Claim No: CO/1306/2016

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

BETWEEN:

THE QUEEN
on the application of

CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS[1]

Defendant

-and-

HUMAN RIGHTS WATCH
AMNESTY INTERNATIONAL
RIGHTS WATCH (UK)
OXFAM

Interveners

OPEN SKELETON ARGUMENT OF THE SECRETARY OF STATE

FOR HEARING 7, 8, 10 FEBRUARY 2017

Time estimate: 3 days

Essential OPEN Reading:

- Skeleton Arguments
- Claimant's Statement of Facts and Detailed Statement of Grounds dated 8 March 2016

[1] Following the creation in July 2016 of the new Department for International Trade, responsibility for export controls was transferred, by administrative means, from the Secretary of State for Business, Innovation and Skills, to the new Secretary of State for International Trade. Further, the relevant legal rights, liabilities and obligations have, as from 9 November 2016, been transferred to the Secretary of State for International Trade under S.I. 2016/992. In those circumstances these legal proceedings can now be transferred to the Secretary of State for International Trade.

- Claimant's witness statements by Ann Feltham dated 7 March 2016 and 10 October 2016.

- Defendant's OPEN Witness Statements of:

    - Edward Bell, Head of the Export Control Organisation ('ECO') in the Department for International Trade ('DIT'), dated 5 August 2016, 20 December 2016 (referred to hereinafter as 'Bell 1', 'Bell 2');

    - Neil Crompton, Director of the Middle East and North Africa Directorate ('MENAD') at the Foreign and Commonwealth Office ('FCO'), dated 5 August 2016 , 21 December 2016 ('Crompton 1', 'Crompton 2'),

    - Peter Watkins, Director General Security Policy at the Ministry of Defence ('MOD'), dated 5 August 2016 and 21 December 2016 ('Watkins 1', 'Watkins 2').

A. INTRODUCTION AND SUMMARY

1. This skeleton argument sets out the Secretary of State's response to the Claimant's judicial review challenge to two decisions by the Secretary of State: the decision communicated to the Claimant on 9 December 2015[2], to continue to grant new licences for the sale or transfer of arms or military equipment to the Kingdom of Saudi Arabia ("KSA") in respect of such equipment; and the decision not to suspend extant export licences for the sale or transfer of arms and military equipment to the KSA for possible use in the conflict in Yemen.[3] The Secretary of State does not address the points raised by the Interveners in this main skeleton for the reasons set out by GLD in its letter to the Court dated 24 January 2017.

2. The Secretary of State has relied considerably on sensitive material the disclosure of which would be damaging to national security. On 13 October 2016 Cranston J granted a declaration under s.6 of the Justice and Security Act 2013 that the proceedings are proceedings in which a closed material application may be made to the court.[4] Consequently these OPEN submissions should be read in conjunction with the Secretary of State's CLOSED skeleton argument.

3. Three grounds of challenge are advanced by the Claimant: that the Secretary of State:

[2] Exhibited at EB8 to Bell 1

[3] Permission was initially refused by Andrews J on 15 April 2016, but Gilbart J granted permission following an oral hearing on 30 June 2016.

[4] On 14 December 2016 Mitting J gave permission to the Secretary of State pursuant to s.8 of the Justice and Security Act 2013 to withhold sensitive material in his evidence served in these proceedings

a. has failed to ask correct questions and make sufficient enquiries;
b. has failed to apply the "suspension mechanism";
c. has irrationally concluded that the test set out in Criterion 2(c) of the Consolidated EU and National Arms Export Licensing Criteria ("the Consolidated Criteria")[5] is not met.

