Claim No. [ ]

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN

on the application of

CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defendant

STATEMENT OF FACTS AND DETAILED STATEMENT OF GROUNDS

Referencing:	References to the Application Bundle are in the format [*AB Tab page – Tab page*]. References in the format [§1] refer to paragraph numbers.
Suggested Pre-Reading:	Claimant's SFG and attached Annexes (providing chronology of allegations of violations of IHL by Saudi Coalition in Yemen) Common Position 2008/944/CFSP [AB E(EU)1-E(UK)5]; Consolidated EU and National Arms Export Licensing Criteria [AB E(UK)5- E(UK)11]. User's Guide to Council Common Position 2008/944/CFSP (Introductory Note and Sections 1, 2 and 7) [AB C115-C269] C's Letter's of 9 November 2015 [AB D1-D9] and 8 January 2016[AB D17-D35]; D's Letters of 9 December 2015 [AB D11-D16] and 16 February 2016 [AB D46-D56] Report of UN Panel of Experts on Yemen, 26 January 2016, Sections I, V, VI and Annexes 52-56 and 60-62 [*AB* B(UN)90-B(UN)150]

A. INTRODUCTION

1. The Claimant ("CAAT") is a UK-based non-governmental organisation, which campaigns to end the international arms trade. CAAT aims: (1) to stop the procurement or export of arms where they might: exacerbate conflict, support aggression, or increase tension; support an oppressive regime or undermine democracy; or threaten social welfare through the level of military spending; (2) to end all government political and financial support for arms exports; and (3) to promote progressive demilitarisation within arms-producing countries.

2. The Defendant is the Secretary of State responsible for granting, suspending and revoking export licences under the UK's export control regime. In these proceedings, CAAT challenges:

    (a) the Defendant's on-going failure to suspend extant export licences for the sale or transfer of arms and military equipment to Saudi Arabia ("SA") for possible use in the conflict in Yemen; and

    (b) the Defendant's decision, communicated to the Claimant on 9 December 2015, to continue to grant new licences for the sale or transfer of arms or military equipment to Saudi Arabia in respect of such equipment.

3. To enable it to bring these proceedings, CAAT seeks a protective costs order (see separate application). The Claimant also seeks an order for expedition, for reasons set out at the end of the present document.

4. The Claimant notes that persons who have been granted licences by the Defendant for the export of military equipment to Saudi Arabia will, where they remain extant, be directly affected by the present claim and, as such, are entitled to participate as interested parties. The Claimant is unaware of the identities of the businesses affected and so has not formally added such persons as interested parties. The Claimant trusts that the Defendant knows the identities of such persons and can take appropriate steps to notify them of the present challenge to enable them to be joined as interested parties if they wish to do so.

B. SUMMARY OF BASIS OF CHALLENGE AND RELIEF SOUGHT

5. Yemen is presently engulfed in a bitterly contested armed conflict between pro- and anti-government forces,[1] which has – on any view – resulted in a great deal of civilian bloodshed.

1 The government of Abd Rabbuh Mansur Hadi, is recognized by the United Nations Security Council as the legitimate government of Yemen. *See* Security Council Resolution S/RES/2216 (2015) [*AB* E(INT)123 - E(INT)130]

An international coalition, led by SA,[2] has intervened in this conflict. It has been alleged that all sides in the conflict, including the Coalition, have perpetrated serious violations of international humanitarian law ("IHL"). These allegations have recently resulted in unequivocal findings that the Coalition has repeatedly breached IHL by a UN Panel of Experts on Yemen appointed by the UN Security Council ("the UN Expert Panel Report")[3] and by the European Parliament ("EP"). The latter on 8 July 2015 passed Resolution 2015/2760, which declared that air strikes by the Saudi Coalition in Yemen had inflicted civilian deaths "in violation of [IHL]". On 25 February 2016, the EP passed Resolution 2016/2515, which declared that the export of arms and military equipment to Saudi Arabia for use in Yemen by Member States was "*in violation of Common Position 2008/944/CFSP*" ("the Common Position"), given the risk of such military equipment being used in the perpetration of serious violations of IHL.

6. The Common Position is given legal effect in domestic law through the Consolidated EU and National Arms Export Licensing Criteria ("the Consolidated Criteria"), which seek to ensure that arms export decisions "are fully compliant with [the UK's] obligations under the EU Common Position and the Arms Trade Treaty".

7. For reasons developed below, CAAT challenges the Defendant's refusal to suspend export licences to Saudi Arabia and its decision to continue to grant new export licences to SA as unlawful on the following grounds:

   a. In assessing whether there exists a "**clear risk**" that military technology or equipment "**might** be used in the commission of serious violations of international humanitarian law" (as per Criterion 2 (c) of the Consolidated Criteria) the government failed to make sufficient enquiries to enable a lawful decision to be reached and, in particular, failed to obtain any or sufficient information or answers to questions regarded as significant by EU Guidance, namely the *User's Guide to the European Code of Conduct on Exports of Military Equipment* ("the Guidance"). As such, in reaching its assessment, material and important issues were not taken into account. These flaws in decision-making were all the more significant since (as is accepted by the Defendant) he is required by the government's own policy set out in the Consolidated Criteria (and by the Common Position) to "exercise special caution

2 The other states comprising the Saudi Coalition include Bahrain, Egypt, Jordan, Kuwait, Morocco, Qatar, Sudan and the United Arab Emirates ("UAE").

3

<u>and vigilance</u> in issuing licences" for the export of arms to Saudi Arabia (see Criterion 2 (b) of the Consolidated Criteria).

b. Further, or alternatively, the Defendant has failed to apply, properly or at all, its "suspension mechanism". That mechanism provides for the suspension of extant licences and for a moratorium on the granting of new licences where a proper risk assessment cannot properly be conducted and/or where it cannot be conducted on the basis of "reliable evidence" (as required by the Consolidated Criteria). As set out below, the Defendant does not have (and has not obtained from SA) information that is key to a proper application of the Consolidated Criteria. In these circumstances, especially given the "special caution and vigilance" required in respect of Saudi Arabia, the Defendant failed properly to apply its own suspension mechanism.

c. Further, or alternatively, the Defendant has irrationally concluded that the test set out in Criterion 2 (c) in the Consolidated Criteria (which deliberately sets a low threshold), is satisfied in respect of the export of military equipment to Saudi Arabia for possible use in Yemen. Overwhelming evidence of violations by SA exists, including the authoritative findings of UN agencies and officials, with a mandate for the protection of human rights and IHL and the investigation of violations. The Defendant offers no rational basis to suggest that the findings of these bodies are so clearly wrong that there can be said to be no "clear risk" that violations "might" occur.

8. The Claimant seeks the following relief:

   a. A prohibiting order prohibiting the Defendant from granting further export licences for the sale or transfer of arms or military equipment to Saudi Arabia, for possible use in the conflict in Yemen, pending a lawful review by the Secretary of State as to whether such sales comply with the EU Common Position and/or the Consolidated Criteria.

   b. A mandatory order requiring the Defendant to suspend extant licences for the sale or transfer of arms or military equipment to Saudi Arabia for possible use in the conflict in Yemen, pending a lawful review by the Secretary of State as to whether such sales comply with the EU Common Position and/or the Consolidated Criteria.

c. A quashing order quashing the Secretary of State's decision, communicated by letter of 9 December, to continue to grant new licences for the sale or transfer of arms or military equipment to Saudi Arabia in respect of such equipment.

d. Such further or other relief, including declaratory relief, as the Court thinks fit.

C. FACTUAL BACKGROUND

9. A conflict has been on-going in Yemen since at least 2015 between groups claiming to constitute the legitimate Yemeni government. Armed forces loyal to the government of Abd Rabbuh Mansur Hadi are presently engaged in hostilities with Houthi forces and militias loyal to the former president Ali Abdullah Saleh. In March 2015 the Saudi Arabia-led coalition ("the Saudi Coalition") commenced a military campaign, targeting Houthis and allied rebel groups. This military campaign has involved substantial numbers of air strikes against a wide variety of targets. This Saudi Coalition military campaign is on-going.

