov’*), [39].

<sup>3</sup> *Mamatkulov and Askaraov*; *Tyrer v. the United Kingdom* [1978] ECHR 31; *Christine Goodwin* [2002] ECHR 75; *Marckx v Belgium* [1979] ECHR 2; (1979) 2 EHRR 330 (Plenary); *Chassagnou and others v France* [1999] ECHR 22; (1999) 29 EHRR 615 (GC); *Dudgeon v United Kingdom* [1981] ECHR 5; (1981) 4 EHRR 149 (Plenary).

<sup>4</sup> This was the starting point in *Bankovic* at [59] and reiterated in the oft-cited framing of jurisdiction for the purposes of Article 1 as ‘*primarily*’ territorial in *Al-Skeini v United Kingdom* [2011] ECHR 1093; (2011) 53 EHRR 18 (GC) (*‘Al-Skeini’*) at [109].

<sup>5</sup> *Al-Skeini* at [134] referred to this as ‘*state agent authority and control*.’ For comprehensiveness, such State agent authority and control can be established first, through the acts of diplomatic and consular agents; second in circumstances where through the consent, invitation or acquiescence of the Government of the territory concerned, a State exercises all or some of the public powers normally to be exercised by that Government (at [135]); and third where the use of force by a State’s agents operating outside its territory brings an individual into the custody of State agents abroad (at [136], referring to *Öcalan v Turkey* [2005] ECHR 282; (2005) 41 EHRR 45 (GC) (*‘Öcalan’*) at [91]).

<sup>6</sup> *Al-Skeini*, [138].

<sup>7</sup> *Ilascu and ors v Moldova and Russia* [2004] ECHR 318; (2005) 40 EHRR 46 (GC), [312].

*Öcalan v Turkey* (physical power over persons exercised on foreign soil),<sup>8</sup> and *Al-Skeini v United Kingdom* (effective control over an area outside national territory).<sup>9</sup>

6. More recent iterations of this Court's jurisprudence confirm the progression of its reasoning in respect of control and authority, identifying further situations where *physical* power and control of an individual will suffice to establish jurisdiction within Article 1. In *Jaloud v Netherlands*<sup>10</sup> and *Pisari v Moldova and Russia*,<sup>11</sup> both cases concerning military checkpoints, extraterritorial jurisdiction of the respective states was found in each case in respect of an unlawful killing occasioned at the checkpoint.<sup>12</sup>
7. In addressing the question of jurisdiction in these cases, the Court referred to the 'personal model' of extraterritorial jurisdiction, the paradigmatic example being where someone is arrested and detained by foreign agents,<sup>13</sup> as compared to the 'spatial' model of jurisdiction, being jurisdiction as control over an area.<sup>14</sup> In *Jaloud*, the Court found the Netherlands to be exercising 'authority and control over persons passing through a checkpoint,' confirming the existence of jurisdiction relating to persons physically coming into contact with State agents, even without powers of detention necessarily being exercised.<sup>15</sup>
8. In *Pisari*, the Russian government did not object to the allegation that it exercised jurisdiction.<sup>16</sup> The Court nevertheless went on to find that extraterritorial jurisdiction in

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<sup>8</sup> *Öcalan*, [91]. RWUK also notes the corollary that, where a UN institution such as the International Criminal Tribunal for the Former Yugoslavia exercises authority within The Netherlands, The Netherlands has been absolved of jurisdiction for the purposes of Article 1 of the Convention: see *Blagojevic v Netherlands*, App. No. 49032/07 and *Galic v Netherlands*, App. No. 22617/07.

<sup>9</sup> *Al-Skeini*, [138]-[139].

<sup>10</sup> *Jaloud v Netherlands* [2014] ECHR 1292; (2015) 60 EHRR 29 (GC) ('*Jaloud*').

<sup>11</sup> *Pisari v Moldova and Russia*[2015] ECHR 403 ('*Pisari*').

<sup>12</sup> In *Jaloud*, Azhar Sabah Jaloud was killed at a checkpoint in occupied Iraq manned by Dutch troops and members of the Iraqi Civil Defence Force on 21 April 2004. This case also concerned the adequacy of the investigation pursuant to Article 2. The shooting took place in an area where UK was the occupying power and Dutch operations were carried out under the command of British armed forces. In *Pisari v Republic of Moldova and Russia*, Vadim Pisari was killed by a Russian soldier at a peacekeeping checkpoint in the security zone created in the aftermath of the Transdnestrian conflict. On 1 January 2012, Mr Pisari passed through the checkpoint and failed to comply with an order to stop the vehicle, following which a sergeant fired three shots, one of which hit and killed Mr Pisari. The allegation was similarly one of an inadequate investigation pursuant to art 2. Eight soldier, four Russian, two Moldovan and two Transdnestrian manned the checkpoint. The security zone was created pursuant to a peace agreement and was under the control of a Joint Control Commission consisting of representatives of all three parties.

<sup>13</sup> Whether in times of peace with the agreement and cooperation of local agents (as in *Öcalan v Turkey* above) or during belligerent occupation as in *Hassan v United Kingdom* (App No 29750/09).

<sup>14</sup> The model driving the finding of jurisdiction in *Al-Skeini* and *Loizidou v Turkey* [1995] ECHR 10; (1995) 20 EHRR 99 (GC) at [61]-[64], by dint of belligerent occupation.