4. In summary it is the Secretary of State's position that:

a. He has asked himself the relevant questions (as specified in Criterion 2(c)), and taken into account the key factors identified in the EU User's Guide produced by the General Secretariat of the Council of the European Union[6]). He has taken reasonable, and on any view rational, steps to obtain and consider the relevant information necessary for him to take his decisions;
b. He has rationally concluded that he is in possession of sufficient information to conduct the requisite risk assessment pursuant to Criterion 2(c) and that the suspension mechanism does not apply;
c. His conclusion that there is not a clear risk that UK licensed items might be used in the commission of a serious violation of International Humanitarian Law ('IHL') pursuant to Criterion 2(c) is also rational. There is no proper basis for the inference of irrationality the Claimant seeks to draw.
d. It is not sufficient for the Claimant to point to other bodies which have concluded that there have been, or may have been, past IHL violations committed by the Coalition and to assert that this creates an inference of irrationality and a burden of public explanation. Criterion 2(c) imposes no burden on the Secretary of State to explain why views expressed by these or any other third parties are wrong. The fact that those views have been expressed and the bases for such views are matters which would naturally be, and have been, taken into account when making the forward-looking assessment required by Criterion 2(c). However, they are to be considered alongside <u>all</u> of the information available to the Secretary of State – some of which may not be publicly available.

5. The process for making relevant export licence decisions is explained in Bell 1 at §§5-16. The final decision to grant or refuse an export licence rests with the Business Secretary (now the International Trade Secretary). However prior to making a decision he takes advice from other key government departments, principally the Foreign and Commonwealth Office ('FCO') and the Ministry of Defence ('MOD'). Those other government departments have expertise in areas relevant to the consideration of

[5][E(UK)5 - E(UK11].
[6]General Secretariat of the Council of the European Union "*User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*", 20 July 2015 COARM 172 CFSP/PESC 393 ("EU User's Guide") at [C/115-C/269 at C/168].

applications including human rights, international obligations (including obligations as a matter of International Humanitarian Law ('IHL')) and defence. The decision whether or not to grant a licence takes full account of the recommendations made by these departments (which in the case of sensitive or finely balanced applications will be made by Ministers personally).

6. As is evident from the nature of the Criterion 2(c) test, as applied to a context such as the present, the ultimate issue for the Secretary of State is one which is shot through with judgement and prediction. It involves the evaluation of future risk in a dynamic and fast-moving situation. The complexity and range of matters that feed into that issue is also an essential part of the context – and itself requires judgements to be made as to relative importance and weight. As made clear in the Secretary of State's OPEN and CLOSED evidence there are "*many channels of communication at all levels*"[7] with KSA. In making these decisions, the Secretary of State has relied on advice and information from those with intimate knowledge and expertise of KSA, its processes, procedures and the situation on the ground, including advice from officials embedded within KSA, as well as diplomats and MOD personnel in constant contact with their KSA counterparts.

7. The context is also one in which information bearing on the issue is almost bound to be less than full – assessments are being made as to the conduct of military operations, to which the UK is not a party, by a foreign sovereign state in another (extremely volatile) part of the world.

8. As is evident from the detailed evidence which has been submitted on behalf of the Secretary of State, the decision-making processes have been conducted at the highest levels of government and on the basis of careful assessments of relevant information. The Foreign Secretary has recognised that some of the decisions have been "extremely finely balanced"[8]; and serious and concerning developments in the Yemen conflict have had to be assiduously and conscientiously evaluated as part of the decision-making process.

9. All of those elements serve to highlight the thoroughly ambitious nature of the Claimant's rationality and *Tameside* challenges. At the heart of both public law concepts lies the recognition that substantial respect is to be afforded to the judgements of the Secretary of State. No doubt in some contexts arguments can be mounted that the margin of discretion to be afforded the decision maker is a narrow one because the issue is a tolerably straightforward one (whether at the point of considering the information/matters feeding into the substantive decision or in relation to the actual

[7] See Crompton 1 at §34

[8] See Bell 2 at §15 with reference to the advice given by the Foreign Secretary of 8 November 2016 2016 (see Exhibit EB9 to Bell 2) and, in particular, after the Great Hall airstrike which occurred on 8 October 2016.

decision itself). The present context is as far away from that sort of case as it is possible to imagine. Properly analysed, the Secretary of State's December 2015 decisions and the continuing decisions thereafter cannot be impugned on either rationality or *Tameside* grounds and this judicial review should be dismissed.

B. FACTUAL BACKGROUND

10. The assessment undertaken by the Secretary of State pursuant to Criterion 2(c) with respect to the licensing of arms for export to KSA is carried out on a case-by-case basis.[9] It is made by reference to expert advice from both the FCO and MOD. These departments have kept the situation under careful and continual review. This joint working with other government departments has ensured that the Secretary of State is able to keep the situation under regular review. Detailed information in relation to the Secretary of State's decision making is set out in the witness statements filed on his behalf.

