Neutral Citation Number: [2009] EWHC 1910 (Admin)

Case No: C0/1739/2009

**IN THE HIGH COURT OF JUSTICE**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2009

**Before** :

**LORD JUSTICE PILL**
**And**
**MR JUSTICE CRANSTON**

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**Between :**

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| **The Queen on the Application of Al-Haq** | **Claimant** |
| **- and -** | |
| **Secretary of State for Foreign and Commonwealth Affairs** | **Defendant** |

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**Mr Michael Fordham QC, Mr Raza Husain and Mr Zachary Douglas** (instructed by **Public Interest Lawyers**) for the **Claimant**
**Mr James Eadie QC and Mr Sam Wordsworth** (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 18 & 19 June 2009

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# Judgment

**Lord Justice Pill :**

1. This is an application for a declaration that the United Kingdom ("UK") Government is responsible for a breach of the UK's international obligations and for a mandatory order that the Government use its best endeavours to meet those obligations. The proposed defendants are selected as the government departments with the relevant responsibilities and I will refer to them collectively as "the Government". The obligations are said to be under customary international law in respect of the Government of Israel's actions in the course of Operation Cast Lead in Gaza since 27 December 2008.

2. The claimant, Al-Haq, is a non-governmental human rights organisation ("NGO") based in Ramallah in what the claimants describe as Occupied Palestinian Territory ("OPT") and I adopt, for present purposes, that description of the West Bank, without considering its implications in legal terms. The claimant has special consultative status with the United Nations Economic & Social Council and is affiliated to other NGOs. Evidence has been submitted describing its role in documenting alleged violations of the individual and collective right of Palestinians by the Government of Israel ("Israel").

3. Collins J has referred the application for permission to apply for judicial review to this court on a specific basis:

> "It seems that there are at least three main issues of principle:
>
> (1) Does the domestic court have jurisdiction to deal with this claim?
>
> (2) If it does have jurisdiction, should it exercise it in the circumstances?
>
> (3) Does the claimant have the necessary locus standi?
>
> . . . I am entirely satisfied that mandatory orders would not be appropriate but, if the claim is allowed to go forward, and if there is any successful outcome some sort of declaratory relief may result. I am not persuaded that I should refuse permission without a court hearing submissions on jurisdiction and standing and whether on the facts as presented by the claimant, if there is jurisdiction and the claimant has standing, the court would exercise its jurisdiction. I do not grant permission, but direct that these three issues be decided not on the basis of arguability but as if permission had been granted limited to them. Due to their importance, the issue should be decided by a Divisional Court next term."

Assumed facts

4. As we have been told repeatedly on behalf of the claimant, the court must determine the issues referred on the basis of "the facts as presented by the claimant". It is necessary to assume the accuracy of the "factual background" as described by the

claimant. The court is invited to consider the preliminary issues on the premise that Israel has committed serious breaches of peremptory norms of international law in Gaza in Operation Cast Lead.

5. The allegations against Israel are set out in considerable detail in the claimant's grounds. It is alleged:

(a) Operation Cast Lead began with an intensive bombardment of the Gaza Strip area of the OPT followed by a full ground assault.

(b) There have been many civilian casualties, including women and children. Thousands of residences have been destroyed, completely or partially. The buildings bombarded included UN and UNRWA buildings. Civic facilities, Mosques, workshops, factories and educational and health institutions have been at least partially destroyed.

(c) There have been multiple reports of the targeting of ambulances and hospitals. Particular incidents are described.

(d) There have been widespread reports of intensive use of white phosphorus bombs throughout the Gaza Strip, contrary to the Convention on Certain Conventional Weapons, Geneva 1980.

(e) There has been a wanton destruction of civilian, cultural and governmental infrastructure, including factories, legislative buildings, farmland and civic institutions. Tunnels giving means of access to Egypt have been bombed and a naval blockade established.

(f) It is noted that Israel commenced a unilateral ceasefire on 18 January 2009, though there have since been several violations by both sides.

6. It was submitted that Israel is in breach of peremptory human rights norms through the nature and intensity of force used during the incursion into Gaza. International law recognises the right to self-determination which Israel has denied to the Palestinian people. Israel's occupation of Palestinian territory is unlawful, it was submitted. The breaches of Israel's obligations have been extended and intensified by Operation Cast Lead. It involved breaches of the peremptory norms of self-determination and the non-acquisition of territory by force, it was submitted. There have been breaches of the Geneva Convention 1949. Given the scope of the present application to this court, I do not propose to set out in detail the international instruments and decisions of international organisations which Israel is said to have breached or ignored.

