

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

Claim No. CO/1306/2016

IN THE MATTER OF A JUDICIAL REVIEW

BETWEEN:

THE QUEEN

on the application of

CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Defendant

SUBMISSIONS ON BEHALF OF THE INTERVENER OXFAM

A. INTRODUCTION

1. By Order dated 12 January 2017, Oxfam was granted permission by Mr Justice Mitting to intervene in writing in these proceedings in relation to the following two matters:

- (1) factual material, information and evidence regarding the impact of the conduct of the Saudi-led Coalition in Yemen, on the provision of humanitarian assistance, including by Oxfam, and on civilians and on civilian objects indispensable to the survival of the civilian population; and
- (2) a legal analysis of the rules of international human rights law binding in armed conflict, complementing the rules of international humanitarian law. Those rules are applicable to the UK's assessment of weapons exports to Yemen by virtue of Article 1(b) of the Consolidated EU and National Arms Export Licensing Criteria (Consolidated Criteria), which implement the UK's obligations under Arts 6 and 7 of the Arms Trade Treaty.¹

¹ Mr Justice Mitting granted permission for written submissions on both points combined of no longer than 25 pages. Permission to intervene orally was refused.

2. This is the first time that Oxfam has intervened in a case before the Courts in England and Wales, underscoring the importance of the matters before the Court to Oxfam as a charity and humanitarian relief organisation, and in particular to its activities in Yemen.

B. THE FACTUAL INFORMATION REGARDING THE IMPACT OF THE SLC

3. Oxfam's factual submissions are set out in the appended witness statement of Josephine Hutton [JH], which the Court is invited to consider prior to the following legal submissions.

C. OVERVIEW OF OXFAM'S LEGAL SUBMISSIONS

4. Oxfam makes the following eight submissions:
 - (1) It is settled law that international human rights law (IHRL) applies in situations of armed conflict, alongside international humanitarian law (IHL).
 - (2) Of particular relevance on the facts of this case are the rights to life, and the associated rights to food and to water.
 - (3) Pursuant to Criterion 1(b) of the Consolidated Criteria, the Defendant may not grant an export licence where to do so would be inconsistent with the UK's obligations under the Arms Trade Treaty (ATT). ATT Arts 6 and 7 require the UK to engage in a detailed IHRL risk assessment – beyond that required under Criterion 2(b) of the Consolidated Criteria – prior to authorising any weapons exports.
 - (4) ATT Art 7 requires the UK to refuse the export of any weapon to a State if there is an *'overriding risk'* that it *'could be used to commit or facilitate a serious violation of international human rights law'*.
 - (5) There is evidence of serious violations of IHRL being committed and facilitated by the SLC in Yemen as witnessed by Oxfam and as recorded and determined by numerous expert bodies.
 - (6) The weapons exported from the UK to KSA are plainly capable of being used *'to commit or facilitate'* those serious violations of IHRL.
 - (7) There is no evidence on the public record that the Defendant had proper regard to the broad considerations of IHRL, as required under Criterion 1(b), prior to authorising the export of

weapons to KSA. Failure to have had regard to such considerations would render any consequent weapons export unlawful.

(8) A determination by the Defendant that the authorisation of weapons exports to KSA would comply with the UK's obligations under the ATT, and meet Criterion 1(b) would appear *prima facie* irrational on the basis of the open materials evidencing serious breaches of IHL by the SLC, and Oxfam's experience of the conduct of the SLC in Yemen, as set out in its witness statement.

D. SUBMISSIONS

5. Each of the above submissions is dealt with in turn below.

(1) IHL in situations of armed conflict

6. It is established law that IHL, as contained in treaty and customary international law, continues to apply alongside IHL in situations of armed conflict. The International Court of Justice (ICJ) has confirmed that *'the protection offered by human rights conventions does not cease in case of armed conflict'*.²
7. Armed conflict and arms transfers are capable of affecting the enjoyment of a large number of human rights, protected under international treaties and under customary international law. They include, but are not limited to, the rights to health, housing and education, and the prohibitions on torture, forced displacement, and the excessive use of force. We focus in particular, as permitted by the Court, on the right to life and the right to food and water.
8. The legal position on the right to life in situations of an armed conflict is summarised in the 'Draft General Comment No. 36: Article 6: Right to life', prepared for the United Nations Human Rights Committee (UNHRC), the body responsible for interpreting the International Covenant on Civil and Political Rights (ICCPR):