The conflict in Yemen

11. The factual and operational background to the conflict in Yemen is addressed in the Secretary of State's evidence at: Crompton 1 §§1-11, Crompton 2 §§5-13, Watkins 1 §§ 12-17 and §§100-102 and Watkins 2 §§4-10.

12. Yemen is the second largest country in the Arabian peninsula and is bordered by the KSA to the north, the Red Sea to the west, the Gulf of Aden and Arabian Sea to the south, and Oman to the east-northeast. The border with KSA is approximately 1,800km. Although Yemen's constitutionally stated capital is the city of Sana'a, the city has been under rebel control since February 2015. Because of this, Yemen's capital has been temporarily relocated to the port city of Aden, on the southern coast.

13. In September 2014 Houthi forces (a Shia Zaydi movement from the north of Yemen) entered Sana'a and, backed by former Republican Guard Forces loyal to former president Salah, took control of key central government institutions. In January 2015, Houthi forces took control of areas in central and southern Yemen and placed President Hadi and other key officials, under house arrest[10].

14. The military operations conducted in Yemen by the coalition of nine states ("the Coalition"[11]) were commenced following the express request of the Yemen President in a

[9] Cf to the Claimant's Grounds at §8 which suggests a blanket decision to "*grant new licences*" has been taken.
[10] Crompton 1 at §7
[11] The coalition comprises: KSA, Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Qatar and Bahrain.

letter dated 24 March 2015 to the UN to provide support "*by all necessary means and measures, including military intervention, to protect Yemen and its people from continuing aggression by the Houthis*"[12]. The Coalition has been led by KSA[13] and it commenced its operations on 25 March 2015.

15. As explained in Crompton 1 at §§8-10, there is a sound legal basis for the intervention by the Coalition, namely the consent of the Government of Yemen and its right to defend itself against an internal military threat and a clear goal of stability and security. In addition the UN Security Council Resolution 2216 (2015) dated 14 April 2015[14] noted President Hadi's letter to the UN outlining the request for support, including military intervention, reaffirmed its support for the legitimacy of President Hadi and condemned "*in the strongest terms, the ongoing unilateral actions taken by the Houthis*". The UK fully supports both the Coalition and the right of Saudi Arabia to defend itself. Instability in Yemen, where there is a long-standing al-Qaeda presence and a growing threat from Daesh, threatens not just the Gulf but security in western Europe.

16. There have been numerous ceasefires and cessations of hostilities (CoH) during the conflict (see Crompton 1 at §§112-118 and Crompton 2 at §§5-13). As explained in the Defendant's evidence, those fluctuations have been a factor in the overall (complex) assessment process which has been carried out under Criterion 2(c). A nationwide ceasefire was adopted between 15 December 2015 and 2 January 2016[15]. A further local de-escalation was agreed on 4 March 2016[16]. On 23 March 2016 the UN announced a nationwide ceasefire which began on 10 April 2016[17] and continued, while peace talks were conducted in Kuwait, until 6 August 2016[18].

17. The Kuwait talks broke down and this resulted in a stepping up of military activity in Yemen including an increase in Coalition airstrikes[19]. There followed an escalation in military tensions. A brief CoH did not hold[20], nor did a further brief CoH in November 2016[21]. As at early 2017 Houthi and Salah's GPC[22] forces continued their occupation of Sana'a, and ground fighting remained significant in both the Northern Provinces and

[12]UN Security Council Resolution 2216 (2015), citing the letter dated 24 March 2015 from the Permanent Representative of Yemen, to the United Nations, transmitting a letter from the President of Yemen (President Hadi) [E(INT)/123 – E(INT)/129].
[13] It is to be emphasised that the UK is not a party to the Yemen conflict and is not a member of the Coalition.
[14] Exhibit NC2 to Crompton 1
[15] Crompton 1 at §§112
[16] Crompton 1 at §113
[17] Crompton 1 at §115-118
[18] Crompton 2 at §§5-6
[19] Crompton 2 at §§7-11
[20] Crompton 2 at §§10-11
[21] Crompton 2 at §11,Watkins 2 at §9
[22] General People Congress

around Taizz to the North of Aden. Generally there has been a downward trend in daily airstrikes and, with that reduction, an increase in pre-planned targeting by the Coalition[23]. There has also been a downward trend in the allegations of IHL violations[24].