7. The UK's relationship with Israel is described in the claimant's grounds. A substantial quantity of military equipment is sold by the UK to Israel under Standard Individual Export Licences (SIELS). Military equipment is also purchased from Israel. Under the EU-Israel Association Agreement provision is made for preferential trading with Israel.

8. The claimant seeks an order requiring the UK government:

> "(a) To publicly denounce Israel's actions in Operation Cast Lead and the construction of the Wall.
>
> (b) To suspend all SIEL approvals to Israel.
>
> (c) To suspend all UK government financial or ministerial assistance directly given to UK companies exporting military technology or goods to Israel.
>
> (d) To request that the EU suspend the EU-Israel Association Agreement on article 79 [of the Treaty] grounds [which are claimed to permit suspensions] and use best endeavours to ensure it is so suspended.
>
> (e) To seek out and suspend any other financial or military assistance given by the UK government to Israel.
>
> (f) To call a Conference of the Parties to be convened to address Israel's grave breaches."

9. Accepting that there are limits to the extent to which the courts can direct the UK government how to conduct its foreign relations, steps to be taken by the Government are suggested:

> "a. the exercise of universal jurisdiction to prosecute or extradite any individuals involved in grave breaches,
>
> b. the enforcement of the system for suppression of such breaches,
>
> c. significant diplomatic pressure,
>
> d. the introduction of measures to the Security Council under Chapter VII of the UN charter (the Security Council's powers to maintain peace);
>
> e. clear public denunciation,
>
> f. lawful sanctions,
>
> g. application of pressure through withdrawal of preferential trading terms, or
>
> h. convening a meeting of the Conference of the Parties."

Submissions and authorities

10. Mr Fordham QC, for the claimant, submitted that when jurisdiction to deal with a claim such as the present is in issue the courts operate on a case-by-case basis depending on the subject matter of the dispute. Mr Fordham relied on the statement of Lord Phillips MR in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, at paragraph 85:

> "The issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular case."

Treaty obligations and customary international law impose obligations on the UK. By reason of these obligations, the United Kingdom is under an obligation, in its domestic law, it was submitted, not to recognise the unlawful acts or to render aid and assistance to the Government causing them. It is for the courts to ensure that the Government carries out the UK's international law obligations.

11. Central to Mr Fordham's submissions is the Advisory Opinion of the International Court of Justice ("ICJ") of 9 July 2004 on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" ("the Wall Opinion"). In its Opinion, the court described the wall and stated that the request for an Opinion was limited to the legal consequences of the construction of those parts of the wall situated in the OPT. The court concluded that the construction of the wall and its associated regime were contrary to international law (paragraph 142). The court advised that the legal consequences for Israel included ceasing forthwith the works of construction in the OPT and the dismantling forthwith of those parts of the structure within the OPT (paragraph 151). Israel was also under an obligation to return land and other immovable property seized for purposes of constructing the wall in the OPT or, if that is impossible, to compensate the persons in question for the damage suffered (paragraph 153).

12. In the following paragraphs of its Opinion, the court considered the legal consequences as regards other states of the internationally wrongful acts flowing from Israel's construction of the wall (paragraph 154). The court concluded, at paragraph 159:

> "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to be the exercise of the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to

> ensure compliance by Israel with international humanitarian law as embodied in that Convention."

13. Mr Fordham conceded that Operation Cast Lead is an operation distinct from the construction of the Wall but the international obligations on other states recognised in the Wall Opinion apply equally, it was submitted, to the breaches of international law in Operation Cast Lead which, for present purposes, are to be assumed. Mr Fordham submitted that the court must require the Government to recognise Israel's breaches of international law. The point of reference to domestic law in this case is that it is concerned with the activities of a domestic entity, the Government. The court must direct the Government formally to accept that Israel is in breach and to declare that the Government has the obligations identified by the ICJ in the Wall Opinion with respect to the breaches in Operation Cast Lead (Wall Opinion paragraph 159). It is then for the Government to decide what measures are then necessary.

14. Mr Fordham next relied on the House of Lords decision in *Kuwait Airways Corpn v Iraqi Airways Co* (Nos 4 and 5) [2002] UKHL 19 [2002] 2 AC 883. The claimants sought delivery up of aircraft held by the defendants following a resolution by the Iraqi Revolutionary Command Council ("RCC"), during Iraq's occupation of the Kuwait, transferring the property to the defendants.