<sup>15</sup> At [139], citing *Al-Skeini* at [130]-[139].

<sup>16</sup> *Pisari*, [33].

respect of the shooting at the checkpoint was established, and referred expressly to the ‘public powers’ framing of the personal model of jurisdiction in *Al-Skeini*.<sup>17</sup>

9. The Court’s jurisprudence confirms that the existence of physical power and control over an individual are important indicators in the factual interrogation of whether Article 1 jurisdiction in respect of a State party exists to the extent of that control. Detention of individuals by state agents outside its territory is but one application of a wider principle whereby the use of force by a state’s agents outside its territory may bring an individual into the State’s Article 1 jurisdiction.<sup>18</sup> The exercise of power and control over an individual by a State outside that State’s own territory is the gravamen of the personal model of jurisdiction.
10. RWUK submits that the application of this principle of power and control over an individual may give rise to different outcomes in different factual situations. Whether jurisdiction is established is ultimately an intensely factual, and specific, enquiry, to be guided by the principles articulated by the Court as to when jurisdiction is established.
11. In considering application of the principles in each new factual circumstance, it is useful and important to take into account the development of comparative human rights jurisprudence.<sup>19</sup> Of particular note is recent guidance from the Human Rights Committee in respect of the right to life, General Comment No 36.<sup>20</sup> The guidance articulates further elements of the factual jurisdictional enquiry, specifically that the question of the exercise of power and control over the person naturally includes cases of foreseeable impact by the State on the person’s rights, specifically the right to life.
12. As to the significance of Human Rights Committee guidance, the International Court of Justice stated in its judgment in the *Diallo* case that:

*‘Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its “General Comments.”*

*Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [ICCPR] on that of the Committee, it believes that it*

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<sup>17</sup> At [33], citing *Al-Skeini* at [135] and [149].

<sup>18</sup> *R (Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin) at [95].

<sup>19</sup> Article 31(3)(c), VCLT.

<sup>20</sup> United Nations Human Rights Committee, *General Comment No 36*, UN Doc. CCPR/C/GC/36 (30 October 2018) (‘General Comment No 36’).

*should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal scrutiny, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.*<sup>21</sup>

13. The Human Rights Committee notes in respect to the right to life under Article 6 of the International Covenant on Civil and Political Rights ('ICCPR'),<sup>22</sup> that every State:

*'has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.'*<sup>23</sup>

14. There are different ways of characterizing the importance of a focus on the State's capacity to affect a person's enjoyment of her right. The concern elicited in *Bankovic* in establishing a framework for extraterritorial jurisdiction reduced to 'cause and effect' remains relevant.<sup>24</sup> It is submitted that the contribution from General Comment No 36 is that the capacity for a State to affect a person's right is an important factor in establishing how and when someone is said to be subject to or within the jurisdiction of a State, outside of its territory, for the purposes of the ICCPR and European Convention. The importance of that contribution warrants further analysis.
15. The view of the Human Rights Committee as set out in General Comment No 36 reflects wider developments towards what is termed by leading publicists a '*functional approach*' to jurisdiction,<sup>25</sup> and General Comment 36 has been characterized as '*shift[ing] the focus*

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<sup>21</sup> *Case Concerning Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo)* ICJ Rep 2010, p639, [66].

<sup>22</sup> United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

<sup>23</sup> General Comment No 36, [63].

<sup>24</sup> *Bankovic*, [38]. RWUK does, however, resist the characterization of the recognition of jurisdiction with reference to the notion of the State's ability to affect a person's enjoyment of rights, such as through an air strike, as constituting any kind of 'instantaneous' allocation of jurisdiction. Rather, by definition, the notion of foreseeable impacts on the rights of individuals is one which imports an assessment of the reasonable, prospective consequences of a State's action, to assist in the factual enquiry as to jurisdiction. It does not dispense with that enquiry – rather it adds further texture to it and assists the Court and States in navigating the question of when jurisdiction is said to exist extraterritorially.

<sup>25</sup> Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *The Law & Ethics of Human Rights* 47. Prof Shany was, together with Sir Nigel Rodley, co-author of the draft of General Comment 36.

*of the jurisdictional inquiry from that of power or control over territory or over the person, to that of power or control over the enjoyment of the right to life.*<sup>26</sup> RWUK submits that, in line with this Court's own articulation of principles concerning the establishment of extraterritorial jurisdiction, the focus on power or control over the *right itself* is a useful principle to drive the focus of factual assessments of jurisdiction.<sup>27</sup> Rather than an alternative basis of jurisdiction, the 'functional' approach in this sense is a further articulation of the factual conditions that can give rise to extraterritorial jurisdiction in a given case.

16. This approach to analysing whether authority and control for the purposes of Article 2 has been established has strong normative weight within the European Convention framework. It has been argued that the 'functional' analysis of jurisdiction is the fundamental explanation of States' human rights obligations, with the paradigms of territorial sovereignty, power over persons, and effective control of areas extraterritorially merely as *specific instances* of that general principle.<sup>28</sup> Indeed, the Interveners note that Judge Bonello came to a similar conclusion in his separate concurring opinion in this Court in the *Al-Skeini* case:

*'10. States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and finally, by compensating the victims of breach of human rights. These constitute the basic minimum functions assumed by every State by virtue of its having contracted into the Convention.*

*11. ... Very simply put, a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control.*

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<sup>26</sup> See: Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' (26 March 2019) *Human Rights Law Review* (forthcoming), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3360647](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360647), p23.