10. The Defendant has approved export licences for a wide range of military equipment for export to Saudi Arabia, including military equipment which is being used, or which may be used, in the conflict in Yemen. This equipment includes, *inter alia*, precision guided missiles, military improvised explosive devices and other munitions, components, equipment and technology for Saudi Arabia's fleet of Typhoon Eurofighter aircraft including military aero-engines, military communications equipment, components for military helicopters, components for gun turrets, components for military support aircraft, military support vehicles and associated technology.

(i) Evidence regarding Violations of the Laws of War by the Coalition

11. The conflict in Yemen has caused enormous loss of civilian life and a humanitarian crisis. According to the UN Office for Coordination of Humanitarian Affairs (UNOCHA), 93% of casualties caused by the use of air-launched explosive weapons in populated areas are reported to be civilian.[4] On numerous occasions international organizations (including the United Nations, its senior human rights officials, the European Parliament and many humanitarian and human rights NGOs) have condemned Saudi Coalition airstrikes in Yemen as constituting serious violations of international humanitarian law. The instances of such condemnation are too numerous to set out, in full, in these grounds. They are, however, summarized below.

4 State of Crisis: Explosive Weapons in Yemen, UN Office for the Coordination of Humanitarian Affairs, 22 September 2015 [*AB* B(UN)45-B(UN)48]

12. The violations of IHL found by these bodies include (1) failure to take "all precautions in attack" as required by IHL; (2) attacks causing disproportionate harm to civilians and civilian objects (3) failure to adhere to the principle of distinction and/or the targeting of civilians and civilian objects and those not directly participating in hostilities, including facilities necessary to meet basic humanitarian needs such as electricity and water-processing plants (4) the destruction of Cultural Property contrary to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its Protocols and/or a failure to adhere to the immunity to be afforded to such property during armed conflict. The particular findings of international organizations and agencies are set out below.

(ii) The Findings of UN Agencies and Officials

13. As explained in Annex I [A40-A50], the UN and its senior officials have found that Saudi Coalition air strikes (and other conduct in Yemen) has repeatedly violated IHL. Such condemnation has emanated from the UN Secretary General, the UN Panel of Experts on Yemen, the Under-Secretary General for Humanitarian Affairs, the UN High Commissioner for Human Rights, the Coordinator for the UN Office for the Coordination of Humanitarian Affairs ("UNOCHA") in Yemen and the Director General of UNESCO among others.

14. In Resolution 2140 (2014), the UN Security Council established a panel of experts to investigate those who engaged in or provided support for acts that threatened the peace, security or stability of Yemen (including violations of applicable IHL/IHRL). The Panel of Experts submitted a detailed, final report to the Security Council on the situation in Yemen, in January 2016. The report's findings have been widely publicized in the media. The Expert Panel found that the Saudi Coalition had violated IHL, at times, on a "widespread and systematic" basis and that this has the "potential to meet the criteria for a crime against humanity".[5] In particular the Panel found as follows:

14.1. The Coalition's targeting of civilian's through air strikes, either by bombing residential neighbourhoods or by treating the entire cities of Sa'ada and Marran as military targets is a grave violation of the principles of distinction, proportionality and precaution. Such attacks were, on occasion, conducted in a widespread and systematic manner [Expert Panel Report, 128]. The Claimant notes the potential significance of this observation as a matter of international

5 In preparing its analysis, the Panel conducted interviews with eyewitnesses, including refugees, humanitarian organizations, journalists and local activists. Satellite imagery was also relied upon.

law since “widespread” or “systematic” violations of certain rules of IHL, including indiscriminate killing, may constitute crimes against humanity.

14.2. The Panel documented 119 coalition sorties relating to violations of international humanitarian law, many involving multiple airstrikes on multiple civilian objects [Expert Panel Report, 138].

14.3. The Panel documented three alleged cases of civilians fleeing residential bombings and being chased and shot at by helicopters [Report, at 138].

14.4. On 8 May 2015, the entire cities of Sa’ada and Marran were declared “military targets” by Brigadier General Assiri on behalf of the coalition.[6] The Panel found that Sa’ada remains one of the most systematically targeted and devastated cities in Yemen, as a result of Coalition air strikes. The Panel observed that the targeting of the entire cities is in direct violation of IHL [Expert Panel Report, 139-140].

14.5. The city of Sa’ada faced systematic indiscriminate attacks by the Coalition, including on hospitals, schools, mosques [Expert Panel Report, 140].

14.6. The Panel notes that the United Arab Emirates (one of SA’s coalition partners) has deployed mercenaries in the conflict in Yemen which it states “increases the likelihood of violations of international humanitarian law” [Expert Panel Report, 143].

14.7. The panel found that lax accountability measures on the part of the Coalition and the legitimate government of Yemen may have resulted in the diversion of weapons into the hands of radical groups and to the black market. The panel found that there exists a pattern of weapons diversion [Expert Panel Report, 84].

15. Also highly relevant to the targeting practices of the Saudi Coalition is the statement by Brigadier General Assiri (spokesman for the Saudi Coalition) as to how militia activities along the Saudi/Yemen border would be addressed. He stated “now our rules of engagement are: you are close to the border, you are killed”.[7] As set out in more detail below, these statements constitute direct evidence of targeting practices that are plainly contrary to IHL, in particular, the principle of distinction between combatants and civilians and the prohibition on indiscriminate targeting.

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6 Joint Letter to Human Rights Council, Human Rights Watch and Ors, 23 February 2016, [*AB* B(HRW)165- B(HRW)167]

7 Reuters, Saudi Arabia says 375 civilians killed on its border in Yemen War, 1 February 2016, [*AB* B(P)21-B(P)22]

16. Other UN agencies have also condemned Coalition air strikes. On 28 September 2015, the UN Secretary General condemned a Coalition airstrike which hit a wedding party, killing 135 people in Wahijdah, a Yemeni village. The Secretary General recalled that "[a]ny intentional attack against civilians is considered a serious violation of international humanitarian law. Violations of international law should be investigated through prompt, effective, independent and impartial mechanisms to ensure accountability".[8] Recently, on 2 December 2015, the office of the UN Secretary General issued the following statement:

> "The Secretary-General condemns the airstrikes today by the Saudi-led Coalition on a mobile health clinic run by Médecins Sans Frontières (MSF) in Taiz city, Yemen. According to MSF, the strikes resulted in injuries to seven people and destroyed the clinic. He had condemned an earlier incident on 27 October during which a hospital run by MSF in Sa'ada province was hit by airstrikes."

The Secretary-General underscored that medical facilities and medical personnel are explicitly protected under IHL. He called for a prompt, effective and impartial investigation into the incident.[9] The Saudi coalition had been given the coordinates of the clinic, according to MSF.[10] Similarly, speaking to the BBC, Johannes Van der Klaauw, the UN Humanitarian Coordinator in Yemen had condemned the shelling of schools and hospitals by the Saudi Coalition.[11]

17. In June 2015, the UN High Commissioner for Human Rights, stated that "my office has received information suggesting that indiscriminate and disproportionate attacks are being used on densely populated areas, including the attack on *Al Mazraq* camp". At least 40 people were killed on 30 March 2015, when a camp of internally displaced civilians was attacked. On 19 August 2015, Stephen O'Brien, the Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator of the OCHA, reported to the UN Security Council, that the "scale of human suffering [in Yemen] is almost incomprehensible". O'Brien specifically condemned "attacks on residential areas and civilian

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8 Statement attributable to the Spokesman for the Secretary-General on Yemen, 28 September 2015 [*AB* B(UN)36]

9 UN Secretary General, Ban Ki-Moon, Statement attributable to the Spokesman for the Secretary-General on Yemen, 2 December 2015