18. In a new dimension to the conflict, the Houthis have mounted attacks on shipping in the Red Sea. On 1 October 2016 a UAE-flagged civilian charter vessel was attacked and badly damaged by Houthi forces north of the Bab El Mandeb straight. In response, the US increased its naval support in the area[25]. On 30 January 2017, a Saudi frigate (Al Madinah) was attacked in the Southern Red Sea and two of her crew killed.

19. The US continues to conduct a counter-terrorism campaign against Al-Qaeda in the Arabian Peninsula (AQAP) and extremists, including Daesh, in Yemen. These groups continue to take advantage of ungoverned space, on-going fighting and instability. As recently as 29 January 2017, there was a US operation in the vicinity of Al Bayda, in the mountains North of Aden, against AQAP leaders.

20. It is to be noted that the conflict in Yemen poses a real military threat to KSA. There have been numerous cross-border incursions and a number of Saudis have been killed on the KSA side of the border. As of 1 February 2017 (in figures which have been reported to the Defence Attaché, which the UK assesses as credible), there have been 745 Saudi soldiers and border guards killed along the Southern front, and over 10,000 injured since March 2015 – equalling almost 2 servicemen killed for every day of the conflict. The Saudis have reported over 150 ballistic missile attacks since March 2015 (a figure which UK Defence Intelligence assesses as credible) and, of particular concern, 24 attacks into the KSA by larger SCUD variant missiles over the last 15 months. At the end of October 2016 the Houthi-Saleh forces fired a SCUD missile (the third SCUD to be fired in 2016) aimed, according to a Houthi-Saleh spokesman, at Jeddah International Airport, although the Saudis have said it was aimed at Mecca[26].

21. Diplomatic efforts to promote a peaceful/political settlement on the part of the UK, the US and the UN have continued. The UN Special Envoy and the 'Quad' (i.e. the UK, US, KSA and UAE)[27] continue to push for a reintroduction of the CoH and engagement with a proposed 'Road Map', although that has currently been rejected by the Yemeni parties to the conflict[28] The UK government has invested significant efforts in supporting efforts to secure a lasting peace in Yemen, through its work in the Quad, in the UN Security Council and in the region. The Foreign Secretary and Tobias Ellwood, Minister for Africa

[23] Watkins 2 at §6
[24] Watkins 2 at §36
[25] Watkins 2 §10
[26] Crompton 2 at §12, Watkins 2 at §7
[27] Crompton 2 §6
[28] Crompton 2 §13 and Watkins 2 at §5

and the Middle East, have been active in trying to bring the conflict to a peaceful settlement.

C. THE LEGAL FRAMEWORK FOR UK ARMS EXPORTS

22. The Secretary of State has set out in a separate Annex to this skeleton argument the relevant legal framework for UK arms exports. That is intended to provide the Court with a guide to the primary and secondary legislation in this area, as well as the relevant EU measures and applicable policies of the Secretary of State.

Updated version of the Consolidated Criteria

23. On 25 March 2014[29] the Government published an updated version of the 'Consolidated EU and National Arms Export Licensing Criteria' ('the Consolidated Criteria'). This was done in order to ensure that the Consolidated Criteria reflected the UK's obligations under the Arms Trade Treaty (see §15 of the Annex) and was also consistent with the 2008 EU Common Position (see §11 of the Annex)[30].

24. Criterion 2 to the Consolidated Criteria (which is relevant to the Claimant's challenge), provides as follows:

> *"CRITERION TWO*
>
> ***The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.***
>
> ***Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:***
>
> *a) not grant a licence if there is a clear risk that the items might be used for internal repression;*
>
> ***b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, 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;***
>
> ***c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law.***
>
> *For these purposes items which might be used for internal repression will include, inter alia, items where there is evidence of the use of these or similar items for internal repression by the proposed end-user, or where there is reason to believe that the items will be diverted from their stated end use or end user and used for internal repression.*

[29] Exhibit EB1 to Bell 1

[30] See Notice to Exporters 2014/08.