<sup>27</sup> It is notable that the drafters of the General Comment themselves viewed their expression of extraterritorial jurisdiction as building upon, and not inconsistent with the existing jurisdictional analysis of the European Convention: see Christof Heyns, Yuval Shany and Ryan Goodman, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment No 36,' *Just Security* (4 February 2019) available at: <https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/>

<sup>28</sup> Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857, 874-876.

12. Jurisdiction means no less and no more than “authority over” and “control of.” In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional – in the sense that when it is within a State’s authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.

13. The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfill them (or not to fulfil them).<sup>29</sup>

17. The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions explicitly endorsed this approach to jurisdiction in her report on the investigation into the unlawful death of Jamal Khashoggi, concluding that a State’s responsibility to protect the right to life ‘may be invoked extra-territorially in circumstances where that particular State has the capacities to protect the right to life of an individual against an immediate or foreseeable threat to his or her life.’<sup>30</sup>

18. The Special Rapporteur continued:

*‘Such understanding of the scope of the responsibility to protect [the right to life] is particularly relevant when applied to agencies whose mandate may have an extra-territorial scope. To the extent that they perform their functions outside national borders, or that their functions concern other States, such functions should include, whenever they may reasonably do so, the protection of those whose lives are under a foreseeable threat.’<sup>31</sup>*

19. The approach is also consistent with the Human Rights Committee’s existing analysis, which takes a view of jurisdiction following the application of governmental power, whether physical or otherwise.<sup>32</sup> The endorsement of the functional approach by the Human Rights Committee ought to carry weight from the perspective of this Court, in and

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<sup>29</sup> *Al-Skeini*, Concurring Opinion of Judge Bonello, [10]-[13]

<sup>30</sup> Annex to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Investigation into the Unlawful Death of Mr. Jamal Khashoggi, UN Doc. A/HRC/41/CRP.1 (19 June 2019) (‘Khashoggi Report’), [360].

<sup>31</sup> Khashoggi Report, [361].

<sup>32</sup> Human Rights Committee, Concluding Observations on the United States of America, UN Doc. CCPR/C/USA/CO/4 (23 April 2014) (reviewing the use of lethal force by drones in foreign territory); Human Rights Committee, Concluding Observations on the United Kingdom, UN Doc. CCPR/C/GBR/CO/7 (17 August 2015) (reviewing foreign surveillance programs as one element of the application of governmental power).



of itself, as a matter of orthodox principles of public international law. As a matter of treaty law, State parties to the ICCPR accept and endorse the role of the Human Rights Committee in its interpretation of the Convention and its reporting and overview role.<sup>33</sup> Authoritative interpretations of the Human Rights Committee in respect of a widely ratified human rights treaty ought to be accorded appropriate weight, in light of its analogous subject matter and purpose, the customary nature of the international rules the Committee is interpreting, and the capacity for involvement and objection afforded to States throughout the Human Rights Committee's analytical process.<sup>34</sup>

20. The situation in the present application, would appear to fall well within the scope contemplated by the Human Rights Committee's reference to persons whose right to life is '*impacted by [a State's] military or other activities in a direct and reasonably foreseeable manner.*'<sup>35</sup> A killing via military airstrike concerns decisions directly taken by a State official to launch a military strike at an identified target. This Court would be open to take the view that it would be an unfortunate anomaly if a strike occurring at the direction of a State which, by design, affects a targets' *right to life* did *not* fall under the protection of the Convention, simply because the targeted persons could, on certain approaches, be characterized as not (or at any rate not yet) under the physical authority of the State (or located within an area effectively controlled by the State).
21. RWUK returns to the persuasive logic in the reasoning of Mr Justice Leggatt of the English High Court in the case of *Al-Saadoon and ors v Secretary of State for Defence*, addressing the question of how a targeted use of force is an assertion of jurisdiction for the purposes of the Convention, as follows:

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<sup>33</sup> Specifically, Article 40(1) obliges states to submit periodic reports to the Committee on the measures they have adopted to give effect to the rights enshrined in the Convention. Article 40(4) and (5) prescribes the General Comment formulation process, to which States consent and agree to provide commentary upon. By accession to the ICCPR, States are taken to acknowledge the role of the Human Rights Committee to interpret the ICCPR in line with these provisions of the ICCPR itself, and for the limited role of States in that interpretive process (without prejudice, of course, to their persistent objection and the creation of customary international law). As such, its views ought to be granted concomitant weight in relation to analogous provisions (see also VCLT, Article 31(3)(b)). The competence of quasi-judicial monitoring bodies within a Treaty system ought to be respected in terms of the interpretation of those treaty rules (see for example Christian Tomuschat, 'Les Observations Générales' in Emmanuel Decaux (ed), *Le Pacte International Relatif aux Droits Civils et Politiques* (2011), p15; Thomas Buergenthal, 'The U.N. Human Rights Committee,' in JA Frowein and R Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 5, 2001, pp341-398. See also Human Rights Committee, *General Comment No. 33*, UN Doc. CCPR/C/GC/33 (5 November 2008), [11].