10 Médecins Sans Frontières, 'Yemen: Nine wounded in Saudi-led coalition airstrike on MSF clinic in Taiz' [B(MSF)5-B(MSF)6] Yemen conflict: MSF hospital destroyed by airstrikes, BBC News, 27 October 2015 [*AB* B(UN)54]

11 Gabriel Gatehouse, 'Inside Yemen's Forgotten War' BBC Newsnight, 11 September *2015 [AB* B(P)1-B(P)4]

infrastructure". He stated: "these attacks are in clear contravention of international humanitarian law and are unacceptable".[12]

18. Air strikes by the Saudi Coalition have also damaged or destroyed important sites of cultural property. These attacks have been condemned by UN Educational, Scientific and Cultural Organisation (UNESCO) (which, again, has specific expertise and responsibilities in this area) as a violation of IHL. On 12 June 2015, UNESCO condemned the destruction of a world heritage site in Yemen – specifically parts of the old city in Sena'a, as a result of a Coalition air strike.[13] On 17 September 2015, UNESCO "deplored" the destruction of parts of the ancient city of Baraqish by Coalition bombing. The Director General of UNESCO stated that she was "grieved by the senseless destruction of one of the richest cultures in the Arab region" and "again urge[d] all parties to refrain from any military use or targeting of cultural heritage sites and monuments, in respect of their obligations under international humanitarian law, notably the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols".[14]

(iii) The Position of the European Parliament

19. By a resolution passed on 25 February 2016,[15] the EP describes the Coalition intervention in Yemen as having caused a "disastrous humanitarian situation" and constituting "a threat to international peace and security". The Resolution "expresses grave concern" at the airstrikes by the Saudi Coalition and observes that the transfer of military equipment to Saudi Arabia is "***in violation of Common Position 2008/944/CFSP on arms export control, which explicitly rules out the authorising of arms licences by Member States if there is a clear risk that the military technology or equipment to be exported might be used to commit serious violations of international humanitarian law and to undermine regional peace, security and stability***" and calls for "an initiative aimed at imposing an EU arms embargo on Saudi Arabia given "the fact that the continued licensing of weapons sales to Saudi Arabia would therefore be in breach of Council Common Position 2008/944/CFSP of 8 December 2008".

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12 Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Stephen O'Brien 'Statement to the Security Council on Yemen', United Nations Office for the Coordination of Humanitarian Affairs, 19 August 2015 [*AB* B(UN)12-B(UN)14]

13 Director, Irina Borokova, 'The Director General of UNESCO condemns the destruction of historic buildings in the Old City of Sana'a, Yemen', UNESCO, 12 June 2015 [*AB* B(UN)3- B(UN)4]

14 Director, Irina Borokova, 'UNESCO Director-General deplores destruction of parts of ancient city of Baraqish, calls for protection of Yemen's heritage' UNESCO, 17 September 2015 [*AB* B(UN)35]

15 EP Resolution on the Humanitarian Situation in Yemen (Resolution 2016/2515 (RSP)), [*AB* B(EP)7-B(EP)11]

20. The European Parliament has also condemned airstrikes by the Saudi-led Coalition in Yemen in earlier resolutions. In Resolution 2015/2760(RSP), passed on 8 July 2015, the EU Parliament:

> "Condemn[ed] the air strikes by the Saudi-led coalition and the naval blockade it has imposed on Yemen, which have led to thousands of deaths, have further destabilised Yemen, have created conditions more conducive to the expansion of terrorist and extremist organisations such as ISIS/Da'esh and AQAP, and have exacerbated an already critical humanitarian situation."

21. The European Parliament further noted:

> "[O]n several occasions air strikes by the Saudi-led military coalition in Yemen have killed civilians, in violation of international humanitarian law, which requires all possible steps to be taken to prevent or minimise civilian casualties."[16]

22. On 17 November 2015, the EU Council adopted Conclusions on Yemen stating that the "EU is deeply concerned by the indiscriminate targeting of civilian infrastructure notably medical facilities, schools and water systems, ports and airports..."[17]

(iv) The Findings of Relief Organizations and NGOs

23. The International Committee of the Red Cross (ICRC), which has a specific legal mandate under the Geneva Conventions 1949 in respect of IHL and a great deal of expertise in this area, also condemned the airstrikes in Yemen by the Saudi Coalition. On 30 September 2015, the ICRC condemned the airstrike in which two of its workers were killed, observing that "[i]ndiscriminate air strikes and shelling have been going on in many parts of Yemen for more than six months, causing huge suffering to the civilian population".[18]

24. Detailed reports based on empirical evidence gathered by reputable NGOs including Amnesty International and Human Rights Watch demonstrate that targeting by the Saudi Coalition has been indiscriminate and/or disproportionate on numerous occasions. Full details of AI and HRW's investigations and findings are set out in Annexes IV [*AB* A63-A68] and V [*AB* A69-A74]. Both Human Rights Watch and Amnesty International prepared detailed reports on IHL violations in Yemen, following field investigations in Yemen itself,

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16 EP Resolution on the situation in Yemen (2015/2760(RSP), 9 July 2015 [*AB* B(EP)1-B(EP)6]

17 Council of the European Union, Outcome of the Council Meeting, 16-17 November 2015, EU 14120/15 [*AB* B(EC)16].

18 Yemen: Two volunteers of the International Red Cross and Red Crescent Movement killed in airstrike, ICRC, 30 September 2015 [*AB* B(ICRC)1-B(ICRC)2]

including site visits and speaking with witnesses. The Human Rights Watch report entitled "*What military target was in my brother's house? Unlawful Coalition Airstrikes in Yemen"* was published on 26 November 2015, [19] while Amnesty International published their investigation entitled "*Yemen: 'Nowhere safe for civilians': Airstrikes and ground attacks in Yemen*", in August 2015.[20]

25. Amnesty International's August investigation concluded that "[c]oalition strikes which killed and injured civilians and destroyed civilian property and infrastructure investigated by Amnesty International have been found to be frequently disproportionate or indiscriminate."[21] Amnesty International identified a pattern of apparent targeting of civilians and civilian objects. HRW's investigation reported on ten incidents, which killed at least 309 civilians. In all cases Human Rights Watch found evidence of serious violations of fundamental principles of IHL, including the principles of distinction, proportionality, precautions in attack and the selection of means and methods of warfare so as to minimise civilian casualties.

(v) Saudi Investigations and Assurances

26. Saudi Officials have offered the government an assurance that SA will seek to adhere to IHL in the conflict in Yemen. In a press conference on 31 January 2015 Saudi Coalition Spokesman Brigadier General Assiri, outlined the Coalition's processes to review military operations in Yemen. According to the General, each air force reviews operations in respect of performance and accuracy. Brigadier Assiri states that all allegations of violations of IHL are considered and that nothing is ignored. In addition, the Yemeni government has recently established a National Commission of Inquiry to consider violations of IHRL and IHL.

27. Saudi Arabia has published the result of one investigation (the attack on MSF hospital on 25 October 2015). The General indicates that the target in that instance was considered a "high

19 "What Military Target Was in My Brother's House" Unlawful Coalition Airstrikes in Yemen [*AB* B(HRW)62-B(HRW)140]. Examples of alleged violations include attacks on markets at Muthalith Ahim and Amran in civilian-dense areas where investigators could not identify any military objective, the use of wide-area explosive weaponry in residential areas, and the treatment of entire cities of Marran and Sa'ada as military objectives.

20 Yemen: 'Nowhere safe for civilians': Airstrikes and ground attacks in Yemen, Amnesty International, 17 August 2015, Index number: MDE 31/2291/2015. [*AB* B(AI)5-B(AI)33] The NGO examined eight air strikes by Coalition forces in Southern Yemen, including the targeted bombing of a residential compound on 24 July, 'killing at least 63 civilians and injuring 50 others'. In all of the airstrikes they investigated, including those on a school and a mosque, no legitimate targets could be identified.