15. At paragraph 18, Lord Nicholls of Birkenhead stated:

> "When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."

16. The House of Lords decided that the resolution of the RCC was of a character that involved "flagrant violations of rules of international law of fundamental importance" (paragraph 29). Lord Nicholls referred, at paragraph 25, to *Buttes Gas & Oil v Hammer* (No.3) [1982] AC 888 (to which further reference will be made) as illustrating the principle that there may be cases where the issues are such that the court has "no judicial or manageable standards by which to judge [the] issues" (Lord Wilberforce at page 938). However, Lord Nicholls continued, at paragraph 26:

> "This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. Lord Wilberforce himself accepted this in the *Buttes* case, at page 931D. Nor does the

> 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not in doubt. That is the present case."

The Kuwait case, submitted Mr Fordham, demonstrated the power of the court to rule upon actions of foreign governments which violate international law.

17. Mr Fordham next relied on the decision of the House of Lords in *R v Jones (Margaret) & Ors* [2006] UKHL 16 [2007] 1 AC 136. The issue was whether, on charges of criminal damage at an operational military airbase, the defence could contend that the government's actions in preparing for, declaring and waging war in Iraq were unlawful acts which they were justified in attempting to prevent by their use of reasonable force under section 3 of the Criminal Law Act 1967. It was contended that war crimes were customary international law crimes which were assimilated into municipal law (paragraph 22). Giving the leading speech, with which Lord Rodger of Earlsferry, Lord Carswell and Lord Mance agreed, Lord Bingham of Cornhill stated, at paragraph 23, that he would accept "that a crime recognised in customary international law may be assimilated into the domestic criminal law of this country". However, in the same paragraph, Lord Bingham accepted the proposition that international law could not create a crime triable directly, without the intervention of Parliament, in an English court. Lord Bingham agreed with the observations of Sir Franklin Berman (*Asserting Jurisdiction: International and European Legal Perspective* (2003)):

> ". . . it would be odd if the executive could, by means of that kind, acting in concert with other states, amend or modify specifically the *criminal* law, with all the consequences that flow for the liberty of the individual and rights of personal property. There are, besides, powerful reasons of political accountability, regularity and legal certainty for saying that the power to create crimes should now be regarded as reserved exclusively to parliament, by statute."

18. At paragraph 59, Lord Hoffmann acknowledged that lack of certainty as to the elements of the offence need not in itself deter the court:

> "If the core elements of the crime are certain enough to have secured convictions at Nuremburg, or to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait, then it is in my opinion sufficiently defined to be a crime, whether in international law or domestic law."

19. Mr Fordham submitted that it was accepted in *Jones* that breaches of international law may be assimilated into domestic law and are justiciable in domestic courts. The claim of *Jones* failed only because of the domestic law rule that the *criminal* law may not be amended or modified other than by statute.

20. Rather than return the case at a later stage, I refer to other statements of Lord Bingham in *Jones*. At paragraph 30, he stated:

> "But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law."

Lord Bingham referred to *Buttes* as supporting the second of those rules:

> "In *Buttes*, at p 933, Lord Wilberforce cited with approval the words of Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* (1897) 168 US 250, 252:
>
> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."
>
> I do not suggest that these rules admit of no exceptions: cases such as *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corporation v Iraqi Airways Company* (Nos 4 and 5) [2002] 2 AC 883 may fairly be seen as exceptions. Nor, in the present context, is the issue one of justiciability, to which many of these authorities were directed. In considering whether the customary international law crime of aggression has been, or should be, tacitly assimilated into our domestic law, it is nonetheless very relevant not only that Parliament has, so far, refrained from taking this step but also that it would draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection."

21. Fuller CJ's approach was also applied by the Supreme Court in *Oetjen v Central Leather Co.* (1918) 246 U S 297, 304:

> "To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the court of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.' "

22. I make further reference to *Abbasi*, on which Mr Fordham relied. The claimant sought, by judicial review, to compel the Foreign and Commonwealth Office to make representations on his behalf to the United States Government about his detention at Guantanamo Bay. The claim failed because this court concluded, at paragraph 79, that the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998 ("the 1998 Act") did not afford any support for the contention that the

Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf. Giving the judgment of this court, Lord Phillips MR stated, at paragraph 57:

> ". . . albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."

