[ORAL ARGUMENT NOT YET SCHEDULED]

No. 16-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

AHMED SALEM BIN ALI JABER *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.,*

Appellees.

BRIEF OF AMICI PROFESSORS MARY ELLEN O'CONNELL AND DOUGLASS CASSEL IN SUPPORT OF PLAINTIFF-APPELLANTS AND URGING REVERSAL

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GLOSSARY OF ABBREVIATIONS

ECHR	European Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice

INTEREST OF AMICI[1]

Amici Mary Ellen O'Connell and Douglass Cassel are legal scholars specializing in international law on the use of force, international humanitarian law and international human rights law. They have an abiding interest in the integrity and proper application of these bodies of law. They believe that judicially manageable standards of international law can and should be applied to instances of extrajudicial killings by means of unmanned drone strikes, including in the present case. They submit this amicus brief with the consent of all parties.

Mary Ellen O'Connell is Robert and Marion Short Professor of Law and Research Professor of International Dispute Resolution—Kroc Institute for International Peace Studies, University of Notre Dame. She was a Vice President of the American Society of International Law from 2010-2012, and chaired the Use of Force Committee of the International Law Association from 2005 to 2010. She was a professional military educator (Title X) for the United States Department of Defense, 1995-1998.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici state that no party's counsel authored this brief in whole or part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than amici contributed money that was intended to fund preparing or submitting the brief.

Her primary research is in international law on the use of force and international legal theory. She is the author or editor of numerous books and articles on these subjects, including among others, *International Law and Drone Attacks beyond Armed Conflict Zones*, in DRONE WARFARE: ETHICAL, LEGAL, STRATEGIC, AND HUMAN RIGHTS IMPLICATIONS (D. Cortright et al. eds. Chicago, 2015); *21st Century Arms Control Challenges: Drones, Cyber Weapons, Killer Robots, and WMDs,* 13 WASH. U. GLOBAL STUD. L. REV. 515 (2015); *The Prohibition of the Use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW, JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM (N. D. White and C. Henderson eds., Edward Elgar 2013); *Peace and War*, in The HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (B. Fassbender and A. Peters, eds., Oxford 2012); *Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE (Simon Bronitt, et al. eds., Hart Publishing 2012); WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11 (Martinus Nijhof/Brill 2012); and THE POWER AND PURPOSE OF INTERNATIONAL LAW, INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (Oxford 2008, paperback 2011).

Professor O'Connell holds a B.A. from Northwestern University, an M.Sc. in International Relations from the London School of Economics, a J.D. from Columbia Law School, and an LL.B. and Ph.D. from Cambridge University.

Douglass Cassel is Professor of Law and Notre Dame Presidential Fellow at the University of Notre Dame. He specializes in international human rights law, international humanitarian law and international criminal law. Among other positions, he has served on the Executive Council of the American Society of International Law, and as director of human rights centers at the law schools of DePaul, Northwestern and Notre Dame universities. He serves as President of the Board of the Justice Studies Center of the Americas, to which he has been nominated by three separate United States Administrations and elected on each occasion by the member States of the Organization of American States.

Among many other scholarly publications, Professor Cassel is the author of *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law*, 98 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 811 (2008), reprinted in TERRORISM AND HUMAN RIGHTS (Martin Scheinin, ed., Edward Elgar Publishing 2014), and in TERRORIST RENDITION AND DETENTION: STATE PRACTICES 1 (A. Begum ed., Amicus

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Professor Cassel holds a B.A. from Yale University and a J.D. from Harvard Law School.

SUMMARY OF ARGUMENT

Judicially manageable standards of international law render the claims of Plaintiff-Appellants Ali Jaber et al. justiciable. International law permits the use of lethal force (1) in zones of armed conflict, (2) as peacetime law enforcement, and (3) as a military response to certain armed attacks. As the Department of Justice has recognized, at the time the Ali Jabers were killed by a drone strike in 2012, Yemen was not a zone of armed conflict. Nor was the drone strike lawful as a matter of peacetime law enforcement: it was not "strictly unavoidable" to avoid an "imminent" threat of death or serious personal injury. Other peacetime restrictions on lethal force rule out the use of drone-launched missiles for law enforcement.

