

**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**

**-and-**

**HUMAN RIGHTS WATCH**  
**AMNESTY INTERNATIONAL**  
**RIGHTS WATCH (UK)**

**Interveners**

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**WRITTEN SUBMISSIONS ON BEHALF OF AMNESTY INTERNATIONAL,  
HUMAN RIGHTS WATCH, AND RIGHTS WATCH (UK)**

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**INTRODUCTION**

1. Amnesty International, Human Rights Watch, and Rights Watch (UK) (**‘the Interveners’**) provide these written submissions pursuant to the permission granted by Mr Justice Blake by Order dated 22 September 2016, as varied by Mr Justice Cranston by Order dated 13 October 2016. The Interveners have long histories of working to promote, protect, and monitor human rights, in the UK and internationally. They are concerned to ensure that any decisions taken by the Defendant on behalf of the UK in relation to the export of materiel used in armed conflicts abroad – in the present case the export of arms and military equipment to the Kingdom of Saudi Arabia (**‘KSA’**) – conform with the requirements of

international and domestic law. Further, the Interveners benefit from a network of human rights researchers, such that they are able to obtain reliable information in relation to conditions on the ground in Yemen.<sup>1</sup>

2. The Interveners have been granted permission to provide submissions on the following matters:<sup>2</sup>

2.1. The position at international law of the attribution of State responsibility for an internationally wrongful act (**'State Responsibility'**); and

2.2. Information regarding the current state of the conflict in Yemen and its impact on civilians.

3. The Interveners' submissions on State Responsibility focus on Article 16 of the International Law Commission's Draft Articles on State Responsibility (**'Articles on State Responsibility'**).<sup>3</sup> Article 16 provides:

*'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

*(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*

*(b) the act would be internationally wrongful if committed by that State.'*

4. In summary the Interveners submit that:

4.1. Article 16 of the Articles on State Responsibility (**'Article 16'**) reflects a rule of customary international law.

4.2. The interpretation and application of the rule reflected in Article 16 is not straightforward, but certain key principles can be discerned.

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<sup>1</sup> Further information about the objectives and work of the Interveners was provided in the Interveners' Application under CPR, r54.17 for Permission to Intervene.

<sup>2</sup> Mr Justice Blake granted permission for written submissions on both points 2.1 and 2.2 of no longer than 25 pages, and oral submissions of 30 minutes on point 2.1 alone.

<sup>3</sup> UNGA Resolution No 56/83 on the Responsibility of States for Internationally Wrongful Acts, 28 January 2002, UN Doc A/RES/56/83.

4.3. There was at least a *prima facie* case (and/or reasonable cause for concern) that the Defendant's decision to continue to grant new licences for the sale or transfer of arms or military equipment to Saudi Arabia for possible use in the conflict in Yemen would (or was likely to) breach the UK's obligations arising from Article 16. Further or alternatively, there was and/or is at least a *prima facie* case (and/or reasonable cause for concern) that the Defendant's decision to continue to grant such licences and/or the maintenance of extant export licences has breached and/or continues to breach the UK's obligations arising from Article 16.

4.4. Criterion One of the Consolidated EU and National Arms Export Licensing Criteria ('**the Common Criteria**'),<sup>4</sup> on its proper construction, requires (*inter alia*) that: (a) the UK does not breach Article 16; and also (b) that the UK perform its own analysis specifically to consider its obligations arising from Article 16.

4.5. In the circumstances of this case, in the absence of any suggestion that the Defendant has performed an analysis specifically to consider the UK's obligations arising from Article 16, there are additional reasons for the Court to conclude that the grant and maintenance of the export licences at issue in this case was and is unlawful and to grant declaratory relief in that regard.

5. As regards the current state of the conflict in Yemen, in summary, 2016 has seen a continuation of civilian casualties, particularly as a result of airstrikes conducted by the KSA-led coalition.

## **(I) STATE RESPONSIBILITY**

### **(A) Article 16 of the International Law Commission's Articles on State Responsibility and Customary International Law**

6. A State ('State A') may itself be liable for a wrongful act under international law where it '*aids or assists*' another State ('State B') in the commission of an internationally wrongful act by State B. In such a case, the liability of State A

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<sup>4</sup> HC Deb 25 March 2014, cols 9-14WS (Rt Hon Vince Cable MP, then Secretary of State for Business, Innovation, and Skills) [A/1].

under international law is separate and distinct from the liability of State B. The International Law Commission ('ILC') sets out the relevant rules in Article 16 of its Articles on State Responsibility.

7. The International Law Commission is a subsidiary body of the United Nations General Assembly<sup>5</sup> comprising experts (both academics and practitioners) drawn from legal systems worldwide and tasked with the codification and progressive development of international law.<sup>6</sup> Within its mandate of codification, the ILC works to formulate and promulgate '*rules of international law in fields where there already has been extensive State practice, precedent and doctrine,*'<sup>7</sup> whereas in pursuit of its mandate of '*progressive development,*' the ILC prepares draft treaties '*on subjects which have not yet been regulated at international law or in regard to which the law has not yet been sufficiently developed in the practice of States.*'<sup>8</sup> In practice, the ILC's publications may contain both rules which have crystallised as customary international law (and are therefore binding on all States) and rules which do not (yet) themselves constitute customary international law, but have been formulated by the ILC, based on State practice,<sup>9</sup> as suggestions for subsequent adoption by States.
8. The Articles on State Responsibility drafted by the ILC in part reflect settled principles of international law and in part constitute the ILC's proposed development of the law. The ILC began its work on State responsibility in 1956 with a limited focus on the question of responsibility for injuries caused by States to aliens (particularly diplomats) and their property. In 1963 the mandate for the ILC's work in this field was broadened to '*the definition of the general rules governing the international responsibility of States.*'<sup>10</sup> After much work in the second half of the twentieth century, the United Nations General Assembly granted a first reading to a set of draft Articles in 1996. Following further drafting,

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<sup>5</sup> Statute of the International Law Commission 1947, adopted under UNGA Resolution No 175(II) on the Establishment of an International Law Commission, 21 November 1947, UN Doc A/RES/175(II).