21 Yemen: 'Nowhere safe for civilians': Airstrikes and ground attacks in Yemen, Amnesty International, 17 August 2015, Index number: MDE 31/2291/2015. [*AB* B(AI)5-B(AI)33]

value target" and "was attacked without verifying if there is a hospital or not..." (Coalition Statement, p. 5) This statement in itself is prima facie evidence of a violation of IHL (failure to take precautions in attack). As regards other investigations, the government state in their Response to LBC dated 16 February 2016, that aside from the 25 October incident, HMG is "aware of other investigations currently underway, for example into the alleged strike on a MSF mobile clinic on 2 December 2015, ***but we have not yet seen their conclusions***" (emphasis added), (Response to LBC, p. 9 [*AB* D54]). It therefore appears that the only investigation the conclusions of which the government has seen provides prima facie evidence of a violation of IHL.

28. The UN High Commissioner for Human Rights Zeid Ra'ad al-Hussein, has recommended the establishment of an Independent International Commission of Inquiry into violations of IHL by all sides in Yemen.[22] In September 2015, the Netherlands and other nations proposed a draft resolution to the UN Human Rights Council establishing an independent commission of inquiry. This proposal was opposed, and ultimately thwarted, by SA and other members of the Coalition.[23]

(vi) The UK Government's Approach

29. By correspondence of 9 December 2015 and 16 February 2016, the government has confirmed that it has granted licences for (and confirmed that it will continue to grant licences) for the supply of arms to the Saudi Arabia for use in the conflict in Yemen.[24] Licences are also understood to have been granted for the supply of arms and military equipment to other members of the Saudi Coalition.

30. The Defendant accepts that it has "concerns" regarding alleged violations of IHL in Yemen [Defendant's Letter of 9 December 2015, p. 2 [*AB* D12]. It states that these concerns have been raised with SA and that assurances have been received, at various levels, from the Saudi government. The government states that it has stressed to SA "the importance of conducting transparent investigations into all incidents" of alleged violations of IHL, but that the UK government itself "is not carrying out separate investigations_into these incidents" [Letter of 9 December 2015, p. 4, *AB* D14]. The government states, however, that the MOD

22 UNHCHR, Situation of Human Rights in Yemen, 7 September 2015, A/HRC/30/31 [*AB* B(UN)17-B(UN)34].

23 Saudi Objections Halt U.N. Inquiry of Yemen War, New York Times, 30 September 2015, [*AB* B(P)12-B(P)14].

24 'UK 'will support Saudi-led assault on Yemeni rebels - but not engaging in combat'', *Daily Telegraph*, 27 March 2015 [*AB* B(P)1-B(P)4]

monitors incidents of alleged violations of IHL in Yemen "using available information", including from "government sources, foreign governments, the media and international NGOs" [Letter of 9 December, p. 2, *AB* D12]. As part of this, the government says that the MOD is monitoring all "incidents of potential concern". The MOD assesses this information to monitor: who was responsible for an incident; whether there is a legitimate military target in the area; whether the strike was carried out using an item provided by a UK export licence and whether the incident complied with IHL (Defendant's Response to LBC, 16 February 2016, p.2 [*AB* D47). In addition, a number of UK staff are located in SA headquarters "in a liaison capacity" to obtain information regarding Saudi targeting processes. These officers are <u>not</u> involved in selecting, directing or any decision-making in respect of targeting (Response to LBC, p. 11). The government indicates that the United States and UK have advised Saudi Arabia on targeting practices. In addition, the United Kingdom has also provided professional development courses to Saudi Arabian military personnel, which has included compliance with IHL.

31. The UK government indicates that it <u>does not know</u> whether Saudi Arabia has instigated criminal, administrative or disciplinary investigation into any alleged violation of IHL in Yemen by Members of its armed forces (Response to LBC, p. 9 and 10, [*AB* D54]). The government <u>does not know</u> whether SA has prosecuted, punished or disciplined a member of its armed forces for violation of IHL in Yemen (Response to LBC, p. 9, [*AB* D54]). Moreover, the government <u>does not know</u> whether Saudi Arabia has in place legislation which permits the prosecution and/or punishment of persons suspected of committing violations of IHL. (Response to LBC, p. 9, [*AB* D54]). Further, the government <u>does not know</u> whether SA has <u>ever</u> prosecuted or punished a member of its armed forces for perpetration of a war crime under domestic law (Response to LBC, p. 9, [*AB* D54]). It therefore appears that this is information that the Government did not consider it necessary to seek from SA in order to inform the assessment required under the Consolidated Criteria and Common Position.

D. LEGAL FRAMEWORK

(i) Domestic Legal Framework

32. The Export Control Act 2002 ("the 2002 Act") provides the legal framework for the regulation and control of the export of certain goods, including military equipment and technology from the United Kingdom. Such controls may be imposed by the Secretary of State "for the purpose of giving effect to any EU provision or other international obligation of the United Kingdom" (s. 5 (2), of the 2002 Act). The Export Control Order 2008 ("the 2008

Order") provides for controls in respect of the export of military goods or technology from the United Kingdom. A lengthy list of controlled military equipment and technology is set out in Schedule 1 of the 2008 Order. A licence may be either "general or granted to a particular person", subject to a time limitation and subject to conditions (Art. 26 (6), 2008 Order).

33. The Consolidated Criteria serves as guidance pursuant to s. 9 of the Export Control Act 2002. By s. 9(5) of the 2002 Act, decision makers <u>must</u> have regard to this guidance "when exercising a licensing power or other function" falling within the scope of the 2002 Act. Each of the obligations set out in the EU Common Position is reflected in the Consolidated Criteria. The Consolidated Criteria seek to apply in the United Kingdom the EU Common Position as well as the requirements of the Arms Trade Treaty. The Guidance makes clear that the government "will not grant a licence" where to do so would conflict with the ATT and that the Consolidated Criteria are intended to be "fully compliant with our obligations under the EU common position and the arms trade treaty".

34. Article 32 of the 2008 Order empowers the Secretary of State to "amend, suspend or revoke a licence [previously] granted by the Secretary of State". In 2014, the government informed the House of Commons Committee on Arms Exports Controls:

> "The 2008 Order does not specify the grounds on which a licence may be revoked. In practice the reasons include [situations] [...] [w]here there has been a change in circumstances in the destination country or region such that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies […] [or] [w]here new information has come to light about a particular export which indicates that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies."[25]

35. According to the government's policy on export control licensing, as set out in Parliament on 7 February 2012 by the Secretary of State for Business, Innovation and Skills, the licence suspension mechanism will be "triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult."[26]

36. This policy must be read in conjunction with the Consolidated Criteria. The Consolidated Criteria makes clear that a risk assessment will be conducted on the basis of "<u>reliable evidence</u>". It follows that export licences should be suspended where, in light of the situation on the ground, the difficulty of conducting an assessment is such that risk cannot be

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25 UK Parliamentary Committee on Arms Exports Controls, *Scrutiny of Arms Exports and Arms Controls (2015)* Volume II, 9 March 2015, p. 177 [*AB* C62-C114]

26 Hansard WS 7 Feb 2012 : Column 7WS [AB C1-C9]

properly assessed and/or where there is insufficient "reliable" information to enable a lawful assessment of risk.

(ii) European Union Law

37. The EU Council Common Position 2008/944/CFSP of 8 December 2008 applies to EU Member States exporting arms and military equipment to non-EU States. The Common Position is legally binding as between Member States. Article 1 imposes an obligation to assess applications for arms export licenses case by case, in conformity with the criteria set out in Article 2 of the Common Position.

37.1. Criterion 1 imposes an obligation on EU Member States to deny an export licence where "inconsistent with ... the international obligations of Member States ..."

37.2. Criterion 2 requires that "[h]aving assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall ... deny an export licence if there is <u>a clear risk</u> that the military technology or equipment to be exported <u>might</u> be used in the commission of serious violations of international humanitarian law". In making this assessment, the exporting state must take into account 'the recipient country's attitude towards relevant principles established by instruments of [IHRL and IHL]". Article 2, Criterion 2 (b) stipulates that exporting States must:

> "(b) exercise special caution and vigilance in issuing licences […] to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe."