The legal merits of this case turn, then, on the Government's assertion that the killings of the Ali Jabers were incident to a lawful exercise of military self-defense. That assertion depends on judicially manageable standards of international law, of the kind courts have long adjudicated. It was therefore error for the court below, invoking the "political question doctrine," to dismiss the claims for a supposed lack of judicially manageable standards. The district court ruling should be reversed and remanded for that court to adjudicate the merits of the claims of unlawful killings.

ARGUMENT

Amici address the sole issue of whether the claims of Plaintiff-Appellants Ali Jaber et al. rest on judicially manageable standards of international law, and are therefore justiciable. *Ahmed Salem Bin Ali Jaber* v. *United States*, No. 15-CV-840, 2016, U.S. Dist. LEXIS 21301 (D.D.C. Feb. 22, 2016). *See also Baker v. Carr*, 369 U.S. 186, 210-11 (1962). The District Court dismissed Ali Jaber's case largely because it felt constrained to follow *El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) rather than "Judge Weinstein's thoughtful opinion in *In re Agent Orange Product Liability Litigation*…." The District Court was "bound by the decisions of the D.C. Circuit, not the Eastern District of New York."

(slip op. at 14, citing *Nguyen Thang Loi* v. *Dow Chem. Co.* (*In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 75 (E.D.N.Y. 2005)).

The District Court decision is overly cautious in seeking to apply *El-Shifa*. The claims of Ali Jaber et al. are, as the District Court stated, "not materially distinguishable" from those in the *Agent Orange* case, but they are distinguishable from the claims in *El-Shifa*. The central claim of Ali Jaber is that the United States Government violated international and domestic law on the use of force. In contrast, in *El-Shifa*, the claimants sought to prove a duty to provide compensation in customary international law. *El-Shifa*, 607 F.3d at 839-40, 844-45. Moreover, the *El-Shifa* court did not have the benefit of over six years of public statements by the United States Government that the Government's uses of lethal force comply "*with all applicable law, including the laws of war*."[2]

Amici agree with the Government's position set out consistently in those public statements that the international law on the use of force governs U.S. drone attacks abroad. Amici disagree that the Government has complied with the law. Nevertheless, it is not our purpose in this brief to argue the

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[2] Harold Hongju Koh, Legal Advisor, State Dep't, The Obama Administration and International Law, Remarks at Annual Meeting of Am. Soc'y of Int'l Law, Washington, D.C., at 10 (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm (accessed 8 Aug. 2012)(emphasis in the original.)

merits. Rather, amici seek only to demonstrate that the Court has available to it well established, manageable standards of international law that are regularly applied by courts in the United States and abroad to make judicial determinations of the lawful use of lethal force.

I. Manageable, well-established international legal standards regulate the use of lethal force by governments

This case, like *Agent Orange*, "does not raise a nonjusticiable political question. It raises issues that courts are structured and empowered to decide—the nature and applicability of substantive international law and domestic tort law."

> The second *Baker* factor requires a court to determine whether there are judicially discoverable and manageable standards for resolving the issue. While the answers to questions of international law, like those of domestic law, may not always be clear, they are ascertainable and manageable…
>
> *See, ... also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 62 (2d ed. 1996) ("Of course the President cannot do what is forbidden to him....").

In Re Agent Orange, 373 F. Supp. 2d, at 70-72; *see also Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 69-70 (D.D.C. 2014); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 45-46 (D.D.C. 2010). At the same time, the Supreme Court has also made clear that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369

U.S. at 211. Although "attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs." *Schneider v. Kissinger*, 412 F.3d 190, 198 (D.C. Cir. 2005) quoting *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.,* 810 F.2d 1236, 1238 (D.C. Cir. 1987).

Salem and Waleed bin Ali Jaber were killed by the impact of a drone-launched Hellfire missile. Whether the operation that led to their death was lawful or unlawful depends on an initial choice of law question: Did the drone attack occur within a zone of armed conflict to which the United States was a party? The answer to this question leads to one of three sets of applicable rules governing all use of lethal force by governments:

1.) **Zone of Armed Conflict**: If the attack occurred within a zone of armed conflict, the legality of the killings depends on whether the requirements of the law of armed conflict for conduct on the battlefield were met.

2.) **Peacetime Law Enforcement**: If the attack occurred outside an armed conflict, the legality of the killings depends on whether the attack could be justified under the peacetime law

> governing resort to lethal force, basically the rules for law enforcement, unless
>
> 3.) **Military Self-Defense**: The U.S. had the right to initiate military force under international law.

See Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 345-46 (2010).

In this case there is no serious argument that conditions (1) or (2) obtained. At the time of the attack on the Ali Jabers in 2012, Yemen was not a conflict zone. Nor does the case concern peacetime law enforcement measures. As shown by the justifications offered by the United States Government, this case turns on the third condition: whether the killing of the Ali Jabers was incident to a lawful use of military force in self-defense. As shown below, that issue is governed by judicially manageable standards of international law.

These threshold questions respecting the justification of the use of force are key because the proper application of the right to life depends on the answer. The duty to protect the right to life is mandated throughout international law, including in treaties, customary international law, and as *jus cogens*. The International Covenant on Civil and Political Rights, to which the United States is a party, restates the rule in a universally accepted

form:

> Article 6 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his right to life.[3]

A. Zone of Armed Conflict

Under customary international law an "armed conflict" exists – and thus condition (1) is met -- if and only if organized armed groups are engaged in fighting of a certain intensity. These factors trigger the law governing the conduct of military operations or international humanitarian law. International Law Association, *Final Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law* (2010), available at http://www.ila-hq.org/en/committees/index.cfm/cid/1022.[4] See also, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845 (2009), cited in *Department of Justice White Paper on Lawfulness of a*

[3] The Covenant may be found at http://www2.ohchr.org/english/law/ccpr.htm.

[4] The Report was prepared for the International Law Association the world's oldest and largest organization of international lawyers. The 2010 Use of Force Committee consisted of 18 experts on the law regulating resort to force, the *jus ad bellum*. The experts came from 15 different countries and five continents. They reviewed hundreds of violent incidents during a 65-year period to assess the state practice and *opinio juris* on the definition of armed conflict. The Report was adopted by 700 members of the ILA at the final meeting of the 2010 Biennial in The Hague.

Lethal Operation Directed against a US Citizen who is a Senior Operational Leader of Al-Qaida or Associated Force, at 4. [5]

The law of armed conflict provides that members of the regular forces of a state party to a conflict will not be charged with a crime for killing enemy fighters, so long as the killing respects the rules governing targeting, especially the principles to distinguish noncombatants, to take precautions, and to respect the limits of necessity, proportionality, and humanity.

As Ali Jaber argues in this case, armed conflict was not occurring in Yemen at the time of the drone attack at issue. In the DOJ White Paper cited above, this was acknowledged. DOJ White Paper, at 2.

B. Peacetime Law Enforcement

Outside an armed conflict, except in self-defense against an armed attack (condition 3 below), authorities may exercise lethal force only when "absolutely necessary in the defence of persons from unlawful violence." *McCann & Others v United Kingdom*, Series A no 324, App no 18984/91 (1995). Similarly, the *United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials* ("*UN Basic Principles"*), widely adopted by police in the United States and throughout the world, provide in Article 9:

[5] https://www.documentcloud.org/documents/602342-draft-white-paper.html

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[6]

> These tests prohibit the use of bombs and missiles as law enforcement weapons because such weapons are too imprecise and risk bystander lives and destruction of property. Bystanders' lives may not be put at risk in peacetime. There is no margin for "collateral damage".

These international law restrictions on resort to lethal force in peacetime are reflected in the Fourth and Fifth Amendments to the United States Constitution. American courts have creatively interpreted the Constitution's Fourth Amendment protection from "unreasonable searches and seizures" to find restrictions on the use of lethal force by government officials. *Tennessee v. Garner*, 471 U.S. 1 (1985). The Fifth Amendment guarantee of due process also incorporates the protection of life from the excessive use of lethal force by governments. *See Al-Aulaqi v. Panetta,* 35 F. Supp. at 72 ("The due process clause of the Fifth Amendment was intended to secure the individual from arbitrary exercises of governmental power. …

[6] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27 to Sept. 7, 1990, http://www2ohchr.org/english/law/firearms.htm.

To state a procedural due process claim, a plaintiff must establish that he had a protected interest in life, liberty or property, *see* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) …).

United States officials have not claimed, nor could they, that the drone attack in which the Ali Jabers were killed was "strictly necessary" to avoid an "imminent" threat of death or serious injury.