The nature of the items to be transferred will be considered carefully, particularly if they are intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment; summary or arbitrary executions; disappearances; arbitrary detentions; and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the universal declaration on human rights and the international covenant on civil and political rights.

In considering the risk that items might be used for internal repression or in the commission of a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit gender-based violence or serious violence against women or children." (emphasis added)

25. All applications to export arms and other strategically controlled goods that appear on what is known as the UK's 'Strategic Export Controls List'[31] ('the Consolidated List') are considered on a case-by-case basis against the Consolidated Criteria.

26. As explained in Bell 1 at §§3 & 5-12, responsibility for export controls now rests with the new Department for International Trade and the Secretary of State for International Trade now has overall responsibility for the UK's export licensing process[32]. The UK's export licensing authority within that department is known as the Export Control Organisation ("ECO")[33].

27. In exercising his powers the Secretary of State seeks and takes account of advice from a number of other Government Departments including the FCO and the MOD[34]. Whilst the Secretary of State will make the final decision in each case, Ministers from these advisory departments, principally the FCO and MOD, will provide recommendations to help him reach a decision[35].

28. Licences have been granted by the ECO for the supply to KSA of arms and military equipment that could be and have been used in the conflict in Yemen.[36]

29. Licences for the export of arms and military equipment to KSA have not been, and will not be, issued if to do so would be inconsistent with the Consolidated Criteria. This includes Criterion 2(c) i.e. where there is a clear risk that the items to be licensed might be used in the commission of a serious violation of IHL.

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[31] Also called the 'Consolidated List of Strategic Military and Dual-Use Items that require Export Authorisation'

[32] Responsibility was formerly with the Secretary of State for Business Innovation and Skills – see footnote 1 above.

[33] Bell 1 at §1

[34] Bell 1 at §§5-12

[35] Bell 1 at §12

[36] The Claimant refers to "*military improvised explosive devices*" (§5 of the Claimant's Grounds). Licences have not been and would not be granted for such devices.

30. With respect to Criterion 2(c), there are two requirements that must be addressed - a "*clear*" risk and a "*serious*" violation of IHL. The Claimant's Grounds do not engage with the standard set by this threshold of "*clear risk*" and "*serious violation"* (the latter of which has a special meaning in IHL as discussed in Section D immediately below). The Claimant simply asserts criterion 2(c) sets a "*low*" threshold, with reference to the term "*might*".[37] The clarity of the risk and the seriousness of the violation of IHL are deliberate, integral and important components in the standard set by Criterion 2(c). They indicate a higher threshold or standard than is presented by the Claimant.

Parliamentary Committees on Arms Export Controls

31. The Parliamentary Committees on Arms Export Controls ("CAEC") comprises members of the Defence, Foreign Affairs, Business, Innovation and Skills and International Development Committees. Its remit is to examine the Government's expenditure, administration and policy on strategic exports, specifically the licensing of arms exports and other controlled goods. On 10 March 2016 CAEC launched an inquiry[38] into the use of UK-manufactured arms in the conflict in Yemen[39] [40]. In the event members of the CAEC could not agree a single report and two reports were issued by component groups of CAEC on 15 September 2016 with differing recommendations. In addition, Members of the Defence Select Committee withdrew from the process and did not issue a report. The Claimant's reliance on the CAEC reports is discussed further at §128 below.

32. Separately from CAEC, Ministers have also appeared before the All-Parliamentary Group on Yemen, as explained in Crompton 1 at §§95-108. FCO and MOD Ministers have also spoken in Parliamentary debates on Yemen, made Oral and Written statements, responded to Urgent Questions and answered a wide range of Parliamentary Questions and Ministerial Correspondence.

D. <u>INTERNATIONAL HUMANITARIAN LAW ('IHL')</u>

[37]Claimant's skeleton at §8 and Claimant's Grounds §§46 and 56.

[38] In particular CAEC were to examine:"*if weapons manufactured in the UK have been used by the Royal Saudi Armed Forces in Yemen, if any arms export licence criteria have been infringed and discuss what action should be taken in such cases*."