<sup>6</sup> *Ibid*, Article 1(1).

<sup>7</sup> *Ibid*, Article 15.

<sup>8</sup> *Ibid*.

<sup>9</sup> Albeit State practice not sufficiently uniform to evidence a rule of customary international law.

<sup>10</sup> Roberto Ago, Report by Mr Roberto Ago, Chairman on the Sub-Committee on State Responsibility, [1963-II] Yearbook of the International Law Commission, 227, para 5.

the current version was granted a second reading in 2001. The United Nations General Assembly has repeatedly commended the Articles to governments,<sup>11</sup> and particular rules have been held to reflect norms of customary international law binding on all States.<sup>12</sup>

9. In particular, Article 16 has been recognised as reflecting customary international law, *inter alia*, by the International Court of Justice ('**ICJ**'), the UK Government and courts, and the Federal Constitutional Court of Germany:

9.1. In the *Bosnia Genocide* decision<sup>13</sup> (which is considered further below), the ICJ affirmed Article 16 as reflecting customary international law.

9.2. In *R (Al-Saadoon) v Secretary of State for Defence*,<sup>14</sup> the question of UK's responsibility under Article 16 arose in relation to allegations of torture by another state. Mr Justice Leggatt noted that Article 16 has customary international law status, as recognised by the ICJ.<sup>15</sup> On the facts of that case, the Court did not have to proceed and determine whether Article 16 had actually been breached.

9.3. The UK Government has stated that it considers Article 16 to reflect customary international law (by which the UK is bound) on various occasions, including its reply to the report of the Joint Committee on Human Rights regarding allegations of UK complicity in torture,<sup>16</sup> and

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<sup>11</sup> Most recently in UNGA Resolution No 68/104 on the Responsibility of States for internationally wrongful acts, 18 December 2013, UN Doc A/RES/68/104.

<sup>12</sup> See, for example, the reliance placed by the European Court of Human Rights on the Articles as reflecting international law in the cases of *Ilaşcu v Moldova and Russia* [2004] ECHR 318; (2005) 40 EHRR 46, [319]-[321] and *Verein Gegen Tierfabriken Schweiz v Switzerland (No 2)* [2009] ECHR 1025, [36]-[37] and [86].

<sup>13</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment of 26 February 2007, ICJ Rep 2007, p.42 ('**Bosnia Genocide case**'), [420]. See also the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Rep 1986, p14, [558].

<sup>14</sup> *R (Al-Saadoon) v Secretary of State for Defence* [2015] 3 WLR 503 (Admin), [193] (Leggatt J).

<sup>15</sup> *Ibid.* [193].

<sup>16</sup> Secretary of State Home Department and Secretary of State for Foreign and Commonwealth Affairs, *Allegations of UK Complicity in Torture: The Government Reply to the Twenty-Third Report from the Joint Committee on Human Rights* (Cm 7714, 2009), 2 [A/5].

most recently in its response to the Joint Committee on Human Rights report regarding the government's use of drones for targeted killing.<sup>17</sup>

9.4. Article 16 has also been taken to reflect customary international law by the Federal Constitutional Court of Germany.<sup>18</sup>

10. In light of the consistent view of international courts, and the position of both the UK courts and the UK Government, the *existence* in international law of the principles set out in Article 16 is not understood to be in dispute.

### **(B) The Requirements of Article 16**

11. The rule of responsibility set out in Article 16 may be analysed as containing three main conditions, based on the wording of Article 16 and (to some extent) the ILC's Commentary<sup>19</sup> on it:

11.1. That the assisting State, when it provides assistance, has '*knowledge of the circumstances of the internationally wrongful act*' by the other State.<sup>20</sup>

11.2. That the assistance provided by the State as a matter of fact contributes to the commission of the unlawful act to the requisite degree.<sup>21</sup>

11.3. That the contemplated act '*must be such that it would have been wrongful had it been committed by the assisting State itself*'.<sup>22</sup>

#### (1) '*knowledge of the circumstances of the internationally wrongful act*'

12. The interpretation and application of the subjective element of Article 16 is not straightforward. These issues have been explored in various academic texts<sup>23</sup> and

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<sup>17</sup> Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing: Government's Response to the Committee's Second Report of Session 2015-16 (fourth report)* (2016-17, HL 49, HC 747), 17 [A/17].

<sup>18</sup> *Al-M* (5 November 2003) 2 BVerfG 1506/03, [54].

<sup>19</sup> International Law Commission, "Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries" [2001-II(2)] Yearbook of the International Law Commission ('**ILC Commentary**'), 31-143.

<sup>20</sup> See Article 16(a); ILC Commentary on Article 16, [4].

<sup>21</sup> This requirement does not appear expressly within the text of Article 16. It is set out within the ILC Commentary on Article 16, [5] and [10].

<sup>22</sup> See Article 16(b); ILC Commentary on Article 16, [6].

most recently in November 2016 in a Research Paper published by Chatham House.<sup>24</sup> Three main questions arise: (a) *what* the assisting State must know; (b) what *degree* of knowledge the assisting State must have; and (c) whether there is a separate requirement of *intention* (and if so, what it means).