C. Military Self-Defense

The lawful basis for lethal drone strikes in Yemen most often asserted by United States officials is the lawful resort to military force under international law of self-defense. See e.g., DOJ White Paper, at 2.

The relevant international law on the use of force is found in the United Nations Charter. The Charter mandates that states are prohibited from using force. Only two narrow exceptions are expressly provided. States may seek a United Nations Security Council authorization under Chapter VII of the Charter, or they may resort to force in self-defense under the terms of Article 51. An argument exists that governments in effective control of a country may invite outside assistance to repress armed rebellion. The Security Council did not authorize force Yemen in 2012, nor did the requisite invitation exist from Government of Yemen. The U.S. could invoke

only self-defense. This is the basis that the United States has most often invoked for drone attacks in Yemen.

The United States was the principal drafter of the Charter and the sole drafter of Article 51.[7] Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The International Court of Justice (ICJ), the principal judicial organ of the United Nations and the only court with general jurisdiction over states on matters of international law, has applied Article 51 in a number of cases. It has found that military force in self-defense may be used only in response to a significant attack and only when the response is necessary and proportionate to the threat. *Military and Paramilitary Activities in and around Nicaragua* (*Nicar. v. U.S.*), 1986 I.C.J. 98, ¶¶ 194-95 (June 27) [hereinafter *Nicaragua*]; *see also* Eritrea-Ethiopia Claims, Partial Award, *Jus Ad Bellum,* Ethiopia's Claims 1-8, Dec. 19, 2005, www.pca-cpa.org and

[7] *See* STEPHEN C. SCHLESINGER, ACT OF CREATION, THE FOUNDING OF THE UNITED NATIONS, A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD (2003).

Oil Platforms (Iran v. U.S.), 2003 I.C.J., at ¶ 51. Moreover, the response may be directed only against the territory, planes, or ships of a state responsible for the initial significant attack. *Case Concerning the Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J., ¶ 147 (Dec. 19).

The scope of the right of self-defense is further limited by the *jus ad bellum* principles of necessity and proportionality. In addition to demonstrating a lawful basis for using force, states must also show that force is necessary to achieve a defensive purpose. If a state can make that showing, it must then show that the method of force used will not result in a disproportionate loss of life and destruction compared to the value of the objective. Although these principles of necessity and proportionality are not expressly mentioned in the Charter, in *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, the ICJ found "a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[8]

[8] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 245 (July 8) (quoting I.C.J. Reports 1986 at 94). *See also*

The foregoing rules on the use of force are among the most important in international law. They are among the *jus cogens* prohibitions. The *Restatement* Third of American Foreign Relations Law defines *jus cogens*:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character…

In *Committee of U.S. Citizens Living in Nicaragua*, this Court listed the widely recognized *jus cogens* norms as including "the principles of the United Nations Charter prohibiting the use of force."[9] The International Court of Justice recently indicated that the rules of civilian protection during armed conflict are also *jus cogens*. *Jurisdictional Immunities of the State* (Ger. v. Italy, Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 93 (February 3). Leading human rights scholar Christof Heyns has written persuasively that the right to life in general should be counted among the highest international legal norms. [10]

Nicaragua, 1986 I.C.J. at 94; Oil Platforms (Iran v. U.S.), 2003 I.C.J.161, 198 (Nov. 6).

[9] Committee of U.S. Citizens, citing the Restatement, § 702 & comment n.

[10] Christof Heyns and Thomas Probert, *Securing the Right to Life: A Cornerstone of the Human Rights System*, EJIL TALK!, May 11, 2016, http://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-

A norm in the category of *jus cogens* does not change according to the rules governing treaties and customary international law. States may attempt to change the United Nations Charter or argue that the rules on self-defense have evolved to reflect new state practice. As components of the norm against aggression, however, the rules on self-defense remain stable regardless of contrary state practice. James Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. OF INT'L L. 215 (2011). Practice inconsistent with the prohibition on the use of force violates the prohibition; it does not change it. Further, *jus cogens* norms are *prima facie* the type of norms the Supreme Court defines as actionable within the Alien Tort Statute's reference to "violations of the law of nations." *Jus cogens* norms are clearly "definable, universal and obligatory". *Sosa v. Alvarez–Machain,* 542 U.S. 692, 732-733, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004)

II. The United States Government defends its targeted killing operations as justified under the international law regulating the use of lethal force

The international law reviewed in the previous section is the very law that the United States Government has cited to support drone killings in

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human-rights-system/

speeches and documents since March 2010. The Government asserts alternative interpretations of several of these rules. The Government's interpretations raise the type of justiciable issues that courts deal with every day. High Government officials arguing for the legality of drone strikes have included State Department Legal Advisers, the Department of Defense General Counsel, the Attorney General, and the President.