<sup>34</sup> See also: United Nations, Statute of the International Court of Justice (18 April 1946), Article 38(1).

<sup>35</sup> General Comment No 36, [63].

*'I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is the ultimate exercise of physical control over another human being. Nor as it seems to me can a principled system of human rights law draw a distinction 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 yet in the second case there is not.'*<sup>36</sup>

22. The Third Section has already recognized the jurisdiction of the Convention on equivalent facts in *Pad v Turkey* where the fact that *'fire discharged from [Turkish] helicopters had caused the killing of the applicants' relatives* in Northern Iraq enlivened Turkey's responsibility under the Convention regardless of whether the *'exact location of the impugned events'* occurred within an area effectively controlled by that State.<sup>37</sup> Jurisdiction has similarly been held to have been established in the cases of *Isaak v Turkey*<sup>38</sup> and *Andreou v Turkey*,<sup>39</sup> where persons were actually killed by Turkish-Cypriot agents (by beating and shooting respectively) but the deceased were neither detained by the Turkish agents at the time, or located on territory over which Turkey exercised effective control. Mr Justice Leggatt referred to *Isaak* and *Andreous* in his persuasively reasoned judgment in *Al-Saadoon* as indicating that the decisions in those cases and in *Al-Skeini* were merely specific situations applying *'a wider principle whereby the use of force by a state's agents outside its territory may bring an individual into the state's [A]rticle 1 jurisdiction.'*<sup>40</sup> Further, referring to the case of *Issa v Turkey*,<sup>41</sup> where jurisdiction was established when Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq and then killed them, Mr Justice Leggatt reasoned:

*'Nor can I conceive that if in Issa's case, for example, it had been established that, rather than taking the applicants' relatives to a cave before shooting them, the Turkish soldiers had simply gunned them down, the court would have found that the deceased were not*

<sup>36</sup> *Al-Saadoon and ors v Secretary of State for Defence* [2015] 3 WLR 503 (Admin) (*'Al-Saadoon'*), [95] (Leggatt J). The Court of Appeal reversed Mr Justice Leggatt's judgment in part ([2017] QB 1015 (CA)), but in respect of the concept of extraterritorial violence as a basis for jurisdiction, the Court of Appeal declined to take a positive position, believing that *'that is a conclusion which must be drawn by the Strasbourg court itself and not by a national court'* (at [70] (Lloyd Jones LJ)). To what extent the Human Rights Committee's formulation extends beyond the question of *physical* power to include any act directly and foreseeably affecting rights is an issue that RWUK does not consider needs to be addressed in this case, given the clear physical interference which this case constitutes.

<sup>37</sup> *Pad and ors v Turkey*, App. No. 60167/00, Decision of 28 June 2007, [54].

<sup>38</sup> *Isaak v Turkey* [2008] ECHR 553.

<sup>39</sup> *Andreou v Turkey* [2009] ECHR 1663, [25]-[26].

<sup>40</sup> *Al-Saadoon*, [97] (Leggatt J).

<sup>41</sup> *Issa v Turkey* [2004] ECHR 629.

*within Turkish jurisdiction because the soldiers did not exercise physical power and control over the deceased.*<sup>42</sup>

23. Moreover, it should be emphasized that the broader factual enquiry as to jurisdiction presents important limiting factors to the risk of an unprincipled weakening of the threshold for extraterritorial jurisdiction. As the Court's reasoning in *Jaloud* makes clear, the principles in *Al-Skeini* continue to drive that factual analysis. The nature of the control and force being exerted, for example, in a military air-strike conducted pursuant to United Nations Security Council mandate to assist a national government in the 'maintenance of security' may be seen to fall squarely within a public powers lens of the exercise of physical power. More marginal cases may give rise to different analysis; the Court retains the tools to navigate those factual circumstances.
24. The Court's invocation of a functional approach to the analysis of jurisdiction would be within the bounds of its past jurisprudence, and consistent with the principles that apply in respect of the relevant comparable provisions of the ICCPR (being relevant rules of international law applicable in the relations between the parties). It would enable the Court to ensure that its jurisprudence in respect of Article 1 remains coherent in principle and factually responsive.

#### **Submission II: The Duty of Investigation**

25. RWUK notes that an issue in the present application is the scope and nature of a State's duty to investigate potential breaches of the right to life under Article 2 of the European Convention, especially in factual circumstances of armed conflict.
26. For the avoidance of doubt, the duty of investigation in respect of allegedly unlawful deaths is well-recognized in international law more generally. Outside the European Convention context, the duty as an incident of the right to life has been widely recognized, including by the Human Rights Committee (in its General Comment No 31),<sup>43</sup> the Inter-American Court (in the *Montero-Aranguren v Venezuela* case),<sup>44</sup> and the African Commission on Human and Peoples' Rights (in its General Comment No 3).<sup>45</sup>

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<sup>42</sup> *Al-Saadoon*, [97] (Leggatt J).

<sup>43</sup> UN Human Rights Committee, *General Comment No 31*, UN Doc. CCPR/C/21/Rev.1/Add.13 ('General Comment No 31'), [15] and [18].