13. As to *what* the assisting State must know:

13.1. As noted above, Article 16 was considered and applied by the ICJ in the *Bosnia Genocide* case:

13.1.1. That case concerned, *inter alia*, the alleged complicity of the Federal Republic of Yugoslavia ('FRY')<sup>25</sup> in the commission of genocide by Republika Srpska forces. The ICJ applied Article 16 of the Articles on State Responsibility by analogy<sup>26</sup> in order to determine the meaning of '*complicity in genocide*' under Article III(e) of the Genocide Convention.<sup>27</sup>

13.1.2. The Court reasoned that the issue was whether the '*aid and assistance*' in question was given at a time when the authorities of the FRY were '*clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.*' The Court concluded on the facts that the subjective element of Article 16 was not made out because: '*it was not conclusively shown that the decision to eliminate physically the adult male population of*

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<sup>23</sup> For example: James Crawford SC, *State Responsibility – The General Part* (CUP 2013); Vaughan Lowe QC, 'Responsibility for the Conduct of Other States' (2002) 101 *Kokusaihō gaikō zasshi* [Japanese Journal of International Law and Diplomacy] 1; Miles Jackson, '*State Complicity in International Law*' (OUP 2015); Helmut Philip Aust, *Complicity and the Law of State Responsibility* (CUP 2011); Vladyslav Lanovoy, '*Complicity and its Limits in the Law of International Responsibility*' (Hart 2016).

<sup>24</sup> Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' *Chatham House Research Paper, November 2016*.

<sup>25</sup> That is, the political entity which from 2003 came to be called the State Union of Serbia and Montenegro, rather than the Socialist Federal Republic of Yugoslavia.

<sup>26</sup> *Bosnia Genocide* case, above n.13, [420].

<sup>27</sup> UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 ('**Genocide Convention**').

*the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities [...]’.*<sup>28</sup>

13.2. A number of points emerge from this:

13.2.1. Under Article 16, the assisting State (‘State A’) may have the requisite ‘*knowledge*’ of an internationally wrongful act by State B, without the need for any prior determination by a court (whether international or domestic) as to the wrongfulness of State B’s conduct.

13.2.2. Furthermore, under Article 16, State A may have the requisite ‘*knowledge*’ of an internationally wrongful act by State B, without the need for any wide-ranging analysis or positive determination by State A itself, that State B has acted or will act in a way that is internationally wrongful.

13.2.3. Instead, it is sufficient if State A has ‘*knowledge*’ (to the requisite degree, as to which see below) that the bare ‘facts’ which comprise State B’s wrongful acts will occur.

13.2.4. Furthermore, that ‘*knowledge*’ may arise simply from notice of a few key facts.

13.2.5. The pertinent ‘*facts*’ for these purposes will depend upon the nature of State B’s wrongful act. In the *Bosnia Genocide* case, the underlying ‘*wrongful act*’ was genocide, which is a crime of specific intent (*dolus specialis*). That is why the Court specified the need for the FRY to have knowledge of the perpetrators’ specific genocidal intent. By contrast, in the present case, the KSA is alleged to have carried out breaches of International Humanitarian Law (‘**IHL**’) (see the Claimants’ Statement of Grounds at [39]). Unlike genocide, none of the relevant rules of IHL require the relevant act to be in pursuit of a particular unlawful objective.

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<sup>28</sup> Bosnia Genocide case, above n.13, [421]-[423].

13.2.6. Accordingly, in the present case, for the purposes of liability under Article 16, it would suffice (for example) if the UK ‘*knew*’ (to the requisite degree) that the KSA was, for example, going to launch attacks that targeted civilians or civilian objects or attacks that were disproportionate to the anticipated direct military objective or that the requisite precautions were not in place.<sup>29</sup> The UK would not also need to know the KSA’s motivation or objective in carrying out such attacks.

13.2.7. Furthermore, the reference in the ICJ Judgment to ‘*massacres under way*’ illustrates that there may be situations where the ‘*aid and assistance*’ does not just relate to some potential future breach by State B, but to dynamic situations (which would include the sale of arms by State A to a state involved in an ongoing conflict). The same point is recognised in the academic material on Article 16. For example, it has been said: ‘*When the situation is dynamic, there will be a need for the assisting state to keep an ongoing watch on its own liability as to the facts, and its level of knowledge, develop. Where the breach of the primary rule is continuing, the presumption that the assisting state knows about the breach is likely to increase.*’<sup>30</sup>

14. As to the second question, the *degree* of knowledge that is required:

14.1. It is clear that actual knowledge of the relevant ‘*circumstances*’ is sufficient. In this regard, there is strong support amongst academics for

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<sup>29</sup> A violation of customary international law (see, for example, Rules 1, 7, 11, 13, 14 and 15 of the ICRC’s codification of customary IHL) and Article 13, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (‘**Additional Protocol II**’), 8 June 1977, 1125 UNTS 609. Those customary rules of IHL have been collated by the International Committee of the Red Cross, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

<sup>30</sup> Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, above n.24, [57]; Vladyslav Lanovoy (2014), ‘*Complicity in an Internationally Wrongful Act.*’, *Shares Research Paper No38*, p21.

the view that ‘*near-certainty*’ or something approaching practical certainty (as to the circumstances of the wrongful act) is sufficient.<sup>31</sup>

14.2. It has been suggested that ‘*constructive knowledge*’ is sufficient as a matter of international law. For example, during the negotiations on the text of Article 16, the Netherlands proposed that the Article should provide for responsibility where a State ‘*knows or should have known the circumstances of the internationally wrongful act.*’<sup>32</sup> However, that wording was not adopted in the final text of Article 16. Furthermore, at present, there is a paucity of support amongst eminent publicists<sup>33</sup> for a ‘*constructive knowledge*’ test.<sup>34</sup>

14.3. There is, however, strong support for a ‘*wilful blindness*’ standard. Thus Professor Vaughan Lowe QC has argued that it is ‘*unlikely that a tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner.*’<sup>35</sup> In his book ‘*State Complicity in International Law*’, Miles Jackson<sup>36</sup> endorses that view: ‘*This is almost certainly correct as a matter of law and in principle - wilful blindness, narrowly interpreted, is a justified extension to the category of legal knowledge.*’<sup>37</sup> The November 2016 Research Paper by Chatham House, takes a similar position:

*[wilful blindness] might be defined as a deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality . . .*

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<sup>31</sup> See, Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, above n.24, [39], p24; Jackson, ‘*State Complicity in International Law*’, above n.23, pp160-162.