In March 2010, State Department Legal Adviser Harold Koh, in a speech at the American Society of International Law Annual Meeting, said in reference to drone attacks, "*U.S. targeting practices... comply with all applicable law, including the laws of war,*"[11] and that "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[12] In a March 2012 address at Northwestern University Law School, Attorney General Eric Holder stated:

> In response to the attacks perpetrated . . . by al Qaeda, the Taliban, and associated forces, Congress has authorized the

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[11] Harold Hongju Koh, Legal Advisor, State Dep't, The Obama Administration and International Law, Remarks at Annual Meeting of Am. Soc'y of Int'l Law, Washington, D.C., at 10 (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm (accessed 8 Aug. 2012)(emphasis in the original.)

[12] *Id*.

> President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense.[13]

In comments at Fordham Law School in March 2013, former Defense Department General Counsel and now Secretary of Homeland Security Jeh Johnson, called on the Obama administration to continue efforts at "transparency" about its legal arguments -- "and not just to keep the press, Congress and the courts off its back, when its back is against the wall."[14]

In February 2013, a detailed legal memorandum prepared by the Department of Justice Office of Legal Counsel provided detailed interpretation of the international law on self-defense. The purpose of the memo was to make a colorable case for the legality of hunting and killing an American citizen abroad, outside of armed conflict hostilities. DOJ White Paper, at pp. 1-2.

In a May 22, 2013, letter from Attorney General Holder to Chairman of the Senate Judiciary Committee Patrick Leahy, the Attorney General openly

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[13] Eric Holder, Att'y Gen., Address at Northwestern Univ. School of Law (Mar. 5, 2012) (transcript available at [add link]) (accessed [add date]).
[14] Jeh Johnson, Sec'y of Homeland Sec., A "Drone Court": Some Pros and Cons, Keynote Address at Fordham Univ. School of Law (Mar. 18, 2013) http://www.centeronnationalsecurity.org/past-events-1/?offset=1366063200000.

confirmed the killings of four American citizens in US counterterrorism operations "outside of areas of active hostilities," while stating that such operations are to be conducted, "in a manner consistent with applicable law of war principles."[15] The Attorney General did not attempt to justify how the laws of war could apply outside armed conflict hostilities. The next day, President Obama stated in a speech at the National Defense University:

> Moreover, America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war -- a war waged proportionally, in last resort, and in self-defense.[16]

President Obama indirectly acknowledged problems with the administration's attempted legal justifications for drone attacks. He expressed concern about other governments taking up the practice of drone attacks beyond armed conflict zones. The President announced that his administration would develop presidential policy guidance for the use of military force "outside of areas of active hostilities". The administration just announced it would try to hold other governments to these "rules" out of

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[15] Letter from Eric Holder, Att'y Gen., to Patrick Leahy, Chairman, Sen. Jud. Comm. (May 22, 2013).

[16] President Barack Obama, Address at the Nat'l Def. Univ. (May 23, 2013) (transcript available at https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university)

concern that use of unmanned drones could become lawless following the U.S. example. http://www.defensenews.com/articles/us-seeking-global-armed-drone-export-rules.

A redacted version of the Presidential Policy Guidance (PPG) was released to the public in July 2016, as part of a Freedom of Information Act lawsuit brought by the American Civil Liberties Union against the Department of Justice, *ACLU v. Department of Justice*, 15-cv-01954.[17] In the preamble, the Guidance affirms: "*First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks."[18] The claims of the Ali Jabers concern whether the Government has conformed its practices in fact to that legal basis.

The current Legal Adviser to the State Department, Brian Egan, speaking to the American Society of International Law in April 2016, announced that the administration now argues the law of self-defense has evolved to permit attacks on states that have not first attacked as required under Article 51 of the UN Charter.[19] The Legal Adviser said the United States may lawfully

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[17] https://www.aclu.org/foia-document/presidential-policy-guidance?redirect=node/58033

[18] *Id*. (emphasis in original).