<sup>44</sup> *Montero Aranguren et al (Detention Center of Catania) v Venezuela*, Judgment of 5 July 2006, IACtHR (Ser.C) no. 150, [66].

<sup>45</sup> African Commission on Human and Peoples' Rights, *General Comment No 3*, Adopted during 57<sup>th</sup> Ordinary Session (November 2015) ('African Commission General Comment No 3'), [2] and [15].

27. The key features of this obligation of investigation recognized at international law have been set out in authoritative form in the revised version of the Minnesota Protocol on the Investigation of Potentially Unlawful Death, which was produced and overseen by a range of eminent scholars and based upon an extensive survey of international law sources. First, the investigation must be prompt:<sup>46</sup> persons who become aware of a potential violation of the right to life are required to report to their superiors quickly,<sup>47</sup> and then progressed expeditiously by State authorities.

28. In addition, the investigation must be both effective and thorough. In this regard, the Minnesota Protocol concludes that investigations

*'must, at a minimum, take all reasonable steps to: (a) identify the victim(s); (b) recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death; (c) identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; (d) determine the cause, manner, place and time of death, and all the surrounding circumstances ...; and (e) determine who was involved in the death and their individual responsibility for the death.'*<sup>48</sup>

29. Further, investigations and the persons conducting them must also *'be, and must be seen to be, independent of undue influence'*<sup>49</sup> and investigators *'must be impartial and must act at all times without bias. They must analyse all evidence objectively. They must consider and appropriately pursue exculpatory as well as inculpatory evidence.'*<sup>50</sup> Finally, international law requires that investigations of rights violations be transparent, *'including through openness to the scrutiny of the general public and of victims' families.'*<sup>51</sup> Accessibility to the family members of a victim is generally considered particularly important by leading human rights bodies.<sup>52</sup>

30. A recent judgment of the United Kingdom Supreme Court may provide further helpful context in respect of the application of the requirements of the duty to investigate in

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<sup>46</sup> United Nations Office of the High Commissioner for Human Rights, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (2017) ('Minnesota Protocol'), [23].

<sup>47</sup> *Anzaldo Castro v Peru*, Judgment of 22 September 2009, IACtHR, (Ser.C) no. 202 (2009), [134].

<sup>48</sup> Minnesota Protocol, [25].

<sup>49</sup> Minnesota Protocol, [28].

<sup>50</sup> Minnesota Protocol, [31].

<sup>51</sup> Minnesota Protocol, [32].

<sup>52</sup> See: African Commission General Comment No 3, [7].

specific factual contexts. In *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)*, the Supreme Court held that restrictions imposed on the conduct of an inquiry could so curtail the efficacy of the investigation so as to render it non-compliant with Article 2.<sup>53</sup> Specifically, the Court held that the means by which the independent reviewer may have identified those responsible for the wrongdoing in question had been denied to him; and in the absence of the ability to call witnesses, probe their accounts, press their testimony, it could not be accepted that all means possible to identify those responsible had been deployed.<sup>54</sup> In this way, the interaction and distinction between the duty to investigate as an obligation of result and obligation of means is made clear and helpfully advanced.

31. As regards the operation of the duty to investigate in the context of armed conflict, it is important to note that the duty of investigation recognized under international human rights law ('IHRL') is not displaced by circumstances of armed conflict or occupation where international humanitarian law ('IHL') will also apply. On the contrary, both bodies of law apply in a complementary fashion.<sup>55</sup> As the International Court of Justice has decided, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the protection of IHRL 'does not cease in times of war, except by operation of Article 4 of the [ICCPR] whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision.'<sup>56</sup> The Minnesota Protocol has also specifically noted, '[t]he duty to investigate a potentially unlawful death – promptly, effectively and thoroughly, with independence, impartiality and transparency – applies generally during peacetime, situations of internal disturbances and tensions, and armed conflict.'<sup>57</sup> Assuming,<sup>58</sup> without endorsing, that the airstrike in question took place within the context of a non-international armed conflict to which relevant IHL (both treaty and customary) would apply, the appropriate question for this Court is the content of the relevant obligations in each body of law.

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<sup>53</sup> *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 ('*Finucane*').

<sup>54</sup> *Finucane*, [140] and [134].

<sup>55</sup> *Hassan*, [77].

<sup>56</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996 (I), p66, [25]. Cited with approval by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, p136, [102]-[111].

<sup>57</sup> Minnesota Protocol, [20].

<sup>58</sup> The Interveners are unaware as to whether the State Party in this case has invoked IHL, but for comprehensiveness and in aid of the Court's analysis of the relevant legal framework, they provide assistance on matters within their expertise.