<sup>32</sup> Statement of the Netherlands, [2001] *Yearbook of the International Law Commission*, Vol II(1), p52; and see Crawford, *State Responsibility*, above n.23, 406.

<sup>33</sup> A source of international law pursuant to Article 38(1)(d) of the Statute of the International Court of Justice (18 April 1946) 33 USTS 993 (‘**ICJ Statute**’).

<sup>34</sup> See eg, Crawford, *State Responsibility*, above n.23, 406; Lowe, ‘Responsibility for the Conduct of Other States’, above n.23, 10. Though Lowe notes that ‘*it is ... unlikely that a tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner.*’

<sup>35</sup> Lowe, ‘Responsibility for the Conduct of Other States’, above n.23, 10.

<sup>36</sup> Lecturer in Law at the University of Oxford.

<sup>37</sup> Jackson, ‘*State Complicity in International Law*’, above n.23, pp160-162.

*where the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a state cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence . . .*

*. . . if a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye’.*<sup>38</sup>

14.4. It is further submitted that the degree of knowledge required for Article 16 must be realistic and reflect the fact, *inter alia*, that, to some extent, the assisting State is making assessments as to whether the relevant events will happen in the future and thus, there can never be absolute certainty.

15. As to the third question, *intention*:

15.1. The text of Article 16 does not include any requirement of ‘intention’.

15.2. However, the ILC Commentary on Article 16 states that the aid or assistance must be given ‘*with a view to facilitating the commission of that [wrongful] act, and must actually do so*’.<sup>39</sup> The International Law Commission’s Commentary to Article 16 explains this requirement as limiting the application of the rule ‘*to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct*’ and then says that a State will not be responsible for aid or assistance ‘*unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct*’.<sup>40</sup>

15.3. It has been doubted by at least one eminent publicist whether there is actually a separate ‘intention’ requirement in Article 16. Professor Lowe has argued: ‘*It is, I think, clear that Article 16 does not require proof that the aiding State actually desires or intends that the receiving State should*

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<sup>38</sup> Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, above n.24, [43]-[45], pp24-25.

<sup>39</sup> ILC Commentary on Article 16, [5].

<sup>40</sup> *Ibid.*

*use the aid for the commission of an internationally wrongful act. There is no persuasive evidence in State practice of a requirement that a State giving aid or assistance must not merely know of the manner in which it is to be used, but must in addition intend or desire that it should be so used. And as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts. The fact that the unlawful conduct is foreseen, or foreseeable, as a sufficiently probably consequence of the assistance must surely suffice.’<sup>41</sup>*

15.4. Other academics (consistent with the Commentary to Article 16) take a different view, considering that there is (at least in principle) a separate requirement of intention.<sup>42</sup>

15.5. However, if there is a separate requirement of intention, then there is strong support for the view that: (a) intention in this regard does not mean that the assisting state must ‘*desire*’ the commission of an illegal act by the other state; and (b) a State’s *intention* for these purposes may be imputed or inferred from the existence of the State’s knowledge. Thus, for example, the eminent publicist Professor James Crawford SC (now Judge Crawford of the ICJ) considers that:<sup>43</sup> ‘*[I]f aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed. It is thus wrong to suggest that the complicit state must be in common cause with the principal in order for ... Article 16 to apply.*’<sup>44</sup> The position is also supported by Harriet Moynihan in her Chatham House Paper.<sup>45</sup>

16. Ultimately, the question of whether the assisting State had ‘*knowledge of the circumstances of the internationally wrongful act*’ is a question to be determined

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<sup>41</sup> Lowe, ‘Responsibility for the Conduct of Other States’, above n.23, 8.

<sup>42</sup> For example Aust, *Complicity and the Law of State Responsibility*, above n.23, p249; Crawford, *State Responsibility*, above n.23, 408.

<sup>43</sup> The Interveners note that the eminent publicist Dr Helmut Philipp Aust, even in supporting a higher standard of *mens rea* for the assisting State, acknowledges that such an approach *departs from* the position maintained by the majority of authors: see Aust, *Complicity and the Law of State Responsibility*, above n.23, p249.

<sup>44</sup> Crawford, *State Responsibility*, above n.23, 408.

<sup>45</sup> Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, above n.24, [73]-[76], pp24-25.

on the facts and evidence of each case. However, it is submitted that it must be determined with reference to the principles set out above.

(2) Material contribution

17. With respect to the second condition (that what State A does must in fact contribute to State B's commission of the wrongful act), the following points are made in the ILC Commentary to Article 16:

17.1. There is no requirement that the aid or assistance must have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.<sup>46</sup>

17.2. Where the aid or assistance was '*only an incidental factor in the commission of the primary act*' and/or contributed only to a minor degree to the injury suffered, the assisting State will only be liable to indemnify the victim for those consequences which flow from its own conduct.<sup>47</sup>

18. Thus, it is submitted that where the '*aid or assistance*' is only '*an incidental factor*' in the commission of the primary act, the correct analysis is that this goes to the question of reparation: the assisting State, in principle, remains liable under Article 16.

(3) '*...would have been wrongful had it been committed by the State itself...*'

19. In short, this condition '*limits Article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound*'.<sup>48</sup>

**(C) The Facts of the Present Case**

20. The sales and supply of weapons and military support from one state to another is a paradigm example of a situation where Article 16 may be engaged. Thus the ILC Commentary to Article 16 gives the following examples of state practice:

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<sup>46</sup> ILC Commentary on Article 16, [5].