SA undoubtedly falls into the category of countries in respect of which "special caution and vigilance in issuing licences" is required in light of the findings of, *inter alia*, the European Parliament and the UN Panel of Experts on Yemen and other competent bodies (as set out above). This is accepted by the Defendant.

37.3. Criterion 7 concerns "[e]xistence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions". It requires Member States to "assess ... the risk that [military] technology or equipment might be diverted to an undesirable end-user or for an undesirable end use..."

(iii) EU Guidance

38. Pursuant to Article 13 of the EU Common Position, the User's Guide to the European Code of Conduct on Exports of Military Equipment ("the Guidance") "shall serve" as guidance for the implementation of the Common Position. The Guidance is drawn up by the Working Party on Conventional Arms Exports. The Defendant must therefore have regard to this Guidance when implementing the Common Position and must follow it, unless there is a good reason not to do so (R *(Lumba) v Secretary of State for the Home Department)* [2012] 1 A.C. 245, [at 26]). The Guidance makes clear that it "summarises agreed guidance for the interpretation of its criteria and implementation of its articles" and is "intended for use primarily by export licensing officials". The Guidance cautions that while "isolated incidents" of IHL violations may not require denial of a licence, "[w]here a certain pattern of violations can be discerned <u>or</u> the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern". <u>Importantly, the Guidance identifies a series of factors relevant to the assessment of risk of non-compliance with IHL. These are important and are set out in more detail under the substantive grounds of challenge.</u>

(iv) **International Humanitarian Law**

39. A number of rules and prohibitions provided for by international humanitarian law are of particular relevance to the alleged breaches of IHL by the Saudi-led coalition in Yemen. In particular, the following rules and prohibitions are of relevance:

39.1. ***Obligation to take all feasible precautions in attack:*** IHL imposes a duty on states to take all feasible precautions in attack to avoid and/or minimize harm to civilians or civilian objects.[27] This obligation of customary international law is codified in Article 57 of Additional Protocol I to the Four Geneva Conventions of 1949 ("API").[28] Article 57 imposes a general obligation on states in the following terms: "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects". Article 57 (2) further clarifies this obligation with regard to military attacks, as follows:

> "The following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be

27 Rule 15, Also see Rules 16-21 for further customary obligations regarding precautions in attack [*AB* E(INT)39- E(INT)54] and further relevent rules of Customary International Humanitarian Law [*AB* E(INT)18-E(INT)38 and E(INT)55-E(INT)77] Customary International *Humanitarian Law, International Committee of the Red Cross*, Jean Marie Henckaerts and Louise Doswald –Beck (eds.) (Cambridge, CUP, 2007) (Hereinafter: "ICRC Customary International Humanitarian Law Study").

28 API is applicable in international armed conflict. An identical duty to take precautions in attack applies in non-international armed conflict. *See* "Chapter 5, Rule 15", ICRC Customary International Humanitarian Law Study" [*AB* E(INT)39-E(INT)41]

attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives ... and that it is not prohibited by the provisions of this Protocol to attack them (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

39.2. Under Article 57 (2) (c), "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit". Article 57(3), states that when "a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".

39.3. **Protection of objects indispensible to civilian population**: It is prohibited in international humanitarian law to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, unless used by an adversary "in direct support of military action". This expressly includes "drinking water installations and supplies" (Article 54, AP I).

39.4. **Prohibition on indiscriminate attacks:** IHL prohibits indiscriminate attacks in both international and non-international armed conflict. Article 51(4), AP I defines an indiscriminate attack as one which is not "directed at a specific military objective" or which "employs a method or means of combat which cannot be directed at a specific military objective" or which "employs a method or means of combat the effects of which cannot be limited". Article 51(5)(a) declares certain forms of attack to constitute an "indiscriminate attack", namely:

> "[A]n attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian object."

39.5. **Prohibition on disproportionate attacks:** IHL prohibits States from launching attacks which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"

(Article 57 (5) (b), and Article 57, API). This rule applies in all forms of armed conflict.

39.6. **Prohibition on attacks directed against civilian objects and/or civilian targets:** Such attacks are impermissible. This includes attacks on civilian dwellings, buildings directed to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.[29]

39.7. **Obligation to investigate and prosecute**: Describing the position in customary international law, the International Committee of the Red Cross explains that states are obliged to "investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects".[30] This obligation is imposed by various provisions of the Geneva Conventions of 1949 (Article 49, GC I; Article 50, GC II; Article 129, GC III and Article 146, GC IV). This obligation of customary IHL has also been repeatedly reiterated by the UN General Assembly and the UN Security Council.[31] As regards conduct not amounting to "grave breaches", Article 146 GC IV obliges states to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention". It further requires States to "search for persons alleged to have committed, or to have ordered to be committed, grave breaches" and to "bring such persons, regardless of their nationality, before its own courts". Cognate provisions of GC I-III are drafted in identical terms. Finally, Article 146 requires states to "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" grave breaches of the Geneva Conventions.

39.8. **Obligation to make reparation:** Customary and conventional IHL imposes an obligation on States which violate international humanitarian law to provide compensation in respect of deaths or injury caused by violation of international humanitarian law.[32] Failure to do so constitutes a further breach of IHL (Article 91, AP I; Article 3, Hague Convention IV).

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29 See Articles 48, 51 (2) and 52 (2), Additional Protocol I to the Four Geneva Conventions of 1949 (re: international armed conflicts) and Article 13 (2), Additional Protocol II to the Four Geneva Conventions of 1949 (re non-international armed conflicts). [*AB* E(INT)9a-E(INT)12]

30 *See* "Rule 158", *ICRC Customary International Humanitarian Law Study.* [*AB* E(INT)99- E(INT)101]

31 *See* UN General Assembly Resolution 2583 (1969); Resolution 2712 (1970), Resolution 2840 (1971) and Resolution 3074 (1973). *See further* Security Council.

32 *See* Rule 150, ICRC Customary International Humanitarian Law Study. [*AB E*(INT)89- AB E(INT)98]

(v) The Arms Trade Treaty

40. The government has made clear that it will interpret and apply the Consolidated Criteria in a manner consistent with its obligations under the Arms Trade Treaty ("ATT")[33] and, in particular, will refuse a licence where it is inconsistent with its obligations under the ATT.[34] Prior to granting an export licence, State Parties to the ATT must "assess the potential" that the arms or military equipment "would contribute to or undermine peace and security" or could be used to "commit or facilitate" serious violations of IHL or IHRL (Article 7 (1) (a) and (b), ATT). The ATT imposes an obligation to consider safeguards. According to Article 7 (2), an exporting state must also "consider whether there are measures that could be undertaken to mitigate [the] risk..." that the military equipment could be used "to commit or facilitate violations of IHL or IHRL. According to Article 7 (3) "[i]f, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1 [e.g. that the arms "could be used" to "commit or facilitate violations of IHL or IHRL"], the exporting State Party shall not authorize the export".

41. By Article 11(1), states "shall take measures to prevent the diversion [of military equipment]". Elaborating on this obligation, Article 11 (2) states:

> "The exporting State Party shall seek to prevent the diversion of the transfer of conventional arms ... through its national control system ... by assessing the risk of diversion of the export and considering the establishment of mitigation measures [...]. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures."