Lord Phillips found, at paragraph 64:

> ". . . in apparent contravention of fundamental principles recognised by both jurisdictions [United States and England & Wales] and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."

The court accepted that "there can be no direct remedy in this court". The court, however, rejected the proposition: "that there is no scope for judicial review of a refusal to render diplomatic assistance to a British subject who is suffering violation of a fundamental human right as the result of the conduct of the authorities of a foreign state".

23. At paragraph 99, the court added:

> "The citizen's legitimate expectation is that his request will be 'considered', and that in that consideration all relevant factors will be thrown into the balance."

And at paragraph 104:

> "The extreme case where judicial review would lie in relation to diplomatic protection would be if the Foreign and Commonwealth Office were, contrary to its stated practice, to refuse even to consider whether to make diplomatic representations on behalf of a subject whose fundamental rights were being violated. In such, unlikely, circumstances we consider that it would be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case."

24. Thus, submitted Mr Fordham, the court was prepared to find that a foreign government was in breach of fundamental principles of international law. Moreover, it was accepted that the court may direct the Government at least to consider taking action with respect to a foreign state, by reason of that state's breach of a norm of international law. There are, submitted Mr Fordham, many situations in which a court will direct the Government to comply with its obligations under international law, for example, in asylum and extradition claims, and in refusing to admit evidence obtained by torture.

25. While courts must proceed slowly and on a case by case basis, where there is, as assumed for present purposes, a flagrant violation of international law, the Government is under an obligation, it was submitted, not to recognise the unlawful action of a foreign state or to render aid and assistance to that state. In the present context, it is for the court to ensure that the Government carries out its obligations. Precisely what action the Government should take is a matter for the Government but action or lack of action is susceptible to judicial review applying the usual principles. As in *Kuwait* and in *Abbasi*, there is a clear breach of international law by Israel, it was submitted. The Wall Opinion identifies the duties upon states which arise in such circumstances and *Abbasi* demonstrates the power of the court to act.

26. As to standing, Mr Fordham submitted that the claimant is a responsible and internationally recognised organisation from the relevant area of the world. The impact of the Government's inaction is in the OPT, where the claimant is based. The issues before the court should not go unresolved for want of an appropriate challenger. In *R v Secretary of State for Foreign and Commonwealth Affairs Ex parte World Development Movement Ltd* [1995] 1 WLR 386, standing was granted to the World Development Movement ("WDM") to bring a challenge to the grant of UK governmental aid to the construction of a dam in Malaysia.

27. Mr Fordham also referred to the statement of Simon Brown LJ in *R (CND) v Prime Minister* [2002] EWHC 2777 (Admin) 2003 3 LRC 335. Simon Brown LJ stated:

> "As for standing, again, were the court to regard it an appropriate exercise of its jurisdiction to advise government as it is here invited to do, it would hardly be right to withhold that advice by reference to some suggested deficiency in CND's interest in the matter."

The Campaign for Nuclear Disarmament is, of course, an organisation of long standing based in the United Kingdom.

28. For the Government, Mr Eadie QC, relied on the statement of principle of Lord Wilberforce, with whom the other members of the House agreed, in *Buttes*, already cited. In order to determine the private law claims before the court in that case, it would have been necessary to adjudicate upon an international maritime boundary dispute between sovereign states. Lord Wilberforce accepted, at page 932A, that there is a general principle in English law that the courts will not adjudicate upon the transactions of foreign sovereign states: "This principle is not one of discretion, but is inherent in the very nature of the judicial process". In *Abbasi*, the court acknowledged the existence of "forbidden areas" which the court cannot enter, "including decisions affecting foreign policy" (paragraph 106(iii)).

29. The court is to be invited in these proceedings, submitted Mr Eadie, to pronounce a judgment stating that Israel, a friendly foreign state, had committed most serious breaches of international law in the respects alleged in the grounds. The issues involving Israel and the OPT are complex and sensitive, it was submitted. The court should not attempt to determine them. In *Kuwait*, the breach of international law was 'plain and acknowledged' (Lord Nicholls at paragraph 26).

30. As a sovereign state, Israel is entitled to immunity in the courts of England and Wales to the extent permitted by the State Immunity Act 1978, a principle to be kept in mind in the present context, it was submitted. It is hardly likely that Israel would appear in an English court to defend its activities and could not be expected to do so.