32. RWUK submits that the substantive content of relevant obligations to investigate in IHL track consistently with, and do not detract from IHRL, and as such the co-application of the bodies of law does not give rise to any norm conflict.<sup>59</sup> As noted in *Al-Skeini*, investigative obligations are not foreign to IHL.<sup>60</sup> Of specific relevance in the context of a non-international armed conflict, the Geneva Conventions place an obligation on each High Contracting Party to investigate and prosecute alleged grave breaches of the Conventions, including the willful killing of protected persons.<sup>61</sup> Moreover, common Article 1 to the Geneva Conventions provides for Parties to respect and ‘ensure respect’ for the Conventions, which the International Committee of the Red Cross (‘ICRC’) has confirmed obliges states to ‘repress’ grave breaches of the Conventions by way of effective sanction,<sup>62</sup> an obligation which is now understood to be customary.<sup>63</sup> Notably, where breaches of IHL give rise to State responsibility, customary obligations to cease internationally wrongful acts, offer assurances and guarantees of non-repetition, and to make reparation will also in appropriate cases manifest as requirements to investigate violations of international law in the context of ongoing hostilities.
33. Further, as the independent commission established by Israel (and chaired by retired Supreme Court Justice Jacob Turkel) to consider the legal implications of the raid on the Gaza flotilla in 2010<sup>64</sup> identified, a duty of investigation is implicit in Article 32 of Additional Protocol I to the Geneva Conventions, which recognizes the ‘*right of families to know the fate of their relatives.*’ The ICRC database describes this as a rule of customary IHL, and cites in support a wide range of sources of long standing. For example, the General Assembly in 1974 observed that ‘*the desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible,*’<sup>65</sup> while the United Nations Commission on Human Rights in 2002 affirmed ‘*the right of families to know the fate of their relatives reported missing in*

<sup>59</sup> See Marko Milanovic, ‘A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’ (2009) 14 *Journal of Conflict and Security Law* 459.

<sup>60</sup> *Al-Skeini* at [92], referring to GC III, Article 121; and GC IV, Article 131.

<sup>61</sup> GC I, Articles 49 and 50; GC II, Articles 50–51; GC III, Articles 129 and 130; and GC IV, Articles 146 and 147.

<sup>62</sup> Commentary to the GC IV relative to the protection of civilian persons in time of war.

<sup>63</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol I, pp495 and 558, rules 139 and 153.

<sup>64</sup> Turkel Commission, ‘Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Law of Armed Conflict According to International Law’ (February 2013). See also the similar approach of the Independent Commission of Inquiry established by the Human Rights Committee to assess the adequacy of Israel’s investigations of alleged violations of human rights during the military operations in the Occupied Palestinian Territories in 2014: Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/CRP.4 (2015), [64]ff.

<sup>65</sup> General Assembly, Res.3220 (XXIX).

*connection with armed conflict.*<sup>66</sup> That principle has been reaffirmed by the European Parliament,<sup>67</sup> the Parliamentary Assembly of the Council of Europe,<sup>68</sup> and the International Conference of the Red Cross and Red Crescent.<sup>69</sup>

34. As such, a duty of investigation arises as a matter of IHL in circumstances of potentially unlawful deaths. Further, the content of that obligation is substantively consistent with those under Article 2 of the European Convention.<sup>70</sup>
35. The obligations on a State to deliver an effective investigation under Article 2 are well-traversed before this Court and need no repetition. RWUK submits these obligations are materially similar, such that no question of *lex specialis* or selective application applies. Rather, this Court's reasoning in *Al-Skeini* remains compelling, namely that the procedural obligations under Article 2 continue to apply in '*difficult security conditions*,' including in a context of armed conflict.<sup>71</sup> The primary consideration is whether alleged inadequacies in the investigation undertaken are properly caused by the conditions of the armed conflict, and whether nonetheless in all the circumstances, all reasonable steps have been taken to ensure that an effective, independent investigation was conducted into all alleged breaches of the right to life.<sup>72</sup>
36. Accordingly, RWUK submits that this Court may properly consider that, regardless of the co-application of IHL, the substance of the investigatory obligation upon a State in relation to a potentially unlawful death remains constant, and demands the same key hallmarks of promptness, effectiveness and thoroughness, independence and impartiality, and transparency as found in this Court's jurisprudence and IHRL generally.

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<sup>66</sup> UN Commission on Human Rights, Res. 2002/60.

<sup>67</sup> European Parliament, Resolution on the Problem of Missing Persons in Cyprus.

<sup>68</sup> Parliamentary Assembly of the Council of Europe, Rec. 868 and Rec. 1056.

<sup>69</sup> 26<sup>th</sup> International Conference of the Red Cross and Red Crescent, Res. II; and 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, Res. I.

<sup>70</sup> See: ICRC and Geneva Academy, *Guidelines on Investigating Violations of IHL: Law, Policy and Good Practice* (September 2019).

<sup>71</sup> See also the position outlined in the Minnesota Protocol at [20] that '*[c]ertain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the Protocol's guidance ... Where context-specific constraints prevent compliance with any part of the guidance in this Protocol, the constraints and reasons for non-compliance should be recorded and publicly explained.*'

<sup>72</sup> This is consistent with General Comment 36, which notes at [64] that '*State parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered.*'

**Submission III: The Right to Truth as relevant to delivering an effective remedy at International Law**

37. Where the violation of Article 2 is established, that gives rise to the ancillary obligation in Article 13 of the European Convention, being the State's duty to provide an effective remedy. As with the duty to investigate, the duty of effective remedy is also well-established at international law generally. Article 2(3) of the ICCPR requires States parties to undertake to ensure '*that any person whose rights or freedoms ... are violated shall have an effective remedy,*' '*that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy,*' and '*that the competent authorities shall enforce such remedies when granted.*'<sup>73</sup>
38. As the Human Rights Committee noted, in its General Comment 31, in addition to specific compensation obligations which may arise, '*reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.*'<sup>74</sup> Discharge of the obligation to provide an effective remedy may, accordingly, take various forms appropriate to the nature of the violation and the need for, for instance, individual or systemic redress.
39. That duty of remedy, as a matter of general international law, will itself extend to a duty to conduct a sufficient investigation, quite apart from any duty of investigation arising from a specific right (such as the right to life, or the right to freedom from torture).<sup>75</sup> RWUK submits that in interpreting the right to an effective remedy under Article 13, the right to truth recognized by this Court ought to be considered as a factor in determining whether remedies delivered are, in fact, effective.