<sup>47</sup> *Ibid*, [10].

<sup>48</sup> *Ibid*, [6].

‘ . . . in 1984, Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops on the ground that the assistance was facilitating acts of aggression by Iraq. The British government denied both the allegations that it had chemical weapons and that it had supplied them to Iraq. In 1998, a similar allegation surfaced that Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq’s representative to the United Nations.’<sup>49</sup>

21. In this case the Interveners do not ask (and are not in a position to ask) the Court to make a finding that the UK is actually liable under Article 16. Amongst other matters, the Interveners do not have access to the closed material and do not know what that material may demonstrate.
22. Instead, the Interveners say that there was at least a *prima facie* case (and/or reasonable cause for concern), based on publicly available material,<sup>50</sup> that the Defendant’s decision to continue the export licences (a decision communicated on 9 December 2015) would (or would be likely to) breach UK’s obligations arising from Article 16. Further or alternatively, there was and/or is at least a *prima facie* case (and/or reasonable cause for concern) that the Defendant’s decision to continue to grant the licences and/or the maintenance of extant export licences has breached and/or continues to breach UK’s obligations arising from Article 16.
23. As to ‘*knowledge*’, the Interveners point to the following facts and matters:
  - 23.1. There was a substantial body of material from reputable sources (including the UN Secretary General, the UN Security Council’s Panel of Experts on Yemen, the UN High Commissioner for Human Rights, the European Parliament, and non-government organisations such as

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<sup>49</sup> *Ibid*, [7].

<sup>50</sup> Which is included in the evidence before the Court; see Claimant’s Statement of Facts and Detailed Statement of Grounds, Annexes I to V.

Médecins sans Frontières, Amnesty International, and Human Rights Watch), which detailed the KSA's breaches of IHL in Yemen.<sup>51</sup>

- 23.2. There was credible evidence that the KSA had made multiple attacks on civilians and civilian objects, including the Al Mazraq camp for internally displaced persons<sup>52</sup> and the Médecins Sans Frontières Hayadeen Hospital.<sup>53</sup> Under IHL, civilians are immune from attack.<sup>54</sup>
- 23.3. On 8 May 2015 there was a declaration by Brig. Gen. Ahmad al-Assiri, acting in his official capacity as a senior military officer of the KSA, that the cities of Sa'ada and Marran would be treated as military targets in their entirety.<sup>55</sup>
- 23.4. Attacks on those cities followed, in apparent breach of the IHL principles prohibiting targeting of civilians and also in violation of the principle of distinction.<sup>56</sup>
- 23.5. In light of the KSA's declaration that the cities of Sa'ada and Marran would be targeted without discrimination between military and civilians, the indiscriminate attacks on those cities were carried out intentionally.
- 23.6. Since 9 December 2015, there has been further evidence that KSA was committing breaches of IHL in Yemen, including that summarised in Section II of these submissions.
- 23.7. The facts and matters set out above were at all times a matter of public record.

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<sup>51</sup> See Statement of Facts and Detailed Statement of Grounds, Annexes I-V.

<sup>52</sup> *Ibid*, Annex I, p1.

<sup>53</sup> *Ibid*, Annex I, p7; Annex III, p1.

<sup>54</sup> Articles 51(2), 53, and 52(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ('**Additional Protocol I**'), 8 June 1977, 1125 UNTS 3.

<sup>55</sup> Statement of Facts and Detailed Statement of Grounds, Annex V, p1-3.

<sup>56</sup> Additional Protocol I, Article 51(4). The indiscriminate nature of such attacks is not lessened by the existence within Sa'ada and/or Marran of specific legitimate military objectives, since '[m]ilitary objectives dispersed about populated areas have to be attacked separately.' UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004, reprinted 2010), [5.23.3].

23.8. The Secretary of State has never disputed (in response to the Claimant's Statement of Grounds or otherwise) his knowledge of these facts and matters. Indeed, the response of the Secretaries of State for International Trade, Defence, Foreign and Commonwealth Affairs, and International Development to the First Joint Report of the Business, Innovation and Skills and International Development Committees on the use of UK-manufactured arms in Yemen has recently confirmed that the UK Government is '*aware of reports of alleged violations of [IHL] by actors in the conflict and take these very seriously.*'<sup>57</sup>

23.9. It is the UK Government's own position (albeit a position that has changed over time), that the UK has never performed its own assessment so as to conclude that KSA has not committed breaches of International Humanitarian Law:

23.9.1. Throughout the first half of 2016 the Government consistently represented that it had positively assessed that there had not been any breach of IHL by the KSA-led coalition.<sup>58</sup> Thus the UK claimed that: '*[i]n respect of the allegations about breaches of international humanitarian law, the Ministry of Defence makes assessments of how the Saudis are acting;*'<sup>59</sup> and '*we are doing our own assessments*'<sup>60</sup> of whether the KSA had carried out breaches of IHL.

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<sup>57</sup> Secretaries of State for International Trade, Defence, Foreign and Commonwealth Affairs, and International Development, *First Joint Report of the Business, Innovation and Skills and International Development Committees of Session 2016-17, 'The Use of UK-Manufactured Arms in Yemen'*, *Response of the Secretaries of State for International Trade, Defence, Foreign and Commonwealth Affairs, and International Development*, (Cm 9349, 2016), p7 [A/47].

<sup>58</sup> See Hansard, Answer to Yemen: Armed Conflict: Written answer 15523, 4 January 2016 (Rt Hon Philip Hammond MP) [A/63].; Hansard, Answer to Yemen: Military Intervention: Written answer 24770, 12 February 2015 (Rt Hon Philip Hammond MP) [A/64].; Hansard, Answer to Saudi Arabia: Military Aid: Written answer 24769, 15 February 2016 (Rt Hon Philip Hammond MP) [A/65].; Hansard, Answer to Yemen: Military Intervention: Written answer 24771, 15 February 2016 [A/65]. (Rt Hon Philip Hammond MP); and HC Deb 8 June 2016, vol 611, col 138WH (Mr David Lidington MP, then Minister of State for Europe) [A/66].