31. Mr Eadie also relied on the decision of this court in *CND*. CND sought an advisory declaration on the meaning of UN Security Council Resolution 1441 (2002) as to whether it authorised states to take military action in the event of non-compliance by Iraq with its terms. As in the present case, the court considered preliminary issues of justiciability and standing, the principal question being whether the court ought to entertain the substantive application. It was contended that the prohibition on the unlawful use of force was a peremptory norm of customary international law and, as such, part of the common law of England and Wales, in the absence of any contrary statutory duty. The use of force was unlawful unless authorised and the submission was that the use of force against Iraq would be unlawful unless it was permitted by Resolution 1441.

32. In *CND,* the court declined to declare the meaning of an international instrument operating purely on the plain of international law. Simon Brown LJ stated, at paragraph 36:

> "Should the court declare the meaning of an international instrument operating purely on the plane of international law? In my judgment the answer is plainly no. All of the cases relied upon by the applicants in which the court has pronounced upon some issue of international law are cases where it has been necessary to do so in order to determine rights and obligations under domestic law."

33. Having referred to *Abbasi* and other cases, Simon Brown LJ added, in the same paragraph:

> ". . . there is in the present case no point of reference in domestic law to which the international law issue can be said to go; there is nothing here susceptible of challenge in the way of the determination of rights, interests or duties under domestic law to draw the court into the field of international law . . . The domestic courts are the surety for the lawful exercise of public power only with regard to domestic law; they are not charged with policing United Kingdom's conduct on the international plain."

34. Richards J stated, at paragraph 60, that justiciability engages rules of law rather than purely discretionary considerations. He added:

> "There are rules that, in this context at least, the courts have imposed upon themselves in recognition of the limits of judicial expertise and of the proper demarcation between the role of the courts and the responsibilities of the executive under our constitutional settlement. The objections on grounds of non-

> justiciability therefore provide a separate and additional reason for declining to entertain the claim."

Richards J added, at paragraph 62(iii):

> "The simple point, as it seems to me, is that the court should steer away from these areas of potential difficulty in relation to other states unless there are compelling reasons to confront them. There are no such reasons in this case."

The judgments in *CND* were substantially approved in the Court of Appeal decision in *R (Gentle) v The Prime Minister & Others* [2006] EWCA Civ 1689.

35. Mr Eadie submitted that the Government is in a stronger position than in *CND* where the court was asked to construe a resolution and not to condemn a sovereign state. That is questionable; to enter into the international arena by construing a resolution or treaty involves a presumptiveness and carries possible implications of its own.

36. Mr Eadie relied on the decision of this court (already cited) and of the House of Lords, in *R (Gentle & Anr) v The Prime Minister & Others* [2008] 2 WLR 879. Mothers of two servicemen killed while serving with the British Armed Forces in Iraq sought judicial review of the Government's refusal to hold an independent inquiry to examine whether the Government had taken reasonable steps to be satisfied that the invasion of Iraq was lawful under international law. Reliance was placed on article 2 of the ECHR and the 1998 Act. In this court, Sir Anthony Clarke MR first considered the position in the absence of the ECHR. He referred, at paragraph 26, to cases already cited in this judgment and stated:

> "Absent the Convention, the starting point is the proposition that issues relating to the conduct of international relations and military operations outside the United Kingdom are not justiciable. That proposition is supported by two further propositions. The first is that constitutionally such matters lie within the exclusive prerogative of the executive and the second is that they are governed by international and not domestic law."

37. I have also found relevant Lord Bingham's speech in the House of Lords in *Gentle*. Lord Bingham gave reasons why article 2 had never been held to apply to the process of deciding on the lawfulness of a resort to arms. He referred to the context of the ECHR and stated:

> "This is not to say that if the appellants have a legal right the courts cannot decide it. The respondents accept that if the appellants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude. They do, however, say, in my view rightly, that in deciding whether a right exists it is relevant to consider what exercise of the right would entail. Thus the restraint traditionally shown by the courts in ruling on what has been called high policy - peace and war, the making of treaties, the

> conduct of foreign relations - does tend to militate against the existence of the right: *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136,"

38. Mr Eadie submitted that the court should not enter the forbidden area of decisions affecting foreign policy (*Abbasi*) and should not embark on a course that would require the court to determine the merits of a complex international dispute involving foreign governments. The claim did not involve an individual or organisation asserting its own right to protection under English law.

39. Mr Eadie further submitted that the claimant had no standing to bring the claim. The interests it seeks to represent are not within the jurisdiction of the court.