[63] Article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable. **While rules of international humanitarian law may be relevant for the interpretation and application of article 6, both spheres of law are complementary, not mutually exclusive.** Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a real risk to the

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ, 9 July 2004, §106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ, 19 December 2005, §216.

lives of civilians and persons hors de combat, including the targeting of civilians and civilian objects, [and the] **failure to apply adequate measures of precaution to prevent collateral death of civilians... violate article 6 of the Covenant.** Furthermore, State parties should, subject to compelling security considerations, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less lethal alternatives for attaining the same military objective were considered.³ (emphasis added)

(2) The rights to life and to adequate food and water

9. The right to life is ‘*the most fundamental of all human rights*’.⁴ It is enshrined *inter alia* in Art 6 of the International Covenant on Civil and Political Rights (ICCPR), which requires states to respect the right to life and to protect against its ‘*arbitrary depriv[ation]*’, Art 2 of the European Convention on Human Rights (ECHR), Art 6 of the United Nations Convention on the Rights of the Child (CRC), and Art 10 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), as well as the common law and customary international law. It continues to afford protection to individuals in armed conflict alongside IHL.
10. The UK is a State Party to all the above IHRL conventions. So too is Yemen, the territorial state in which the conflict is being waged, with the exception of the ECHR. The KSA is a State Party to the CRC and CRPD.⁵
11. The right to life encompasses the right to adequate food and water when the situation of individuals or communities is so desperate as to condemn them to hunger unless they are given support,⁶ a situation which Oxfam has witnessed in Yemen [JH §§15-22]. It also has an independent normative existence in IHRL, being expressly recognised in the Universal Declaration of Human Rights 1948 Art 25(1), in CRC Arts 24(2)(c) and 27(3), in CRPD Arts 25(f) and 28(1), and in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Art 12(2), to which the UK, Yemen and the KSA are all parties.
12. The International Covenant on Economic, Social and Cultural Rights (ICESCR) (to which the UK and Yemen are parties) in turn recognises at Arts 11 and 11(2) ‘*the right of everyone to...*

³ UNHRC, *Draft General Comment No.36*, ‘Article 6: Right to life, draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs’, UN doc. CCPR/C/GC/R.36/Rev.2, 7 Sept 2015, §§13 and 63; (internal citations omitted).

⁴ *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514, p.531.

⁵ The status of ratification of all IHRL treaties is available on the OHCHR’s ‘interactive dashboard’: <http://indicators.ohchr.org/>.

⁶ See *e.g.* determination of the Inter-American Court of Human Rights in *Sawhoyamaya Indigenous Community v Paraguay*, judgment of 29 Mar 2006 (merits, reparations and costs), §§158-9, 168, and 170-171.

adequate food’ and *‘the fundamental right of everyone to be free from hunger’*. The UN Committee on Economic, Social and Cultural Rights (CESCR), responsible for interpreting the ICESCR, has affirmed that *‘the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights...’*⁷ This is echoed in the UN General Assembly’s 2007 Resolution on ‘The Right to Food’ (adopted by majority vote of 186:1, with one abstention, the UK, Yemen and the KSA voting in favour),⁸ which

reaffirms... the right to adequate food and the fundamental right of everyone to be free from hunger, so as to be able to fully develop and maintain his or her physical and mental capacities.⁹

13. The human right to water is also enshrined in ICESCR Arts 11 and 12, as interpreted by the CESCR in General Comment No. 15: *‘[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.’*¹⁰ It is also expressly recognised in IHRL treaties including Art 14(2)(h) CEDAW and Art 24(2)(c) CRC.

14. The right to adequate food gives rise to a correlative obligation *‘to respect existing access to adequate food [which] requires States parties not to take any measures that result in preventing such access’*.¹¹ CESR has also stated that ICESCR Art 11 requires that:

States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.¹²

15. The Special Rapporteur of the UN Commission on Human Rights on the right to food has underscored that:

[i]n situations of armed conflict, [the obligation to respect existing access to food] would mean that the Government and other armed groups must not destroy, delay or divert food supplies to civilian populations.¹³

16. The same obligations to respect apply to the right to water.¹⁴

⁷ CESCR, *General Comment No. 12*, ‘The right to adequate food (art. 11)’, E/C.12/1999/5, 12 May 1999, §4.