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<sup>73</sup> ICCPR, Article 2(3)(a)-(c).

<sup>74</sup> General Comment 31, [16].

<sup>75</sup> UN General Assembly, Resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Annex, UN Doc. A/RES/60/147 (2006) makes clear the importance of adequate investigation as an element of an adequate remedy for rights violations. Article 3(b) of the Basic Principles provides that '*[t]he obligation to ensure respect for and implement international human rights law and international humanitarian law as provide for under the respective bodies of law includes, inter alia, the duty to ... [i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.*'



40. In *El-Masri v FYR Macedonia*,<sup>76</sup> the United Nations High Commissioner for Human Rights argued before this Court that the right to truth is ‘*embodied in Article 13 and woven into Articles 2, 3, and 5 of the Convention.*’<sup>77</sup> The Court favourably considered those submissions,<sup>78</sup> affirming that part of an ‘*adequate response*’ by State authorities to an alleged rights violation entails ‘*a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.*’<sup>79</sup> Against that yardstick, this Court concluded that the summary investigation which had in fact been carried out by Macedonia in that case ‘*cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth.*’<sup>80</sup> The right to truth was thus considered germane both to the question of the investigative obligation emanating from the violation of Article 2, and embedded in Article 13, as part of its ancillary role.

41. More recently, the Fourth Section in the case of *Husayn v Poland* held that:

*‘where allegations of serious human rights violations are involved in [an] investigation, the right to truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have a right to know what has happened. An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.’*<sup>81</sup>

42. RWUK submits that this case is an apt chance to address and confirm the Court’s position in respect of the right to truth, and its role in respect of not just Article 2 (as well as other rights engendering a procedural obligation), but also Article 13. The right to truth is a strong interpretative aid to the nature and scope of the investigative duty under Article 2

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<sup>76</sup> *El-Masri v Former Yugoslav Republic of Macedonia* [2012] ECHR 2067; (2013) 57 EHRR 25 (*‘El-Masri’*).

<sup>77</sup> *El-Masri*, [175].

<sup>78</sup> *El-Masri*, [191].

<sup>79</sup> *El-Masri*, [192].

<sup>80</sup> *El-Masri*, [193].

<sup>81</sup> *Husayn v Poland* [2014] ECHR 834, [489]. The First Section has noted ‘*the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life.*’ *Muratspahic v Bosnia and Herzegovina*, App. No. 31865/06, Decision of 2 September 2014, [32].

and the adequacy of any remedy under Article 13, with specific reference to that Article's inherent elements of transparency and accountability.<sup>82</sup>

43. The right to truth has its origin in the specific jurisprudence of international human rights bodies relating to enforced disappearances. In 1983, the Human Rights Committee in the case of *María del Carmen Almeida de Quinteros v Uruguay* first affirmed the existence of a separate right *held by surviving family members* to know what had happened to their family members who have suffered such violations.<sup>83</sup> Thereafter, the Inter-American Court of Human Rights has consistently reiterated the existence of such a right, from its first decided case of *Velásquez Rodríguez v Honduras*<sup>84</sup> onwards.<sup>85</sup> The Inter-American Commission on Human Rights has described the right of family members of disappeared persons 'to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them' as 'part of the right to reparation for human rights violations.'<sup>86</sup> It is the initial attachment of the right to families of victims disappeared by the State that generates the specific public-facing accountability element of the right to truth, bringing an added dimension to the question of an effective remedy for gross human rights violations.
44. The right to truth is now so firmly established in the context of the obligations of States following enforced disappearances that it can properly be viewed as having crystallized in

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<sup>82</sup> See further *Finucane* where the UK Supreme Court noted at [119], in the course of its reasoning concluding that an independent review failed to fulfill the requirements of Article 2, that its conclusions spoke 'to the shortcomings of the procedures that have beset the inquiries that have so far taken place. Those shortcomings have hampered, if not indeed prevented, the uncovering of the truth about this murder.' In addressing the nature and powers of the inquiry that was conducted by the reviewer, the Court further noted at [134] that '[the review] was not an in-depth, probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what had actually happened.' See *Ramsahai v The Netherlands* [2007] ECHR 393; (2008) 46 EHRR 43 (GC) at [324], noting that 'effectiveness' in the context of Article 2 requires that the investigation 'must be capable of leading to the identification and punishment of those responsible.' Note also *Finucane v United Kingdom* [2003] ECHR 328; (2003) 37 EHRR 29, in which the Fourth Section, when addressing whether it would order the UK to conduct a fresh inquiry, referred the matter to the Committee of Ministers under Article 46, because it considered that it could not assume a further investigation would be able to 'provide any redress, either to the victim's family, or by way of providing transparency and accountability to the wider public.' It fell to the Committee of Ministers to determine how then the Government could take steps to comply with its Article 2 obligations.