Incorporation of customary international law

40. The issue of the incorporation of customary international law into domestic law is not susceptible to a simple or general answer and there is no need to attempt one to decide this case. (The complexities of the issue are considered by Sales and Clement, *International Law in Domestic Courts: The Developing Framework* (LQR July 2008 page 388)). What the claimant seeks to incorporate in the present case are norms set out, for example in the Wall Opinion, which impose obligations on the Government under international law. It is claimed that the existence of those obligations creates an obligation on domestic courts to ensure that the Government meets the UK's international obligations, though it is accepted that precisely how the Government meets them is a matter for the Government. That submission can be considered without the need for a general ruling.

Conclusions

41. Applying the principles stated in the cases, it is not in my view arguable that the claimant would, on the assumed facts, obtain the relief sought. As established in *CSSU v Minister for the Civil Service* [1985] AC 374, the controlling factor in considering whether a particular exercise of prerogative power is susceptible to judicial review is not its source but its subject matter. The subject matter in the present case is, at bottom, the conduct of Israel and whether that state is in breach of its international obligations. The need, for the purpose of the present application as referred by Collins J, to assume facts, does not permit the court to ignore the claim in substance being made; for condemnation of Israel. For the courts of England and Wales to decide whether Israel is in breach of its international obligations and, if so, the extent and nature of the breach or breaches, is beyond their competence (Lord Wilberforce in *Buttes*, citing Fuller CJ). That is so whether or not Israel were to decide to contest the allegations before the court. Indeed, the dilemma in which Israel, a sovereign state, would be placed demonstrates the unacceptability of the claimant's proposition.

42. Unlike *Kuwait*, this is not a case in which the breach of international law is plain and acknowledged or where it is, as in *Abbasi*, clear to the court. The Wall Opinion considers different issues and there has been no authoritative judgment upon Operation Cast Lead as a starting point for the court's consideration of whether to act.

43. The domestic element claimed to justify the court in considering the claim is that a remedy is sought against a domestic entity, the UK government. In relation to that entity, the subject matter is, however, in one of the forbidden areas identified in *Abbasi* at paragraph 106(iii), decisions affecting foreign policy.

44. The Government is aware of its international obligations and it is for the Government, and not the courts, to decide, in the present context, what actions are appropriate to comply with those obligations. The object of the claim is to compel a change in government foreign policy. The "toe-hold" established in *Abbasi* does not entitle the court to declare or direct what action the Government is to take upon this assumed breach of international law by Israel.

45. This case is readily distinguishable from those in which a claimant is asserting a readily identifiable right, such as a right in certain circumstances to claim asylum or the right to a fair trial. The claimant purports (subject to standing) to assert a right but, in deciding whether right exists, it is relevant to consider, as I have sought to do, what exercise of the right would entail (Lord Bingham in *Gentle*).

46. Constitutionally, the conduct of foreign affairs is exclusively within the sphere of the executive (*Jones*, *Gentle* in the Court of Appeal, *Abbasi*). While there may, exceptionally, be situations in which the court will intervene in foreign policy issues, this case is far from being one of them. The two strands considered, the nature of the underlying claim, that is condemnation of Israel, and the nature of the claim against the Government, that is a direction or declaration as to what foreign policy it should follow, operate together to demonstrate that the court should not be prepared to consider it.

47. Standing should not be treated as a preliminary issue but must be taken in the legal and factual context of the whole case (Rose LJ in *WDM*, at page 395F, citing *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617. In *CND*, Simon Brown LJ also linked the grant of standing to the issue of exercise of jurisdiction.

48. The claim to standing must be considered in the legal and factual context in which the claim arises. Standing to claim a right must, in my judgment, be considered in the context of the right being claimed. In the present case, there is no right even arguably to be claimed and the claimants should not be granted standing to make the claim they seek to make. While Mr Eadie did not argue that the foreign base of the organisation was itself crucial, he referred to the implications for the work of the courts of England and Wales if foreign NGOs were permitted to bring claims here. I would not grant the claimant standing to bring this claim.

49. I would refuse this application for permission.

50. Because of the detailed submissions made and the subject matter, the judgments in this permission application may be cited.