⁸ UNGA, 76th Plenary Meeting, A/62/PV.76, 18 Dec 2007 pp. 22-3.

⁹ UNGA, Resolution adopted by the General Assembly, A/Res/62/164, 18 Dec 2007, §2.

¹⁰ CESCR, *General Comment No. 15*, ‘The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)’, E/C.12/2002/11, 20 Jan 2003.

¹¹ CESCR, *General Comment No. 12*, ‘The right to adequate food (art. 11)’, E/C.12/1999/5, 12 May 1999, §15.

¹² *Ibid* §37.

¹³ UNGA, *The Right to Food*, transmitting the ‘Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler’, UNGA A/56/210, §27.

17. The IHRL protections of the right to adequate food and water are co-extensive with the protections guaranteed thereto under IHL, under the Geneva Conventions¹⁵ and their two Additional Protocols (API and APII).¹⁶ Most importantly for the present case are the prohibitions against attacks on, or other interferences with, the infrastructure and/or natural resources indispensable for the supply of food and water to the civilian population. They are set out in API Arts 54 and 55 and APII Art 14, relating to the protection of victims of international armed conflicts (IACs) and non-international armed conflicts (NIACs) respectively. The UK, the KSA and Yemen are all parties to both API and APII.
18. The Foreign and Commonwealth Office (FCO) appears to characterise the conflict in Yemen as an IAC.¹⁷ If that were correct, and assuming that the Defendant shares that view, API Arts 54 and 55 would apply to his export risk analysis:

Article 54 – Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Article 55 -- Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

19. If, however, the conflict in Yemen is characterised as a NIAC, which is consistent with the prevailing international consensus, given that it does not involve a *'difference between two States'*,¹⁸ then APII Art 14 would apply to the UK's export analysis:

¹⁴ See fn 10 *supra*, §§21-22.

¹⁵ Geneva Convention relative to the Treatment of Prisoners of War 1949 75 UNTS 135 (GCIII), Arts 20, 26, 29 and 46; and Geneva Convention relative to the Treatment of Civilian Persons in Time of War 1949 75 UNTS 287 (GCIV), Arts 85, 89 and 127.

¹⁷ B. Quinn and D. Smith, 'Calls for investigation into Saudi Arabia's actions In Yemen', *The Guardian*, 11 Nov 2015: <https://www.theguardian.com/world/2015/nov/11/calls-for-investigation-into-saudi-arabias-actions-in-yemen>; and J. Stone, 'Philip Hammond says he wants UK to sell even more weapons to Saudi Arabia', *The Independent*, 11 Nov 2015: <http://www.independent.co.uk/news/uk/politics/philip-hammond-says-he-wants-to-sell-even-more-weapons-to-saudi-arabia-a6730066.html>.

¹⁸ See e.g., Arimatsu and Choudhury, 'The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya', *Chatham House* (March

Article 14 – Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

20. International Committee for the Red Cross's authoritative study of *Customary International Humanitarian Law* underscores that the security of humanitarian relief personnel and objects is an 'indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation'.¹⁹ The ICRC stipulates that 'any attack on [or] destruction... of relief objects inherently amounts to an impediment of humanitarian relief'.²⁰ Under the Rome Statute of the International Criminal Court (Rome Statute), to which the UK is a party, 'intentionally using starvation of civilians as a method of warfare' (a tactic asserted by the UN Committee on the Rights of the Child (the body responsible for implementing the CRC) to have been used by the SLC (see §37 below)) is a war crime.²¹ The UN's Expert Panel on Yemen has raised the 'potential' for the SLC's widespread or systematic 'use of heavy explosive weapons in, on and around residential areas and civilian objects' to 'meet the legal criteria for a finding of a crime against humanity'.²² The systematic and/or widespread deprivation of access to food is also capable of constituting such a crime.²³

(3) Criterion 1(b) and the prohibition of arms exports in breach of the ATT

21. Criterion 1 of the Consolidated Criteria is concerned with 'respect for the UK's international obligations and commitments'. It stipulates that:

[t]he Government will not grant a licence if to do so would be inconsistent with, inter alia... the UK's obligations under the United Nations arms trade treaty. (Criterion 1(b))

22. The key obligations regarding weapons exports binding on the UK under the ATT are contained in its Arts 6 and 7. The focus of the submissions that follow will be ATT Art 7.