42. Furthermore, "[i]f, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State".

E. SUBMISSIONS

(i) Failure to ask correct questions and make sufficient enquiries

43. In applying the Consolidated Criteria, and in assessing whether there exists a "**<u>clear risk</u>**" that military technology or equipment "**<u>might</u>** be used in the commission of serious violations of international humanitarian law", as required by the Consolidated Criteria, the

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33 The Arms Trade Treaty ("ATT") entered into force in respect of the UK on 24 December 2014. [*AB* E(INT)102- E(INT)113]

34 Parliamentary Written Ministerial Statement by Minister for Business, Innovation and Skills, 25 March 2014, Col. 9WS [*AB* E(UK)5- E(UK)11]

government has failed to identify, and consider, the right questions and has failed to make sufficient enquiries to enable a lawful decision to be reached. It is well established that, in making a public law decision, the Secretary of State must (a) "ask himself the right question" and (b) "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly": *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014*, per* Lord Diplock. These obligations of enquiry together form an "elementary duty" of public authority decision makers (*R (Atkinson) v. Lincolnshire County Council and Wealden District Council* (1996) 8 Admin LR 529, 543C. In R (*Refugee Action) v The Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), Popplewell J observed at [121] that "the scope of the investigation required [by the *Tameside* duty] for any given decision is context specific". There, the inquiry was as to the level of support required to avoid destitution for asylum seekers. That "of itself mandate[d] a careful inquiry". The context demanded no less rigorous and searching an inquiry here:

43.1. ***First,*** (as accepted by the Defendant in his letter of 16 February 2016, [at 64]) he was (and is) required by the Consolidated Criteria (and by the Common Position) to "exercise <u>special caution and vigilance</u> in issuing licences" for the export of arms to Saudi Arabia (see Criterion 2(b) of the Consolidated Criteria). It was therefore particularly important that the Defendant take all reasonable steps to illicit information relevant to his decision.

43.2. ***Second***, the subject matter of the decision made by the Secretary of State was of the utmost importance, namely whether UK manufactured weaponry might be used in violation of rules of IHL, with undeniably grave consequences for those affected.

43.3. ***Third***, against the backdrop of <u>overwhelming</u> evidence by UN agencies and others that the Saudi Coalition is in fact violating IHL, it was essential for the Defendant to make rigorous enquiries before reaching a contrary view and concluding that there was not even a "clear risk" that the Coalition "might" violate IHL.

44. In addressing whether there was a "clear risk" that military technology or equipment <u>"might"</u> be used in the commission of serious violations of international humanitarian law (Criterion 2(c) of the Consolidated Criteria), the Defendant erred in two crucial respects:

44.1. First, the Defendant failed to identify and conscientiously consider the questions that it was necessary to ask to reach a lawful risk assessment in accordance with Criterion 2(c). In particular, the Defendant appears to have failed to ask himself

(and therefore to consider) a series of important questions identified as relevant by the EU Guidance and in any event plainly relevant to the proper application of Criterion 2 (c) test.

44.2. Second, in answering these questions the Defendant failed to take reasonable steps to obtain any or sufficient information in respect of factual matters with a crucial bearing on this issue. Again, the EU Guidance identified these factual matters as relevant.

45. As a consequence of these fundamental errors, the Defendant failed to consider, conscientiously or at all, material and important issues in reaching his conclusion. The Common Position states at Article 13 that the EU Guidance "shall serve as guidance for the implementation of the Common Position". The EU Guidance sets out [at pp. 50 and 55] a series of "relevant questions to be considered" in appraising the risk that exported arms will be used in the perpetration of violations of IHL. The Defendant appears to have considered <u>some</u> of these, but has – on his own case – failed entirely to address his mind to others and failed to take steps to obtain any, or any adequate, information in respect of a significant number of important matters specifically identified as relevant in the guidance. Factors identified as "relevant questions" or material considerations in the Guidance include the following:

45.1. ***[Whether] there is national legislation in place prohibiting and punishing violations of international humanitarian law [and] [whether] the recipient country adopted national legislation or regulations required by international humanitarian law instruments to which it is a party.*** On this issue, the Government has said that it does not know whether Saudi Arabia has in place legislation enabling the prosecution and punishment of persons suspected of violations of IHL, stating that it was "not in a potion to advise" as to Saudi Arabia's legislation on this matter (Response to LBC, p 10).

45.2. ***[Whether] mechanisms have been put in place to ensure accountability for violations of IHL committed by the armed forces and other arms bearers <u>including disciplinary and penal sanctions (emphasis added).</u>*** Again, the Government says that it does not know whether: (1) SA has instigated any form of criminal or disciplinary investigation into alleged violations of IHL in Yemen; or (2) SA has prosecuted, disciplined or punished any service personnel for violation of IHL in Yemen. Further, the government states that it would "not ordinarily" expect a State to share this information, appearing to indicate that enquiries as to

these matters have not even been made with SA by the government. The Government further states that it does not know (again, possibly because it has not asked) whether SA has arranged to pay compensation (as required by IHL) to persons injured by a violation.

45.3. ***Inquiry into the recipient's "past and present record of respect for IHL [and] the recipient's intentions", which the Guidance states "should" form part of a "thorough assessment of risk"*** **(Guidance, p 54).** The government states that it does not know whether SA has "ever prosecuted or punished" a member of its Armed Forces for a war crime. The Claimant notes that SA has been actively involved in a number of major armed conflicts in recent decades including the First Gulf War; "Operation Scorched Earth" Conflict in Yemen 2010-2011; the present Syrian Conflict as well as the present Yemen conflict.

45.4. ***[Whether] the recipient country has failed to search for (or extradite) its nationals responsible for violations of international humanitarian law and whether the recipient is a Party to the Rome Statute for the International Criminal Court.*** The former is a fundamental requirement of the legal architecture of international humanitarian law, created by Geneva Conventions I-IV of 1949 following WWII.[35] "Search" in this context connotes an obligation to investigate and, where appropriate prosecute. For its part, the Defendant cannot consider and form a view of this question without first knowing whether SA is presently, or has in the past, prosecuted, disciplined or punished a member of its armed forces for perpetration of a war crime. Again, given the failings identified above, the Defendant was not, at the material time, in a position to address this question. On the latter issue, it is noted that SA is not a member of the International Criminal Court nor is it a party to any cooperation agreement with the Court, to assist its work, for instance the Agreement on Privileges and Immunities of the ICC.

45.5. ***Whether the recipient country has failed to take action to prevent or suppress violations committed by its nationals.*** Given that the government does not know whether SA has ever prosecuted or punished a member of its armed forces for a violation of IHL or whether it even has in place legislation to enable the prosecution and punishment of war crimes, the Claimant submits the government, in assessing risk, has not been in a position properly to assess this issue. Again, it

35 *See e.g*. Article 146, GC IV which provides that States "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts". [E(INT)9]

appears that in reaching a decision on risk no or reasonable steps were taken to elicit this information from Saudi Arabia.

45.6. [Whether] there an independent and functioning judiciary [in the recipient country] capable of prosecuting serious violations of international humanitarian law. The Defendant's LBC does not set out whether this matter was considered, or what view was reached. Objective evidence indicates substantial concern regarding the independence of the judiciary in Saudi Arabia and concerns regarding the impunity of state officials for human rights violations.[36][37] Once again, given that the government does not know whether SA has in place legislation which enables the prosecution of violations of IHL such as the crime of indiscriminate targeting or of a failure to take precautions in attack (nor whether any such legislation has ever been used) the Government is not in a position to answer this issue. The "right question" does not appear to have been asked and no proper steps were taken to elicit this information.

46. The factors identified above are important in assessing whether there is a "clear risk" that IHL "might" be violated in Yemen (the low threshold will be noted). First, the Guidance expressly highlights the relevance of these factors and it must be followed absent a good reason for not doing so (R *(Lumba) v Secretary of State for the Home Department)* [2012] 1 A.C. 245, [at 26]). Second, each of these factors bears directly and substantially on the question of risk. If a State has not, for example, criminalized violations of IHL in its domestic law and cannot prosecute such violations where they occur, the risk of future violations of IHL is elevated. Similarly, whether members of a State's armed forces have been held accountable or, alternatively, have in practice enjoyed impunity for violations of IHL is a similarly relevant consideration in determining whether there is a risk that IHL may be violated by that State's armed forces in a protracted and bitterly contested armed conflict.