<sup>83</sup> *María del Carmen Almeida de Quinteros et al v Uruguay*, UN Doc. CCPR/C/OP/2 at 138 (1990), [14]-[15].

<sup>84</sup> *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988, IACtHR (Ser.C) no. 4 (1988), [181].

<sup>85</sup> See, for example: the *Pueblo Bello Massacre* case, Judgment of 31 January 2006, IACtHR (Ser.C) no. 140; and *Ximenes Lopes v Brazil*, Judgment of 4 July 2006, IACtHR (Ser.C) no. 149 (2006).

<sup>86</sup> Case 11.481 *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*, Report No 37/00 of 13 April 2000).

those jurisdictions as a discrete substantive right enforceable by victim's families.<sup>87</sup>

Accordingly, the United Nations Convention for the Protection of All Persons from Enforced Disappearances provides, at Article 24(2), that every person who has suffered harm as a result of an enforced disappearance *'has the right to know the truth regarding the circumstances of the disappearance, the progress and results of the investigation and the fate of the disappeared person.'*<sup>88</sup>

45. In the past ten years, the 'right to truth' has been consistently endorsed by multilateral human rights bodies, including outside the enforced disappearance context. The United Nations Human Rights Council has endorsed the concept as a part of a legal architecture of rules for combating impunity for human rights violations, stressing

*'the importance for the international community to endeavour to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes of facts of such violations, and the circumstances under which they occurred...'*<sup>89</sup>

46. Further, the Office of the UN High Commissioner for Human Rights Study on the Right to the Truth has concluded:

*'...the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and the obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.'*<sup>90</sup>

47. The right has also been endorsed by the General Assembly, which has resolved that *'the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Governments,'*

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<sup>87</sup> This Court did not go so far as to accept its autonomous operation in this way in respect of extraordinary rendition situations, such as in *El-Masri*.

<sup>88</sup> UN Convention for the Protection of All Persons from Enforced Disappearances, adopted by the UN General Assembly, Resolution 61/177, UN Doc. A/RES/61/177 (2006), Article 24(2).

<sup>89</sup> UN Human Rights Council, Resolution 9/11, *Right to the Truth*, UN Doc. A/HRC/RES/9/11 (2008), Recitals and [1]; and UN Human Rights Council, Resolution 12/12, *Right to Truth*, UN Doc. A/HRC/RES/12/12 (2009), Recitals and [1].

<sup>90</sup> Report of the Office of the United Nations High Commissioner for Human Rights, Study on the Right to the Truth, UN Doc. E/CN.4/2006/91 (9 January 2006), p2.

and has recognized *'the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and protect human rights.'*<sup>91</sup>

48. More generally, explicit reference is made to a right to truth as a constituent ingredient in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The Basic Principles propose that full and effective remedies for serious violations include:

*'... Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;*

*'The search for the whereabouts of the disappeared, for the identifies of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities...'*<sup>92</sup>

49. The right to truth has also been recognized by the African Commission on Human and Peoples' Rights as an element of the right to an effective remedy for violations of the African Charter. The Commission has stated in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa that the right to an effective remedy includes *'(i) access to justice; (ii) reparation for the harm suffered; [and] (iii) access to the factual information concerning the violations.'*<sup>93</sup>
50. What is evident is the growing importance not just of recognition of the victims of violations, but for them to know the truth about the violations, including their facts and the identity of the perpetrators. In this way, the right to truth is a critical and inherent aspect of the principle of accountability, which is an important feature of Article 13.<sup>94</sup>

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<sup>91</sup> UN General Assembly, Resolution 68/165, *Right to the Truth*, UN Doc. A/RES/68/165 (2014), Recitals and [1].

<sup>92</sup> Basic Principles on the Right to a Remedy, Articles 22(b)-22(c).

<sup>93</sup> African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,' DOC/OS(XXX)247 (2003), C(b)(i)-(iii).

<sup>94</sup> See *Aksoy v Turkey* [1996] ECHR 68; (1997) 23 EHRR 553 at [98] in which the right to an effective remedy was expressed as a notion requiring *'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 investigation procedure.'*

51. The reasons proposed by States for failing to deliver adequate investigations or remedies can be assessed with reference to the standard of truth and the principle of the right of the victim to know and understand the facts, circumstances and identity of the perpetrators of human rights violations against her.<sup>95</sup> The validity of grounds for refusing to disclose information germane to investigations can be assessed in line with the right to truth and the principles it represents, and those claims can be assessed by the Court giving due weight to the countervailing principles. The right to truth can also provide an additional factor to be weighed in its assessment of the margin of appreciation the Court affords to States in respect of such claims, and can provide stronger grounds for applicants to challenge claims to continuing non-disclosure of information.<sup>96</sup>

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<sup>95</sup> *Al-Skeini*, [164]-[165].

<sup>96</sup> See relevantly General Comment No 36 at [28], where the HRC notes ‘States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred, and identifying bodies of individuals who had lost their lives ... States parties should also disclose relevant details about the investigation to the victim’s next of kin, allow them to present new evidence, afford them with legal standing in the investigation, and make public information about the investigative steps taken and the investigation’s findings, conclusions and recommendations, subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals.’