2014: https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf; see also HRW, Q & A on The Conflict in Yemen and International Law (April 2015): <https://www.hrw.org/news/2015/04/06/q-conflict-yemen-and-international-law>.

¹⁹ ICRC, *Customary International Humanitarian Law Volume I: Rules* (2005), Rules 31 and 32. See also API, art. 71(2) and APII, art 18(2).

²⁰ *Ibid*, ICRC, Rules 32 and 55.

²¹ Rome Statute of the International Criminal Court 2187 UNTS 90 Art 8(2)(b)(xxv). See also API, Art 54 and APII, Art 14.

²² UNSC, Report of Panel of Experts on Yemen, permission hearing bundle, p. B(UN)107, §124.

²² Rome Statute, Art 7(1)(b), as further elucidated in Art 7(2)(b).

²³ Rome Statute, Art 7(1)(b), as further elucidated in Art 7(2)(b).

23. Insofar as any assessment of IHRL compliance performed by the Defendant in relation to exports to KSA was limited to an assessment under Criterion 2 of the Consolidated Criteria and failed include a detailed consideration of Criterion 1(b), then that determination necessarily failed to have regard to the UK's binding IHRL obligations under the ATT. That is because Criterion 2(b) imposes a less exacting standard than Criterion 1: it merely requires the Defendant to '*exercise special caution and vigilance in granting licences... to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union*'.

(4) ATT Art 7's interdiction of exports in relation to which there is an overriding risk that they could be used to commit or facilitate a violation of IHRL

24. Art 7 ATT requires the UK (and, consequently the Defendant, pursuant to Criterion 1(b)) to conduct an '*objective and non-discriminatory*' risk assessment of all exports within the scope of the ATT, prior to authorising their export. Article 7 provides in relevant part as follows (emphasis added):

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorisation of the export of conventional arms... , shall, **in an objective and non-discriminatory manner, taking into account relevant factors, ... assess the potential** that the conventional arms or items:
 - (a) **would contribute to or undermine peace and security;**
 - (b) **could be used to:** ...
 - (i) commit or facilitate a serious violation of international humanitarian law;
 - (ii) **commit or facilitate a serious violation of international human rights law....**
2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b)...
3. If, 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, the exporting State Party shall not authorise the export...**

25. ATT Art 7 requires a two-stage test for the assessment of exports.²⁴ First, under Art 7(1)(a), the Defendant must determine whether the impact of a proposed export on '*peace and security*' would be negative; if so, he *must* refuse the export. That is because the authorisation of exports that would undermine peace and security are incompatible with the UK's

obligations under the UN Charter to ensure that disputes are resolved ‘*in such a manner that international peace and security... are not endangered*’.²⁵

26. If, conversely, the Defendant does not consider that the export would undermine peace and security, he would then move on to consider as a second stage its compliance with Art 7(1)(b). He would still have to refuse the export if he determined that there was nevertheless an ‘*overriding risk*’ of it being used to commit or facilitate a serious violation of IHRL (or IHL). It is only if the Defendant, having had regard to mitigating measures capable of having an impact on the proposed export in question, were to determine that the risk that the export ‘*could*’ be used to commit or facilitate a serious violation of IHRL (or IHL) was not ‘*overriding*’ (see §X below), that he may authorise it. The following paragraphs deal with the detail of each limb of the test.

(i) Would a proposed export to KSA undermine peace and security?

27. Art 7(1)(a) requires an assessment of whether exports to KSA would ‘*contribute to... peace and security*’. For the purposes of this assessment, the following elements are of particular importance:

(a) As the ATT itself underscores, ‘*peace and security and human rights are interlinked and mutually reinforcing*’ (ATT, Preamble) such that serious violations of IHRL are capable of undermining peace and security.

(b) An assessment that weapons exports to KSA *would* contribute to peace and security in Yemen has little support in the international community, given the protracted and brutal hostilities on the ground, and the repeated reports of serious violations of IHRL and IHL (see, e.g. [JH §3-8]). The European Parliament, for example, has noted that these ‘*developments carry grave risks for the stability of the region, in particular that of the Horn of Africa, the Red Sea and the wider Middle East*’.²⁶ It has unequivocally:

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.²⁷

²⁶ European Parliament, *Resolution of 9 July 2015 on the situation in Yemen* (2015/2760(RSP), § D.

²⁷ *Ibid*, preambular §§R-S.