47. To answer these questions the Defendant ought to have obtained the required information of his own motion and, if necessary, sought such information from the Saudi authorities. It is settled law that the *Tameside* duty of enquiry may require a decision-maker to elicit views or seek further evidence in order to call his attention to matters relevant to his decision (e.g. *R v. Secretary of State for Education ex p. London Borough of Southwark* [1995] ELR 308, 323C, per Laws J). It appears, however, that in crucial respects no information was obtained or even sought.

36 United States State Department 2014 Saudi Arabia Human Rights Report, [at 13] [*AB* C5-C61].
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48. In addition, the Defendant does not appear to have considered adequately the risk of diversion of weaponry in Yemen. Diversion to undesirable end-users itself impacts on the risk of violations of IHL. Criterion 7 of the Common Position requires consideration of the "[e]xistence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions". It requires Member States to "assess ... the risk that [military] technology or equipment might be diverted to an undesirable end-user or for an undesirable end use..." The UN Panel of Experts found that lax accountability measures on the part of the Coalition and the legitimate government of Yemen may have resulted in the diversion of weapons into the hands of radical groups and to the black market and that there exists a pattern of weapons diversion. In pre-action correspondence the Claimant asked whether the government had in place safeguards (including to avert the risk of diversion of weaponry). None were identified. The Defendant has not considered the risk of diversion adequate or at all nor taken action accordingly.

49. In its response to the concern in the Claimant's LBC that the Defendant has made insufficient enquiries/assessed matters properly, the Defendant makes the following points, *inter alia*: (i) allegations of violations are taken "very seriously" and assurances have been received from senior Saudi officials to the effect that Saudi Arabia is complying with IHL (ii) although the UK government is not "investigating" allegations of violations of IHL in Yemen, the MOD is "monitoring" every "incident of potential concern", relying on a range of sources, and "making an assessment of the facts so far as possible, including where possible identifying alternative causes" (Response Letter, [at 20]) and (iii) UK personnel have attended Saudi military headquarters in a liaison capacity and have explained their targeting processes to UK officials (iv) Saudi Arabia claims to have conducted its own investigations into alleged violations but, save one exception, the findings of these investigations have not been shared with the UK government and the government does not know whether any concrete prosecutions, disciplinary or administrative action have followed.

50. None of these points addresses the concerns identified above. In any event, the Claimant notes the following:

50.1. As regards (i), assurances must be treated with great caution, given Saudi Arabia's record in respect of compliance with multilateral human rights treaty obligations and given the consequent "special caution" with which export licences to SA must be considered (as accepted by the Defendant).

50.2. As regards (ii), even if the MOD is monitoring "incidents of potential concern", this does not address the important, broader questions identified above. Furthermore,

the government does not explain whether or why the MOD's conclusions have led it to the view that the findings of the UN Secretary General, the UN Panel of Experts, the UN High Commissioner for Human Rights and numerous others, that violations of IHL are being perpetrated by the Coalition are wrong. Certainly, it does not begin to explain why all of these findings are so fundamentally misplaced that there can be said to be no "clear risk" that serious violations of IHL "might" occur in Yemen using UK supplied equipment.

50.3. As regards (iii), there is nothing to explain how the "small number" of liaison officers who have been able to attend SA's military headquarters has enabled UK officials "better [to] understand" SA's "targeting processes". Presumably, the information which can be obtained through such an arrangement is necessarily limited and controlled by SA, which is very unlikely to be inclined to provide access to information perceived as incriminating. Moreover, the crucial question is whether these processes are, in fact, being respected in practice and on the ground. These officials are not likely to be able to answer this question. Serious concerns remain. The numerous authoritative findings that the Coalition has violated IHL in its targeting indicates that, whatever SA's processes may be in theory, on the ground these processes are not being adhered to. Furthermore, SA has made public pronouncements on targeting which run directly contrary to international humanitarian law. On May 8, 2015, coalition authorities declared the entire Houthi stronghold cities of Saada and Marran to be military targets.[38] As recently as 1 February 2016, Brigadier General Assiri (spokesman for the Saudi Coalition) spoke about Saudi concerns in respect of militia activities along the Saudi/Yemen border, stating "[n]ow our rules of engagement are: you are close to the border, you are killed".[39] Each of these statements on its face discloses targeting practices that are plainly incompatible with IHL and, in particular, the rule of distinction and the prohibition on indiscriminating targeting.

50.4. As regards (iv), the Claimant notes that, with one exception,[40] the government does not know the outcome of SA's investigations into alleged violations of IHL so is (presumably) not able to assess how rigorous such investigations have been, nor whether any violations of IHL have been found or what measures, if any, have been taken in consequence.

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38 Statement of Saudi Ministry of Defense, Brig. Gen. Ahmed al- Assiri, News Conference, May 9, 2015 quoted in full in Human Rights Watch, *Targeting Saada: Unlawful Coalition Airstrikes on Saada City in Yemen*, [at 11] [*AB* B(HRW)16] and in *Bombs Fall from the Sky*, Amnesty International, (2015) p10- 12 [*AB* B(AI)43- B(AI)45]

39 Reuters, Saudi Arabia says 375 civilians killed on its border in Yemen War, 1 February 2016, [*AB* B(P)21-B(P)22]

40 The airstrike on the MSF clinic on 2 December 2015.

51. In short, the Defendant has failed to inform itself of matters fundamental to the assessment of risk. Key issues have not been considered at all. Such enquiries as have been made are insufficient.

(ii) **Failure to apply the suspension mechanism**

52. Further, or alternatively, the Defendant has failed to apply, properly or at all, its "suspension mechanism" policy. This policy requires the Secretary of State to suspend extant licences and the processing of new licences where a risk assessment pursuant to the Consolidated Criteria and Common Position cannot properly be conducted.

53. Article 32 of the 2008 Order empowers the Secretary of State to "amend, suspend or revoke a licence [previously] granted by the Secretary of State". According to the government's policy on export control licensing, as set out in Parliament on 7 February 2012, the licence suspension mechanism will be "triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult". It follows that export licences should be suspended where, in light of the evidence available, the difficulty of conducting an assessment is such that risk cannot be properly assessed. Moreover, the Consolidated Arms Export Licensing Criteria states that "[i]n the application of the above criteria, account will be taken of reliable evidence…" The Claimant recalls (and the government accepts) that "special caution and vigilance" is required in approving licences for the export of arms to Saudi Arabia. It follows from these points that there must be a reliable evidential basis for the government to conduct a risk assessment and reach its conclusion and that such evidence must be carefully and cautiously considered.

54. As noted above, other than an investigation by SA into an incident on 31 January 2016, the Secretary of State's position is that "we are aware that other investigations are currently underway but have not seen their conclusions". Further, the Defendant states (Response to LBC [at p. 8]): "we accept that many allegations made by international agencies are of sufficient concern to warrant further enquiry and those enquiries are on-going, however, we have not seen sufficient information to verify any allegation as a violation of IHL". The Defendant has also confirmed that it is (unsurprisingly) not in a position to investigate[41] alleged violations of IHL in Yemen by the Coalition, although the MOD is monitoring and tracking such violations) (Response to LBC, [at 8]; D's letter of 9 December 2015. It follows that the Defendant is largely reliant on investigations and fact-finding by third parties, whether the UN or the Saudi/Yemeni authorities.

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41 This would presumably involve speaking to eye-witnesses and analyzing primary evidence.

55. The Government is faced with widespread and credible reports of large-scale violations of IHL in Yemen, which the authorities are said to be investigating. However, it appears that, with one exception, the conclusions of these investigations have not been shared with the UK Government. Without knowing the results of these investigations the Defendant cannot properly form its own view as to whether the incidents might have involved serious violations of IHL nor whether, where problems are identified, proper steps have been taken to prevent reoccurrence. The Government is also not in a position to assess whether the findings of the UN Panel of Experts (or other UN agencies) following their investigations, can be rejected so as to conclude that there is no "clear risk" that the Coalition "might" use UK equipment in serious violation of IHL. The Government is not, therefore, in a position properly to assess whether the criteria in the Consolidated Guidance are met. In failing to suspend licences for the export of arms to Saudi Arabia the Defendant failed to apply its own policy properly or at all.