[19] Brian Egan, Legal Advisor, State Dep't, International Law, *Diplomacy, and the Counter-ISIL Campaign*, Address at the Am. Soc'y of Int'l Law

exercise military force in states "unable or unwilling" to prevent terrorism. In answer to a question by one of the authors of this brief as to the legal authority for such an assertion, Egan replied that there are "some cases" in support.[20] He did not list the cases then or since or explain how a norm of *jus cogens* can change in the way he argued. Disclosure of cases forming the authority for a legal argument in justification of government conduct would be expected in a judicial proceeding.

III. Courts regularly demonstrate the capacity to adjudicate the legality of government exercise of lethal force in war and peace

National, regional, and international courts deal with the rules on resort to and conduct of military force regularly. Already in this amicus brief numerous such decisions of United States and international courts have been cited. We add to those decisions here, including prominent cases in which courts focused directly on the competence of courts to apply international law in adjudicating disputes about the use of force, including the use of force in military self-defense.

The International Court of Justice decided the most important case on the international law of self-defense in 1986. In *Military and Paramilitary*

(Apr. 1, 2016) (transcript available at http://www.state.gov/s/l/releases/remarks/255493.htm.

[20] *Id.*

Activities in and against Nicaragua (Nicaragua v. United States), 1986 ICJ 14 (Judgment of June 27), the ICJ carefully assessed the justiciability of Reagan administration claims of a legal right to attack Nicaragua under the international law of self-defense:

> 33. … Before proceeding further, the Court considers it appropriate to deal with a preliminary question, relating to what may be referred to as the justiciability of the dispute submitted to it by Nicaragua. …
>
> The United States … advanced a number of grounds why the Court should find that it had no jurisdiction, or that the claim was not admissible … without ever advancing the more radical argument that … the dispute brought before the Court by Nicaragua was not a "legal dispute". Similarly, while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations … it was careful to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind. …
>
> 34. There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter. …
>
> 35. … [W]hat is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The Court has therefore to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence. … Accordingly the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.

Id. at 26-28.

Regional courts and commissions have decided many cases on the lawfulness of the use of force under international law. The European Court of Human Rights has adjudicated numerous claims involving the use of force and the need to determine whether the situations amounted to armed conflict. See, e.g., *Isayeva, Yusopova and Bazayeva v. Russia*, App. Nos. 57947/00, 57948/00 and 57949/00, Eur. Ct. H.R., (Feb. 24, 2005);[21] *Khashiyev & Akayeva v. Russia*, App. Nos. 57942/00 and 57945/00, Eur. Ct. H.R. (Feb. 24, 2005),[22] and *Ergi v. Turkey*, 66/1997/850/057 Eur. Ct. H.R. (July 28, 1998)[23]. The Inter-American Commission of Human Rights characterized an engagement of Argentina's armed forces with organized, armed militants that lasted thirty hours and resulted in casualties and property destruction as an armed conflict. *Juan Carlos Abella v Argentina*, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.98, Doc. 6 rev., 18 November 1997, ¶¶ 149-50. The Commission distinguished "internal disturbances" from armed conflict on the basis of the nature and level of violence involved.

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[21] http://www.echr.coe.int/echr/
[22] *Id.*
[23] *Id*

National courts also regularly apply international law to adjudicate claims arising from government uses of force. United States courts have adjudicated legal issues relating to international law and the use of force since soon after the founding of the Republic. *See, e.g., Bas v. Tingy*, 4 Dall. (4 U.S.) 37, 43 (1800). A number of these cases are also cited above.

The Supreme Court of Israel found in 2006 that Israel was engaged in a "continuous state of armed conflict" with various "terrorist organizations" due to the "constant, continual, and murderous waves of terrorist attacks" and the armed response to these. The most important factor for the court in reaching this determination was the number of persons killed on both sides. *Public Committee Against Torture in Israel v Israel*, HCJ 769/02 (Dec. 14, 2006). The Israeli Supreme Court has also ruled in a number of cases on the existence of an armed conflict as the threshold question in determining whether international humanitarian or international human rights law applied to Israeli government uses of force in Gaza. *See, e.g.*, *id*. and cases cited therein. In *Physicians for Human Rights v. Israel*, the Israeli government argued that the plaintiffs' claims were non-justiciable issues where there was an on-going use of military force in the Gaza Strip. The court rejected the argument, explaining "we do not substitute our discretion for that of the military commander's, as far as it concerns military considerations. That is

his expertise. We examine the results on the plane of humanitarian law. That is our expertise." HCJ 4764/04, *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, ¶ 5. The Israeli Supreme Court "sees itself as an 'essential part' of the 'democratic triangle' (legislature-executive-judiciary), and understanding its role as the 'main guardian of the rule of law.'" Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* 146 (2014), citing Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 NYU J. INT'L L. & POL. 67, 96 (2006).