Critically, on 25 February 2016, the European Parliament passed a Resolution declaring that the export of arms and military equipment by EU Member States to KSA for use in Yemen was ‘*in violation*’ of the EU’s Common Position on Arms Exports (made binding on the Defendant pursuant to Criterion 1(f) of the Consolidated Criteria). It made reference in particular to the violation by exporting EU States of the prohibition on exports which might be used ‘*to undermine regional peace, security and stability*’.²⁸

(c) A failure by the Defendant to undertake the assessment under Article 7(1)(a) ‘*in an objective and non-discriminatory manner*’ prior to authorising any export, would constitute a breach of ATT Art 7(1)(a) and thus Criterion 1(b) of the Consolidated Criteria.

(ii) *Could a proposed export to KSA be used to commit or facilitate a serious violation of IHRL?*

28. There is no accepted definition of ‘*a serious violation*’ of IHRL. The UN Security Council uses the terms ‘serious’ and ‘grave’ interchangeably in relation to violations of IHRL. In Oxfam’s submission, the term can be properly understood to refer to violations which are particularly serious (i) by their nature, (ii) by their magnitude, (iii) by the manner in which they are committed, and/or (iv) by their impact on their potential victims (including questions of vulnerability):²⁹ ‘*[v]iolations of human rights are also serious when they are persistent, systematic and/or widespread*’.³⁰

29. With respect to the fundamental human rights that are the particular focus of these submissions, arbitrary deprivations of life are a serious violation *per se*, given their most serious nature; so too are widespread violations of the right to food and water, which cause deaths or acute suffering among the civilian population.

30. Art 7(1)(b)(ii) refers to ‘*international human rights law*’ rather than ‘*international obligations under international agreements to which [the UK] is a Party*’ as in Art 6(2). The distinction is critical. Art 7 requires no assessment of whether a particular ATT State Party would be internationally responsible for a violation of IHRL. Art 7 instead requires an assessment by

²⁸ European Parliament, *Resolution of 25 February 2016 on the humanitarian situation in Yemen* (2016/2515(RSP), §N.

²⁹ United Nations Office for Disarmament Affairs (UNODA), *ATT Implementation Toolkit*, Module 6: Export, pp. 12-13; see Casey-Maslen, Clapham, Giacca, Parker, *The Arms Trade Treaty: A Commentary* OUP pp. 260-263

³⁰ U N Office for Disarmament Affairs (UNODA), *ATT Implementation Toolkit*, Module 6: Export, pp. 12-13.

the exporting State Party as to the likelihood that the arms in question ‘*could be used*’ (by whomever) ‘*to commit or facilitate a serious violation of IHRL*’. It is not a requirement that the arms be used by the importing State Party to commit violations of IHRL or indeed by any State at all. It is thus accepted that Art 7 is capable of applying to the conduct of armed non-state actors, even though they are obviously not signatories to human rights treaties.³¹ As the wording of Art 7 makes clear, the risk assessment required of the Defendant is focused on the rights of the potential victims of serious IHRL violations, rather than on the responsibilities of the perpetrators of serious IHRL violations. There can be no doubt that the right to life and the related right to adequate food and water form part of the corpus of IHRL (see §§9-16 above) and that civilians in Yemen are beneficiaries of and entitled to the enjoyment of those rights.

31. It is thus incumbent upon the UK Government to assess, as a matter of fact, whether the arms to be exported to KSA, which may be used by the SLC, ‘*could be used to commit or facilitate a serious violation*’ of the above rights. While the ATT Art 7 assessment process the Defendant must conduct is forward-looking, focusing on the likelihood of a future serious violation of IHRL, past or ongoing occurrences of such violations are plainly critical to his analysis.

(iii) Is there an ‘overriding risk’ that the export of the arms ‘could be used to commit or facilitate a serious violation of IHRL’?

32. The term ‘*overriding risk*’ in Art 7(3) is without pedigree in domestic or international law. At a minimum, it must be understood as only permitting an export if the potential risk of it being used to commit or facilitate a serious violation of IHRL would not be so grave as to override any positive contribution the export might make to peace and security.

33. During the course of the ATT negotiations, the UK took the view that ‘*substantial risk*’ was an appropriate test for assessing the risk of weapons exports on IHRL.³² Its position was that ‘*unless a State is satisfied that a potential transfer would not breach international commitments*’, including that it would not be used ‘*in the commission of serious violations of international humanitarian or human rights law*’, the State should be required to refuse permission for the transfer.³³ The baseline test that European Union (EU) Member States,

³¹ See e.g., Casey-Maslen, Clapham, Giacca, Parker, *supra*, pp. 267-269.