<sup>59</sup> HC Deb 8 June 2016, vol 611, col 138WH (Mr David Lidington MP, then Minister of State for Europe).

<sup>60</sup> Hansard, Westminster Hall Debate, War in Yemen: First Anniversary, 22 March 2016, Vol 607, col 518WH (Mr Tobias Ellwood MP, Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs) [A/94].

- 23.9.2. However, on 21 July 2016, the government issued a formal correction to the effect that the statements were wrong to represent that the government had positively concluded that the KSA-led coalition had not committed any breach of IHL; and that the government should have represented that it had merely '*not assessed*' or been '*unable to assess*' whether there had been any such breaches.<sup>61</sup>
- 23.9.3. Instead of conducting its own assessment of alleged breaches of IHL, the government now maintains that it merely carries out its own '*analysis*,' and that the government '*encourage[s] the Saudis to conduct their own investigations*' into whether breaches of IHL have occurred.<sup>62</sup> In addition, the Ministry of Defence has recently been reported as stating that the UK has no oversight of the targeting decisions taken by the KSA in the use of weapons exported by the UK in the Yemen conflict.<sup>63</sup>
- 23.9.4. Against that background, on 5 September 2016, the Parliamentary Under-Secretary for Foreign and Commonwealth Affairs, Mr Tobias Ellwood MP, on 5 September 2016 asserted that, for the purposes of the approval of arms exports, the government '*look to the future, to the intent of that country [i.e. the KSA] and at how those weapon systems will be used. As things stand, we do not believe that they will be used in breach of IHL.*'<sup>64</sup>
- 23.9.5. As set out above in Section B, in the case of a dynamic situation, such as the ongoing conflict Yemen, it is particular important (in relation to Article 16 '*knowledge*') properly to address existing

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<sup>61</sup> Hansard, Corrections to Parliamentary Questions and Westminster Hall Debates: Written statement HLWS120, 21 July 2016 (Baroness Anelay of St Johns, Minister of State for Foreign and Commonwealth Affairs) [A/132].

<sup>62</sup> Hansard, Corrections to Parliamentary Questions and Westminster Hall Debates: Written statement HLWS120, 21 July 2016 (Baroness Anelay of St Johns, Minister of State for Foreign and Commonwealth Affairs) [A/132].

<sup>63</sup> Nick Hopkins, 'MoD seriously misled me on Saudi arms sales, says Vince Cable,' The Guardian (4 November 2016), available at: <https://www.theguardian.com/world/2016/nov/04/mod-seriously-misled-me-on-saudi-arms-sales-says-vince-cable>, accessed 16 January 2017 [A/134].

<sup>64</sup> Hansard Debate, Humanitarian Law (Yemen), 5 September 2016, Vol 614, col 33[A/135].

allegations of breaches, especially in the face of credible evidence of such breaches.

24. As to the second condition, of ‘*material contribution*,’ the Interveners say that, *prima facie*, sufficient ‘*contribution*’, can be inferred in circumstances where State A grants licences for the supply of military equipment to State B at a time when State B is engaged in an ongoing conflict. The Interveners also note the findings of the UK Joint Committee of Business, Innovation and Skills and International Development, that: ‘. . . *it seems inevitable that any violations of international humanitarian and human rights law by the coalition have involved arms supplied from the UK.*’<sup>65</sup>

25. As to the third condition:

25.1. The rules and prohibitions of IHL are set out *inter alia* in customary international law and in the Geneva Conventions<sup>66</sup> and Additional Protocols I and II to the Geneva Conventions.<sup>67</sup> Further, many of the rules of IHL have attained the status of customary international law, binding on all States regardless of their ratification of these treaties.

25.2. In its Statement of Facts and Detailed Statement of Grounds, the Claimant has set out various rules of IHL, including the obligation to take all feasible precautions in attack, the prohibition of attacks on civilians or objects indispensable to the civilian population, the prohibition of indiscriminate or disproportionate attacks, and the obligations of investigation and reparation in case of breaches of IHL.<sup>68</sup>

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<sup>65</sup> First Joint Report of the Business, Innovation and Skills and International Development Committees of Session 2016-2017, published 15 September 2016, p3 [A/152].

<sup>66</sup> International Committee of the Red Cross (‘ICRC’), Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (‘**Geneva Convention I**’), 12 August 1949, 75 UNTS 31; ICRC, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (‘**Geneva Convention II**’), 12 August 1949, 75 UNTS 85; ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (‘**Geneva Convention III**’), 12 August 1949, 75 UNTS 135; and ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (‘**Geneva Convention IV**’), 12 August 1949, 75 UNTS 287.

<sup>67</sup> **Additional Protocol I** and **Additional Protocol II**.

<sup>68</sup> Statement of Facts and Detailed Statement of Grounds, [39].

25.3. For the purposes of the conflict in Yemen, the Interveners note that the main applicable IHL rules are those which, under Additional Protocol II to the Geneva Convention and under customary international law, apply to non-international armed conflicts.

25.4. In any event, the KSA and the UK are both State parties to the Geneva Conventions and Additional Protocols I and II and are both bound by the rules of customary IHL.<sup>69</sup> It follows that, if and insofar as the KSA commits a violation of IHL, doing so would have been wrongful had the act been committed by the UK itself.<sup>70</sup>

#### **(D) The Requirements of Common Criterion One**

26. Common Criterion One, on its proper construction, requires (*inter alia*) that: (a) the UK does not breach Article 16; and also (b) that the Defendant on behalf of the UK performs its own analysis specifically to consider its obligations arising from Article 16 (especially where there is a *prima facie* case and/or reasonable cause for concern as to an actual or potential breach of those obligations).