In 2013, the Peshawar High Court of Justice in Pakistan ruled that under the United Nations Charter and other international law, the U.S. targeted killing attacks using drones in Pakistan were unlawful. The court concluded that the attacks violated the right to life of Pakistani citizens. *Sabir v. Ministry of Defense*, Peshawar High Court of Justice (No. 1551-P/2012, Nov. 4, 2013). The Russian Constitutional Court found that the conflict between Russian forces and Chechnyan rebel forces in the mid-1990s qualified as a "non-international armed conflict" as the term is used in the 1949 Geneva Conventions on the protect of victims of armed conflict. See

Presidential Decrees and Federal government's Resolution on the Situation in Chechnya, Judgment of July 31, 1995.

United Kingdom courts have decided many cases under international law relevant to aspects of armed conflict. In a 2010 case, a claimant challenged the legality under international law of United Kingdom transfers of detainees from UK detention to Afghanistan's custody. The court applied international law to find that despite risks posed to detainees once transferred, the UK practice conformed with international legal obligations. *R (on the application of Maya Evans) and Secretary of State for Defence* [2010] EWHC 1445 (Admin). In 2016, A UK parliamentary committee released a report on a UK targeted killing using a drone in Syria in August 2015. The Committee investigated the government's claim to be acting under the "international law governing the use of force". It undertook the investigation for two main reasons:

> [F]irst, because of the importance we attach, as a human rights committee, to compliance with the rule of law, including international law; and second, because of the need to provide reassurance to all those involved in implementing the Government's policy that they are not running the risk of criminal prosecution.

The Committee thus recognized the justiciable nature of the legal issues raised in cases of targeted killing with drones. House of Lords, House of Commons Joint Committee on Human Rights, *The Government's policy on*

the use of drones for targeted killing (Second Report of Session 2015-16, HL Paper 141, HC 574) p. 20.[24]

CONCLUSION

Fifteen years after 9/11 and the first use of drones for targeted killing, it is essential that courts adjudicate the legality of the practice. The Supreme Court has made it clear that the courts must ensure the executive does not receive a blank check even in military matters. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Courts are competent to apply the judicially manageable standards of international law that govern this case. The Obama administration has acknowledged again and again that the international law on the use of force, international humanitarian law, and international human rights law apply to U.S. targeted killing. The adversary process lends itself to the production of well-crafted alternative views of the law for the Court's assessment of whether the government is correctly interpreting its international legal obligations.

Equally, the facts of the case are within the reach of the court. This case involves a drone-launched Hellfire missile attack. The facts of such an

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[24] Available at https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/uk-drone-policy-15-16/

attack can be more easily ascertained than many cases involving police use of bullets. American courts are expected to adjudicate claims of excessive use of force by the police in the death of a single person. This case asks the court to assess the legality of a use of major firepower in which five people died. The failure to scrutinize the claim as non-justiciable would amount to a failure of the courts to hold the executive to the very law the Government acknowledges it must obey.

Respectfully Submitted,

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Statement of Compliance

This brief complies with the type-volume limitation of 7,000 words in FRAP 32. It contains 5,700 words, including footnotes, but excluding those portions of the brief exempted by FRAP 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface, Time New Roman, in 14-point font.

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CERTIFICATION FOR SEPARATE BRIEF

Having consulted with other amici who support plaintiffs-appellants on this appeal, the undersigned certifies that in her judgment, this separate amicus brief is necessary because it addresses issues distinct from those addressed by other amici.

/ss/

Mary Ellen O'Connell

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, a copy of the foregoing brief was filed with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit using the Court's ECF electronic filing system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that pursuant to D.C. Circuit Rules eight true and correct copies of the foregoing will be sent via First Class U.S. Mail to the Clerk of the Court and two true and correct copies via First Class U.S. Mail to the following:

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