³² UN Conference on the Arms Trade Treaty, *Compilation of Views on the Elements of an Arms Trade Treaty: Background Document Prepared by the Secretariat*, 10 May 2012, UN Doc. A/CONF.217/2, p. 108: http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/2.

including the UK, are bound to apply in any event under the EU's parallel arms export regime, the European Common Position 2008/944/CFSP – at least as regards serious violations of IHL, is that of a '*clear risk*'. That is, notably, the test that the UK has adopted under Criterion 2(c) of the Consolidated Criteria in relation to the parallel obligation under ATT Art 7(1)(b)(i) to deny any export where there is an '*overriding risk*' that it could be used in serious violation of IHL. Oxfam submits that that would be the 'clearest' interpretation to apply to Criterion 1(b)'s identical requirement that the Defendant deny any export where there is an '*overriding risk*' that it would be used in serious violation of IHRL, contrary to ATT Art 7(1)(b)(ii).

(iv) *The justiciability of the test*

34. The test under Art 7 is properly subject to the scrutiny of this Court. While such determinations by the Government prior to the adoption of the ATT were historically afforded significant deference by the Courts, ATT Art 14 entitled '*enforcement*' specifically mandates the UK to take '*appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty*'. This subjects the UK's compliance with its ATT obligations to the scrutiny of domestic mechanisms, including that of domestic courts. Indeed, domestic mechanisms are intended to be the primary vehicle through which States' obligations are to be assessed. Given the broad scope of ATT Art 14's enforcement obligation, it is necessarily to be interpreted as applying both to the first limb of the test under ATT Art 7(1)(a), as well as to its second limb under ATT Art 7(1)(b): both provisions are at the heart of the ATT's weapons control framework and are critical to its effective enforcement.

(5) Evidence of serious violations of IHRL by the SLC in Yemen

35. There is a considerable body of evidence in the public domain and before the court, establishing a pattern of serious violations of IHRL by the SLC in Yemen. It also includes the factual evidence submitted by Oxfam in this case. Oxfam notes in particular that the SLC's blockade of and attacks on Yemeni ports, agricultural land, warehouses, water wells and humanitarian aid are capable of constituting a violation of the civilian population's right to food and water, as well as violations of equivalent rules of IHL. Oxfam emphasises the role of the KSA in relation to those violations, but also the failure by Yemen, at whose behest and on whose permission the SLC is said to be intervening in the conflict, to protect those rights and

to prevent their violation by the SLC, in serious violation of its own IHRL obligations. The evidence before the Court establishes not just a *risk* of the type of weapons being exported to the KSA from the UK being used to commit or facilitate serious violations of IHRL in the future, but also the fact *that they have already been used in that manner in the past*.

36. The UN Panel of Experts on Yemen has determined that ‘*all parties to the conflict have violated international human rights law*’ and that ‘*all parties to the conflict have violated the rights of the child and committed grave violations against children during armed conflict*’.³⁴ Of particular importance to an analysis of the IHRL export risk of weapons to KSA are the Panel’s findings that the SLC had caused ‘*the intentional disruption of key logistical infrastructure, including ports, bridges and roads*’ resulting in ‘*alarming consequences for civilians*’ and that ‘*[a]ttacks on sea and air routes into the country have resulted in further obstructions to the delivery of humanitarian assistance*’.³⁵ The Panel underscores at §153 that:

The denial of humanitarian assistance is constitutive of a war crime regardless of whether it occurs in an international or a non-international armed conflict... However, the commercial blockade also has an impact on the social and economic rights of the people of Yemen and, as such, on the right to life.