27. The grant, amendment, suspension, and/or revocation of a licence for the export of military equipment and technology from the United Kingdom is governed, under domestic law,<sup>71</sup> by the Consolidated EU and National Arms Export Licensing Criteria (**'the Common Criteria'**),<sup>72</sup> which constitute guidance made pursuant to section 9 of the Export Control Act 2002.<sup>73</sup> The EU Common Position

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<sup>69</sup> The UK, but not the KSA, is also a party to Additional Protocol III, dealing with the Adoption of an Additional Distinctive Emblem for medical and religious personnel (to complement the Red Cross and Red Crescent symbols). For the avoidance of doubt, no allegation in the present proceedings depends upon the status of Additional Protocol III.

<sup>70</sup> See ILC Commentary on Article 16, [6].

<sup>71</sup> And as a reflection of the UK's equivalent obligations at EU law under the EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. OJ L 335, 13.12.2008, 99-103 (**'EU Common Position'**).

<sup>72</sup> HC Deb 25 March 2014, cols 9-14WS (Rt Hon Vince Cable MP, then Secretary of State for Business, Innovation, and Skills).

<sup>73</sup> While the Export Control Act 2002 itself deals expressly with the *grant* of licences, the Export Control Order 2008 clarifies that the Secretary of State may "*amend, suspend, or revoke a licence*" already granted. As the Claimant has noted, the government has confirmed that, while the Order does not specify the grounds for revocation, in practice the decision will be for reasons including where relevant circumstances are such that a proposed export would no longer be consistent with the Consolidated Criteria.

2008/944/CFSP confirms that all export licence applications must be assessed against conditions which are themselves mirrored in the Common Criteria.<sup>74</sup>

28. The Claimant's argument focuses on the Secretary of State's compliance with Common Criterion Two. The Interveners draw attention to Common Criterion One, which deals with the UK's own international legal obligations. Criterion One is described as:

*'Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.'*

29. Criterion One reads, in part:

*'The Government will not grant a licence if to do so would be inconsistent with, inter alia...*

*f) the OSCE principles governing conventional arms transfers and the European Union common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.'*

30. The OSCE principles provide that each transferring State:

*'will avoid transfers which would be likely to: [...] (iii) contravene its international commitments ...'*<sup>75</sup>

31. Thus, by reason of Common Criterion One, the UK is obliged *not* to grant or maintain an export license if to do so would or '*would be likely to*' place the UK in breach of its own international obligations and commitments:

31.1. It is clear from the words '*as well as other international obligations*' and '*inter alia*', that the list of specific international obligations is not exhaustive. As such, Common Criterion One requires that the UK avoid

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<sup>74</sup> EU Common Position, Article 1(1). Article 2(1) of the EU Common Position is rehearsed in the title and body of Criterion One of the Common Criteria.

<sup>75</sup> Organization for Security and Co-operation in Europe, Principles Governing Conventional Arms Transfers (25 November 1993), DOC.FSC/3/96 ('**OSCE Principles**'), [4(b)(iii)].

acting in breach of not only the specific listed arms control instruments but also of the provisions of other relevant treaties to which the UK is a party and the rules of customary international law, including Article 16 of the Articles on State Responsibility.

31.2. The reference to ‘*international commitments*’ in the OSCE Principles, which themselves are incorporated into Common Criterion One are also unqualified.

32. Furthermore, Common Criterion One positively requires that the Defendant on behalf of the UK performs its own analysis specifically to consider its obligations arising from Article 16. That construction follows from, *inter alia*: (1) the express obligation in Common Criterion One not to grant a licence if to do so ‘*would be inconsistent with*’ the UK’s international obligations and commitments; and (2) the requirement to ‘*respect*’<sup>76</sup> the UK’s international obligations and commitments.

### **(E) Conclusion on State Responsibility**

33. In the circumstances of this case, in the absence of any suggestion that the Defendant has performed an analysis specifically to consider the UK’s obligations arising from Article 16 (let alone any positive determination that the UK is not in breach of those obligations), there are additional reasons for the Court to conclude that the grant and maintenance of the export licences at issue in this case was unlawful and to grant declaratory relief in that regard.

### **(II) INFORMATION REGARDING THE CURRENT SITUATION IN YEMEN**

34. From March 2016 onwards, the conflict in Yemen has continued to claim the lives of thousands of belligerents and civilians. The Interveners are aware of a series of

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<sup>76</sup> For example, in *R (on the application of Price) v Carmarthenshire County Council* [2003] EWHC 42 (Admin) (‘*Price*’), Mr Justice Newman stated that the right of “*respect*” for private and family life under Article 8 of the ECHR “*means more than ‘acknowledge’ or ‘take into account’, it implies some positive obligations on the part of the public authority*”[18] (Newman J). See also *Anufrijeva v Southwark London Borough Council* [2002] EWHC 3163 (QB), [104] (Newman J). The notion that the notion of “*respect*” in Article 8 may entail a positive obligation is long established in the Strasbourg jurisprudence. See: *Marckx v Belgium* [1979] ECHR 2, [31]; and *Airey v Ireland* [1979] ECHR 3, [32].

instances in this period where airstrikes of the KSA-led coalition have killed civilians as a result of apparently indiscriminate or, at the least, poor targeting:

- 34.1. On 15 March 2016, two airstrikes on a market in the village of Mastaba in northwestern Yemen killed at least 97 civilians and potentially around 10 Houthi fighters. Human Rights Watch conducted an on-site investigation on 28 March 2016, interviewing 23 witnesses, as well as medical workers at two nearby hospitals that received the wounded, has directly examined apparent remnants of one of the bombs, and has reviewed footage and photographs of fragments of the other apparent bomb. On 16 March 2016, Brig. Gen. Ahmad al-Assiri acknowledged the strike as the responsibility of the KSA-led coalition. The Interveners exhibit Human Rights Watch's report of the incident.<sup>77</sup>
- 34.2. According to an Amnesty International research trip undertaken in May 2016, which interviewed eyewitnesses and emergency staff, there were 16 civilian casualties throughout Yemen in the period between July 2015 and April 2016 as a result of submunition explosions from cluster bombs used by the KSA-led coalition. The coalition has acknowledged using US and UK-made cluster munitions in Yemen; in May 2016 the US suspended transfers of such munitions to the KSA. The Interveners exhibit the Amnesty International report of its research trip.<sup>78</sup>
- 34.3. On 15 August, an airstrike on the MSF-sponsored Abs hospital in the Hajjah governorate in northwestern Yemen killed at least 10 people, including medics and patients. MSF maintains that the co-ordinates of the hospital had been repeatedly shared with the KSA-led coalition, and that the coalition authorities acknowledged responsibility for the strike shortly afterwards in a telephone conversation with MSF. The Interveners note that, as set out in the Second Witness Statement of Peter Watkins, the

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<sup>77</sup> Human Rights Watch, 'Yemen: US Bombs Used in Deadliest Market Strike' (7 April 2016), available at: <https://www.hrw.org/news/2016/04/07/yemen-us-bombs-used-deadliest-market-strike> [A/217].

<sup>78</sup> Amnesty International, 'Yemen: Children Among Civilians Killed and Maimed in Cluster Bomb 'Minefields'' (23 May 2016), available at: <https://www.amnesty.org/en/latest/news/2016/05/yemen-children-among-civilians-killed-and-maimed-in-cluster-bomb-minefields/> [A/226].

Ministry of Defence itself viewed this as an incident of concern from an IHL perspective, requiring an update to the Foreign and Commonwealth Office.<sup>79</sup> The Interveners exhibit Amnesty International's report of the incident,<sup>80</sup> together with the findings of the Médecins Sans Frontières review of the attack.<sup>81</sup>

- 34.4. On 10 September 2016, an apparent coalition airstrike on a water drilling facility near the village of Beit Saadan around 30 kilometres north of Sana'a killed at least 31 civilians and injured 42 more. Human Rights Watch visited the affected area on 10 November, identifying remnants of a US-made laser guided bomb. Shortly afterwards, on 21 September 2016, an apparent coalition airstrike on a densely populated neighbourhood in the city of Hodeida killed at least 28 civilians. Human Rights Watch visited the affected area on 7 November and was unable to identify any military target in the area other than the Presidential Palace, occupied by Houthi forces approximately half a kilometre away. No coalition investigation of these strikes has been undertaken. The Interveners exhibit Human Rights Watch's report of the incidents.<sup>82</sup>
- 34.5. On 8 October 2016, an airstrike on a funeral ceremony in the capital of Yemen, Sanaa, killed at least 100 people and wounded more than 500. Military and official personnel were attending the ceremony, but so were hundreds of civilians. Human Rights Watch interviewed 14 eyewitnesses, as well as rescuers, and reviewed video and photographs of the strike and remnants of the weapons apparently used. On 15 October 2016 the KSA Joint Incidents Assessment Team acknowledged that the strike had been

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<sup>79</sup> Second Witness Statement of Peter Watkins, dated 21 December 2016, [32]-[36].

<sup>80</sup> Amnesty International, 'Yemen's Horror Exposes the Deadly Hypocrisy of Arms Exporters Like the UK and the USA' (26 August 2016), available at: <https://www.amnesty.org/en/latest/news/2016/08/yemens-horror-exposes-the-deadly-hypocrisy-of-arms-exporters-including-britain-and-the-u/> [A/235].

<sup>81</sup> Médecins Sans Frontières, 'MSF Internal Investigation of the 15 August Attack on Abs Hospital Yemen: Summary of Findings' (27 September 2016), available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/Yemen\\_Abs\\_investigation\\_summary\\_final.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Yemen_Abs_investigation_summary_final.pdf) [A/238].

<sup>82</sup> Human Rights Watch, 'Yemen: US-Made Bombs Used in Unlawful Airstrikes' (8 December 2016), available at: <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes> [A/251].

carried out by coalition aircraft, and that the targeting of the ceremony location was wrongful.<sup>83</sup> The Interveners note that the Ministry of Defence also treated this incident as one of concern.<sup>84</sup> The Interveners exhibit Human Rights Watch's report of the incident.<sup>85</sup>

34.6. On 6 December 2016, a further apparent coalition airstrike deploying cluster munitions struck near two schools in the northern Yemeni city of Saada, killing two civilians and wounding at least six. Human Rights Watch has interviewed witnesses and has been provided with photographs apparently indicating both the damage and unexploded submunitions left after the strike. The Interveners exhibit Human Rights Watch's report of the incident.<sup>86</sup>

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<sup>83</sup> See Press Statement by the Joint Incidents Assessment Team on the Great Hall Incident in Sana'a (15 October 2016), available at: <http://www.spa.gov.sa/1548647> [A/265].

<sup>84</sup> Second Witness Statement of Peter Watkins, dated 21 December 2016, [32]-[36].

<sup>85</sup> Human Rights Watch, 'Yemen: Saudi-Led Funeral Attack Apparent War Crime' (13 October 2016), available at: <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime> [A/267].

<sup>86</sup> Human Rights Watch, 'Yemen: Brazil-Made Cluster Munitions Harm Civilians' (23 December 2016), available at: <https://www.hrw.org/news/2016/12/23/yemen-brazil-made-cluster-munitions-harm-civilians> [A/276].

35. In the light of the above, the Interveners consider that the situation regarding civilian casualties in Yemen remains of significant concern.

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**Date: 16 January 2017**