**Mr Justice Cranston :**

51. This claim for permission to proceed to judicial review is nothing but bold. As my Lord has explained, what the claimant ultimately wants is for the court to rule that

Israel's actions in Gaza are unlawful because they are in serious breach of peremptory norms of international law or constitute war crimes. Once that is done it invites the court to grant a declaration, even give a direction, that United Kingdom foreign policy towards Israel be changed. (One aspect is that the United Kingdom should withdraw from an EU-Israel treaty.) That is because the United Kingdom, in the claimant's contention, is in breach of its international obligations because it does not denounce, and continues to recognise as lawful, situations created by Israel's actions. These international obligations are said to be imposed on the United Kingdom through the application of secondary rules of international law. These are incorporated, in the claimant's contention, into the common law as rules of customary international law.

52. As originally conceived Israel was not a party to the action, although the claimant has subsequently said that it would be content if Israel were to be joined as an interested party. Parliament has conferred on Israel and on other states sovereign immunity through section 1 of the State Immunity Act 1978. Were the matter to proceed, Israel would have to waive that sovereign immunity, or have issues determined in its absence. It is also not without significance that the International Court of Justice would have no jurisdiction to resolve a dispute concerning Israel's actions in Gaza without Israel's consent.

53. In my judgment the application fails first, because it is not arguably justiciable. Justiciability depends on the subject matter and suitability of the issues the court will have to determine: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 407B, per Lord Scarman. The claim trespasses onto matters of high policy. The authorities clearly establish that the courts are "very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law": *R v Jones (Margaret)* [2007] 1 AC 136, [30], per Lord Bingham. See also at [65]-[67], per Lord Hoffmann; *R (Gentle) v Prime Minister* [2008] 1 AC 1356, [8(2)], per Lord Bingham; see also [26], per Lord Hope, [58], per Baroness Hale. This is not a matter of discretion. It is not the case that in the modern administrative State there are no no-go areas for the courts.

54. In the few cases where the courts have pronounced on matters of high policy there was what has been termed a domestic foothold. There was either legislative authorisation (see *Gentle*, [26]); the foreign legislation in issue was in the most blatant breach of international norms: (*Oppenheimer v Cattermole* [1976] AC 249, 278 C; *Kuwait Airways Corporation v Iraqi Airways Co* (nos 4 and 5) [2002] 2 AC 883); or the issue arose in the context of ensuring a fair trial in the courts of England and Wales (*A v Secretary of State for the Home Department* (No 2) [2006] AC 221). The claimant advances asylum claims to justify its contention that these matters are justiciable, but there courts make findings about matters such as a well founded fear of persecution in other states because they are authorised to do so under domestic legislation.

55. The rule about the non-justiciability of matters of high policy derives, in part, from a concern about institutional competence, a "recognition of the limits of judicial expertise" as Richards J put it in *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin); [2003] 3 LRC 335, [60]. In that case Simon Brown LJ discussed the Foreign

Secretary's care to avoid committing the government publicly to what it thought was the legal effect of a Security Council Resolution. The evidence of the Director General for Political Affairs at the Foreign and Commonwealth Officer, Mr Ricketts, was that it would have been damaging to the national interest to do so. Simon Brown LJ said:

> "Even, however, were all this not obvious, we would at the very least be bound to recognise Mr Rickett's experience and expertise in these matters and that the executive is better placed than the court to make these assessments of the national interest with regard to the conduct of foreign relations in the field of national security and defence. We could not properly reject Mr Rickett's views unless we thought them plainly wrong" (at [42]).

See also *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] 3 LRC 297, [84], per Simon Brown LJ.

56. The issue of relative institutional competence is apparent in the present claim. Were the matter to proceed, Israel's obligations would need to be defined and then breaches identified and proved on the basis of events occurring outside the jurisdiction. Were Israel to appear any justification it advanced, such as proportionality, would need to be explored. Once this was done the claimant's case would turn on an enquiry into breaches by the United Kingdom of its obligations. Those obligations, which the claimant contends derive from customary international law, would need to be defined. Breaches would then need to be proved through a close examination of the conduct of United Kingdom foreign policy. All of this would entail determinations of knotty issues of law and fact. It would be against the backdrop of possibly the most serious, protracted and controversial dispute in international affairs today. And in the evidence of Mr Turner, the Deputy Director of the Middle East and North Africa Directorate in the Foreign and Commonwealth Office, compelling the Government to take a public position on the matters in the claim would risk hindering the United Kingdom's engagement with peace efforts in the Middle East. This is not the *CND* case, where the claimant was at pains to emphasise that the issue was purely one of law and there were no disputed issues of fact: at [10], [22]. Nor is it *Kuwait Airways,* where breaches of international law were plain: at [24]-[26], per Lord Nicholls.