37. The Court’s attention is drawn to the recent conclusions of the UN Committee on the Rights of the Child (responsible for assessing implementation of the CRC) expressing ‘*deep[.] concern*’ at ‘*credible, corroborated and consistent information that the State party, through its military operation in Yemen, has been committing grave violations of children’s rights*’.³⁶ It continues:

In particular, the Committee expresses its deep concern at information that:

- (a) **Hundreds of children have been killed and maimed as a result of indiscriminate air strikes and shelling by the State party-led coalition on civilian areas and camps for internally displaced persons**, of unexploded cluster bomb submunitions and other unexploded ordnance, and of the dozens of attacks carried out on schools and hospitals;
- (b) **Prohibited tactics such as inducing starvation as a method of warfare have been used by the State party-led coalition against civilians, including children...**;
- (c) **More than 3 million children in Yemen face life-threatening levels of malnutrition and thousands are currently at risk of dying from diseases owing to the dire humanitarian crisis, the destruction of civilian infrastructure critical to the maintenance of basic services and the imposition from both sides of obstacles to the delivery of humanitarian assistance;**

³⁴ UNSC, Report of Panel of Experts on Yemen, permission hearing bundle, p. B(UN)107, §§ 148 and 155.

³⁵ *Ibid.*, §§166 (emphasis added) and 170

³⁶ **CRC, Concluding observations on the combined third and fourth periodic reports of Saudi Arabia** (25 October 2016), §38.

(d) In 2015, more than half of the attacks perpetrated on schools were attributed to the State party-led coalition...; these attacks continued in 2016, leaving millions of children in need of emergency access to education.³⁷ (emphasis added)

38. The Defendant has failed to provide an adequate public explanation as to how, and on what basis, he appears to have dismissed the findings of expert IHRL bodies and agents, including the UN High Commissioner for Human Rights and the UN Security Council appointed Panel of Experts on Yemen, which have concluded that the SLC has committed and/or facilitated serious violations in Yemen. Notably, the Secretary of State for International Development herself warned in September 2015 that ‘*millions*’ of Yemenis were ‘*at risk of starving by the end of the year*’ and that, while UK aid would ‘*save lives in the short term*’, ‘*long term catastrophe*’ could only be averted if ‘*food and especially fuel*’ could reach the country and ‘*be delivered to where it is desperately needed in order to mill wheat, transport food, pump water and power hospitals*’.³⁸ There is no indication that the Government’s own stark warnings on serious violations of the right to food, water and life of the Yemeni population were taken into account by the Defendant in authorising arms exports to SKA for use in Yemen. Weapons exports continued throughout this time [JH §19].

(6) The potential for weapons exported from the UK to KSA to be used to ‘commit or facilitate’ a serious violation of IHRL

39. It is not in dispute that weapons exported from the UK have been used by KSA in the military operations by the SLC in Yemen. The weapons of the type exported by the UK to SKA are plainly capable of being used to commit or facilitate the serious violations of IHRL that have been set out above, including through its attacks on the civilian infrastructure for the production and supply of food and water and other humanitarian assistance, and on the enforcement of restrictions on the movement of goods through the ports and throughout the country.

40. The UK Government (including the Defendant) has referred to a number of measures purportedly put in place to assist KSA to comply with its obligations under international law, albeit that this remains a matter on which there is ‘*much confusion and greater clarity is needed*’.³⁹ As described in the joint report of the Business, Innovation and Skills and

³⁷ *Ibid.* §38

³⁸ DFID, ‘Justine Greening: Food crisis in Yemen could kill millions’, 19 June 2015; DFID, ‘Urgent action needed to prevent famine in Yemen, warns Justine Greening’, 27 Sept 2015: see [JH fn 32].

³⁹ House of Commons Business, Innovation and Skills (BIS) and International Development (ID) Committees, *The Use of UK-Manufactured Arms in Yemen, 2016-2017*, HC 679, §76.

International Development Select Committees on the use of UK manufactured weapons in Yemen, the Government has asserted:

that UK personnel are not part of the intelligence planning cells, but that they are in the Joint Combined Planning Cell HQ... [; t]hat UK personnel are in Saudi Arabia to train, educate and teach best practice, which includes understanding IHL and training air crews and planners how to go about assessing targets for the future, but that our liaison officers “do not provide training, they do not provide advice on IHL compliance, and they have no role in the Saudi targeting chain”.⁴⁰

41. Oxfam is also aware that DfID has sought to influence the SLC to allow the entry of humanitarian aid and commercial supplies via ports and has provided financial support to UN Verification and Inspection Mechanism (UNVIM) for Yemen to help ease the flow of goods.⁴¹
42. In order for the UK to comply with its obligations under ATT Art 7, these mitigation measures would have had to be capable of diminishing the risk that weapons exported *prior to* the adoption or implementation of those measures could be used to commit or facilitate a serious violation of IHRL. They were not. As the Secretary of State for International Development’s public statement makes clear, the measures put in place by the UK were incapable of obviating the risk of starvation, and consequently insufficient to mitigate the ‘*overriding risk*’ that UK arms exports would facilitate the serious violation of the rights to life, food and water in Yemen. As to the reported training of KSA military personnel on general matters of IHL by UK personnel, this is a obviously a very weak mitigating measure in the absence of the provision of advice or oversight in relation to IHL compliance..