(iii) **Irrationality**

56. Further, the Defendant has irrationally concluded that the test set out in Article 2, Criterion 2 (c) of the Common Position and Criterion 2 of the Consolidated Criteria, is satisfied in respect of the export of military equipment to Saudi Arabia for possible use in Yemen. The threshold test is low – a "clear risk" that military equipment or technology "might" be used in a serious[42] violation of IHL. As the EU Common Position Guidance observes [at p. 46] "[t]he combination of 'clear risk' and 'might' in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression" (emphasis added).

57. ***First*****,** overwhelming evidence exists of repeated serious breaches of IHL in the conflict in Yemen, by all sides, including the Coalition. Numerous multilateral organizations with an international mandate for human rights protection (and senior officials from those organizations) have alleged that airstrikes by the Saudi Coalition in Yemen have ***in fact*** violated IHL (not merely that they "may" have done so). This position has been adopted by, *inter alia*: the Panel of Experts appointed by the UN Security Council specifically to consider the situation in Yemen; the Secretary General of the United Nations (on several occasions); the UN High Commissioner for Human Rights (the UN's most senior human rights official); the UN Under-Secretary General for Humanitarian Affairs; the Director General of UNESCO;

42 "Serious" breaches of IHL are set out in GC I-IV (Articles 50, 51, 130 and 147 respectively) as well as Article 11 and 85 of Additional Protocol I and Article 8 of the Rome Statute of the International Criminal Court. Such breaches include, for example, deliberate, disproportionate or indiscriminate attacks on civilian targets or civilian objects or failure to take precautions in attack.

and the European Parliament. Moreover, Amnesty International and Human Rights Watch have both conducted extensive, recent fieldwork in Yemen speaking to witnesses and survivors of alleged violations of IHL Following these investigations each has concluded that grave violations of IHL are likely to have occurred. In its response to the Claimant's LBC, the Government does not challenge the findings of these organizations nor does it offer any reasonable basis to suggest that the findings of these bodies (many with expertise and a specific international mandate to investigate violations of IHRL and IHL) are wrong. Much less does the Government explain why the findings are so clearly wrong that there can be said to be no "clear risk" that violations "might" occur.

58. ***Second*****,** in the Claimant's LBC the Claimant asked whether SA had investigated alleged violations of IHL and, if so, what conclusions had been reached as a result of these investigations (LBC, p. 18). In response, the Defendant states that SA had a press conference on 31 January 2016 in respect of an investigation into the attack on a MSF hospital and that "we are aware that other investigations are currently underway but have not seen their conclusions". Furthermore, the Defendant accepts that it is not in a position to investigate alleged violations of IHL in Yemen itself (although the MOD is monitoring the situation). It follows that neither Saudi Arabia nor, *a fortiori*, the Defendant can confidently say that the numerous alleged violations of IHL are erroneous or mistaken. In these circumstances, there is no sufficient or reasonable basis for the Defendant to reject the findings of the UN and other agencies.

59. ***Third***, the Coalition has, on several occasions made public pronouncements which run directly contrary to international humanitarian law. On May 8, 2015, coalition authorities declared the entire Houthi stronghold cities of Saada and Marran to be military targets. Brig. Gen. al-Assiri, the military spokesman for the coalition, told the media:

> "Starting today and as you all remember we have declared through media platforms and through the leaflets that were dropped on [Marran and Saada], and prior warnings to Yemeni civilians in those two cities, to get away from those cities where operations will take place. *This warning will end at 7 p.m. today and coalitions forces will immediately respond to the actions of these militias that targeted the security and safety of the Saudi citizens from now and until the objectives of this operation are reached.*
>
> *We have also declared Saada and Marran as military targets loyal to the Houthi militias and as a result the operations will cover the whole area of those two cities and*

thus we repeat our call to the civilians to stay away from these groups, and leave the areas under Houthi control or where the Houthis are taking shelter.[43]

60. Similarly, on 1 February 2016, Brigadier General Assiri (spokesman for the Saudi Coalition) spoke about Saudi concerns in respect of militia activities along the Saudi/Yemen border, stating "[n]ow our rules of engagement are: you are close to the border, you are killed”.[44] Declaring and treating an entire city or region as a “military target” is plainly incompatible with IHL. Civilians cannot lose their immunity from attack, owing to an inability or unwillingness to leave a city or region. The principle of distinction and the prohibition on indiscriminate targeting must be respected. The applicable Guidance expressly requires Member States to consider “the recipient’s intentions” in assessing risk. These expressed intentions are inconsistent with the conclusion that there is no clear risk that IHL might be violated by the Coalition in Yemen.
61. **Finally**, the Defendant’s failure to have regard to, and to apply, the Guidance (and the various factors referred to above) is itself irrational.

F. TIMING AND EXPEDITION

62. The Claimant first wrote to the Defendant on 9 November 2015 to raise concerns regarding the licensing of arms and military equipment for export to Saudi Arabia and to ask the Defendant for information regarding its approach to the granting of relevant export licences. The Claimant invited the Defendant to confirm whether it would suspend export licences and decline to grant new licences in view of the evidence of violations of IHL by the Saudi Coalition in Yemen. The Defendant responded to this letter on 9 December 2015, providing some further information in respect of its approach to licencing in respect of Saudi Arabia, but refusing to offer the assurance sought. The Claimant wrote a detailed pre-action letter to the Defendant on 8 January 2016. The Defendant sought a significant extension of time for responding to this letter. The Claimant agreed to six weeks for response. In the event, the Defendant took almost 7 weeks, responding on 16 February 2016. This period resulted in a substantial hiatus.

63. The Claimant has acted promptly in pursuing this claim, notwithstanding the very complex legal issues involved and the constantly evolving factual picture. Moreover, in the particular circumstances of this claim, the Claimant has inevitably been particularly reliant on

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43 Statement of Saudi Ministry of Defense, Brig. Gen. Ahmed al- Assiri, News Conference, May 9, 2015 quoted in full in Human Rights Watch, *Targeting Saada: Unlawful Coalition Airstrikes on Saada City in Yemen*, [at 11] [*AB* B(HRW)16] and in *Bombs Fall from the Sky*, Amnesty International, (2015) p10- 12 [*AB* B(AI)43- B(AI)45]

44 Reuters, Saudi Arabia says 375 civilians killed on its border in Yemen War, 1 February 2016 [*AB* B(P)21-B(P)22]

information provided by the Government in assessing whether matters have been approached lawfully. Significant pre-action correspondence has therefore been both necessary and desirable in order to identify the issues in dispute and for the Claimant to determine whether a claim is necessary. For the avoidance of doubt, the Claimant's position is that the 3 month time limit on judicial review does not apply, since the Claimant brings a challenge in respect of an on-going situation the Claimant submits is unlawful (*R (Independent Schools Council) v The Charity Commission for England and Wales* [2010] EWHC 2604 (Admin), Sales J). In any event, even if the Defendant's letter of 9 December 2015 triggered the three-month time limit, proceedings have been brought promptly and in time.

64. The Claimant seeks expedition of the Claim for the following reasons:

64.1. First, there is a considerable degree of urgency in resolving the underlying issues in the present claim since, on the Claimant's case there has been no lawful risk assessment as to whether UK manufactured arms and military equipment are being exported to Saudi Arabia in circumstances where they may be used in inflicting unlawful civilian casualties or in violation of other fundamental rules of international law.

64.2. Second, it is important that the legal position is clarified expeditiously to ensure that third party interests are protected insofar as possible. There is a pressing need to ensure that those businesses or individuals who seek to use the arms export regime in respect of Saudi Arabia are provided with clarity to enable them to plan accordingly.

64.3. Third, the present claim raises a number of important points of principle, which may impact on how the government assesses export licences in respect of countries other than Saudi Arabia. For this reason too, clarity is urgently required as to whether the government's approach to granting export licences is lawful.

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8 March 2016