57. Quite apart from the complex factual matters which the present claim would involve, there is an absence of what Lord Wilberforce described as "judicial or manageable" standards: *Buttes Gas and Oil Co v Hammer* [1982] AC 888, at 938 B. The claimant advances the Advisory Opinion of the International Court of Justice, *Construction of a Wall* [2004] ICJ 134, [659] as to the obligations of the United Kingdom, coupled with the International Law Commission's Articles on *Responsibility of States for Internationally Wrongful Acts*, 2001. The former is not directly applicable to Gaza, and the latter are, in my judgment, too open-textured to have a great deal of purchase in the present case. It seems to me that much of the ground the claimant seeks to have the court traverse would be more appropriately entrusted to a committee of inquiry, with expertise in diplomacy and international law.

58. Non-justiciablity in this type of foreign relations case is also justified by the principle of comity, "the accepted rules of mutual conduct as between state and state which

each state adopts in relation to other states and expects other states to adopt in relation to itself": *Buck v Attorney General* [1965] 1 Ch. 745, 770D per Diplock LJ. Fuller CJ's statement in *Oetjen v Central Leather Co* (1918) 246 US 297, 304 – that examining the acts of one state in the courts of another would imperil amicable relations between states – has been approved in our courts: e.g. *Buttes Gas* at 933H, per Lord Wilberforce. Mr Turner's statement goes to this point in the present case.

59. To these considerations must be added the constitutional background to non-justiciability: see *Jones*, at [65], per Lord Hoffmann. This has nothing to do with the source of power being the prerogative. Rather, under our constitutional settlement these matters of high policy lie within the exclusive purview of the executive: *Gentle* [2007] QB 689, [267], per Sir Anthony Clarke MR. Constitutionally the overall conduct of foreign policy is entrusted to those with a democratic mandate, the government, in particular the Prime Minister and Foreign Secretary. They are accountable to Parliament, to public opinion and ultimately to the electorate through the ballot box. The basal principle of our system of representative democracy is that the people of the United Kingdom entrust the conduct of the country's foreign policy to their elected representatives, not to the courts.

60. The claimant seeks to gain a "domestic foothold" for the court to review United Kingdom foreign policy through its contention that customary international law is part of English law, so long as there is no constitutional principle or clear statutory authority in contradistinction to it. But Blackstone's view, that the law of nations is adopted in its full extent by the common law (Commentaries, vol IV, ch 5), was penned in an earlier age, on different constitutional and international arrangements. It has not survived as far as the law of treaties is concerned. Under our dualist system these cannot confer rights on individuals, directly enforceable in our courts, without specific transposition into domestic law. In *Jones*, Lord Bingham saw truth in Brierly's contention that international law is not a part, but a source, of our law and agreed that customary international law is applicable by our courts only where the constitution permits (at [11], [23]). The constitutional principle there was that the power to constitute new crimes is now reserved exclusively to Parliament. The constitutional principle here militating against the incorporation of customary international law is the one I have just mentioned. Whether customary international law should have any purchase in domestic law, without specific transposition, is an issue for another day. Certainly a rule that it does not would be consistent with our dualist system regarding the reception of international law.

61. Finally there is the issue of standing. It did not figure to any great extent in the written or oral submissions. The claimant is an internationally recognised human rights NGO in the Palestinian territories. The courts apply a liberal standing test to responsible, expert groups, and that applied to this claimant. It was also submitted that if there are wrongs to be righted, standing follows. The issue of standing had to be approached on the premises that there was a justiciable issue of public law arising out of grave human rights abuses and imperatives recognised in customary international law, and that the claim may be well-founded on the facts and evidence. If the claim were to fail it should fail because the premises were flawed; it would be unthinkable for the claim to fail for want of standing.

62. In my view there are real difficulties in principle with the claimant's arguments on standing. For example, as a matter of principle it seems to me that if declaring an act

or decision to be unlawful will affect a particular individual or group, and if none of them decides to challenge it, the courts must generally refuse to permit someone more remote from the act or decision to do so. In this case no one in the United Kingdom has sought judicial review of United Kingdom foreign policy regarding Israel's actions in Gaza. Then, as a practical matter, there is the Secretary of State's argument that if the claimant is correct, it would follow that any NGO, anywhere in the world, would have standing to bring a claim for judicial review in similar circumstances. Given that in my view permission for this claim to proceed must be refused on justiciability grounds all I need say is that I agree with My Lord that the claimant should not be granted standing to bring this action.