(7) The ‘*objective, non-discriminatory*’ assessment of the risk of a serious violation of IHRL required under ATT Arts 6 and 7 and Criterion 1(b) of the Consolidated Criteria

43. The Defendant is plainly required, pursuant to Criterion 1(b), in conjunction with ATT Arts 6 and 7, to consider whether any export to KSA could be used to commit or facilitate a serious violation of IHRL, including the prohibition on the arbitrary deprivation of life, the right to food and the right to water as enshrined in the international treaties set out at §§9-16 above and in customary international law. Any failure to have performed such an assessment at all or to have undertaken it in an ‘*objective, non-discriminatory manner*’ would constitute a breach of Criterion 1(b).

⁴⁰ *Ibid.*

⁴¹ Fn 32 *supra*.

44. The United Nations Office for Disarmament Affairs' (UNODA) guidance to assist ATT States Parties in complying with their obligations under ATT Art 7 lists a number of important issues that should be addressed in an ATT Art 7 assessment process.⁴² They include whether:

- (i) the receiving State '*disseminates international human rights law, in particular to the security and police forces and other arms bearers, and has integrated international human rights law into its training, manuals and instructions*';
- (ii) '*there is evidence that the type of arms to be exported or a similar type is or has been used for serious violations of international human rights law*';
- (iii) '*the conduct*' of the receiving State '*in respecting international human rights law has been subject of substantial concern by UN human rights monitoring bodies, regional human rights monitoring bodies, national human rights commissions*';
- (iv) the receiving State has '*legislation and effective procedures for the investigation of human rights abuses and violations, including those committed by the State or its agents*';
- (v) the receiving State has '*a competent, independent, impartial and functioning judiciary with the capacity and will to prosecute serious human rights violations*'.

45. The Defendant was not *obliged* to follow the UNODA Guidance to the letter. However, given that Criterion 1(b) is expressly intended to ensure compliance with the UK's obligations under the ATT, and that the Guidance is the most authoritative interpretive statement on the nature and scope of the assessment that must be conducted by States Parties under ATT Art 7, any decision not to take it into account would, at the very least, have had to be reasoned.⁴³ The Defendant could not properly and/or lawfully assess the record of KSA in respect of IHRL without determining the answer – backed by evidence – to questions of the nature and type set out above, on the basis of '*objective, non-discriminatory*' enquiries.

(8) The lawfulness of any determination that there was no requisite risk of weapons exports from the UK being used to commit or facilitate a serious violation of IHRL

46. Oxfam acknowledges that it is not privy to the closed materials in this case and is unaware of their nature or contents. However, on the evidence available in the public domain, including repeated findings by bodies and individuals expert in IHRL, and on the basis of Oxfam's first-hand experience of the conflict in Yemen, any determination by the Defendant that there is no '*overriding risk*' that weapons exported to the KSA '*could be used to commit a serious*

⁴² UNODA, *Arms Trade Treaty Implementation Toolkit Module 6: Exports*, pp.13-14..

⁴³ *R (Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245, per Lord Dyson.

violation’ of IHRL appears to be *prima facie* irrational. The evidence that serious IHRL violations have already occurred and that there is a risk of their recurrence, is overwhelming.

E. CONCLUSION

47. The matters raised in this case are critical in ensuring the effectiveness of the UK’s arms export regime, including in assessing its compliance with the UK’s obligations under the ATT. As such, the outcome of the case also has significant ramifications for Oxfam’s continuing humanitarian work in Yemen and elsewhere, for the safety of its staff and property, and for the protection of the rights of civilians in conflicts in which UK-exported arms are being or may be deployed.
48. Oxfam respectfully submits that the materials and arguments it has presented in these submissions provide a further basis for the Court to determine that the authorisation of export licences by the Defendant for weapons to KSA, for possible use in the SLC’s military campaign in Yemen, was unlawful.

PROFESSOR ZACHARY DOUGLAS QC

BLINNE NÍ GHRÁLAIGH

Matrix Chambers

19 January 2016