[39] Bell 1 at §§42-44

[40] See *R (oao Hasan) v Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin), which was a challenge to the failure to publish reasons for arms exports license decision making: §22 "*In principle, judicial review is a remedy of last resort and is only needed if appropriate redress cannot be obtained by another route. Parliament has set out the means whereby the lawfulness of licensing decisions such as those with which the claimant is concerned should be monitored. Thus there is in my judgment the necessary transparency and insofar as the defendant fails to comply with it, the Committee will comment and the ultimate judge will be Parliament*."

33. The main principles of IHL which are of particular relevance to the use of weapons in an armed conflict are summarised in the User's Guide at §2.10 which states:

> "*The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection.*"

34. At §§39.1-39.8 of the Claimant's Grounds a number of these principles are addressed with reference to the key provisions applying in armed conflict, including in a non-international armed conflict[41]. Those obligations and provisions are broadly accepted[42] by the Secretary of State as pertinent in the export licensing context.

35. It is important however not to lose sight of the fact that, in armed conflict, use of lethal force by a State's armed forces is authorised well beyond situations which could be regarded as self-defence under the criminal law, and permits and regulates both its offensive and defensive use. For example, in an international armed conflict a combatant remains a combatant at all times, even when not actually fighting, and may legitimately be attacked at all times and in all circumstances, and may be targeted wherever found, armed or unarmed, awake or asleep, and even when on leave outside the combat zone[43]. Consequently under international humanitarian law, lethal force can be lawfully used, subject to certain prohibitions and obligations.

36. The position is also similar in non-international armed conflict. Just as in an international armed conflict, where armed forces may kill opposing forces irrespective of the *imminence* of the threat posed, so too IHL permits status-based targeting in a non-international armed conflict. A person who is directly participating in hostilities can lawfully be killed by the armed forces of a State, whether or not it would have been feasible to take the lesser step of capturing him. Further a person who has a continuous combat function (e.g. a military commander of the non-State forces) may also be targeted, irrespective of the imminence of the threat posed.

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[41] It is to be noted that the Canadian Federal Court has recently concluded that the conflict in Yemen is not an international armed conflict, but a non-international armed conflict – see *Turp v Minister of Foreign Affairs* 2017 FC 84 at §67. That was a judicial review of the approval by the Minister for Foreign Affairs of permits for the export of light armoured vehicles to KSA. One of the grounds of challenge was on the basis that Canada was in breach of its international obligations under Article 1 of the four Geneva Conventions of 1949. However the Federal Court (1) accepted that Article 1 of the GCs was not incorporated into Canadian domestic law, (2) held that Article 1 only applied to international armed conflict (which the conflict in Yemen was not), and therefore concluded that Article 1 did not apply because Canada was not a party to an international armed conflict. Further and in any event, compliance with Article 1 was not justiciable. See §§56-75 of the judgment.

[42] It is to be noted that the obligation is to take "all <u>feasible</u> precautions" in attack, and Cf to the Claimant's Grounds at §§12, 25, 27, 45.6 and fn 42 where the reference to "precautions" is unqualified.

[43] see Yoram Dinstein, The Conduct of Hostilities under the Law of Armed Conflict (2010) at p34

37. Further, incidental civilian casualties that are proportionate are permissible under international humanitarian law. As the Turkel Commission[44] put it (pp.101-102):

> "*47. … in the context of an armed conflict a deliberate attack on a person may be legal, if that person is a combatant, or if the person is a civilian taking a direct part in hostilities. Moreover, according to the principle of proportionality, expected incidental loss of civilian life, injury to civilians or damage to civilian objects may be lawful (albeit regrettable) if they are not 'excessive' relative to the concrete and direct military advantage anticipated from the attack.*[45] …
>
> *48. It is thus clear that not every case of death or injury of a person in an armed conflict amounts to a breach of the rules of international humanitarian law. The death or injury of combatants, civilians directly participating in hostilities, and collateral civilian casualties that are proportionate are permissible under international humanitarian law. The death of an individual is thus different from prima facie prohibited acts, such as the use of involuntary shields or rape, which can never be justified as legitimate acts of warfare. The incidental death or injury of a civilian during an armed conflict, conversely, does not necessarily give rise to an automatic suspicion of criminality …*"

"Serious violations" of IHL

38. The test in Criterion 2(c) requires an assessment of whether there is a "*clear risk that the items might be used in the commission of a* ***serious violation*** *of international humanitarian law".* As is accepted by the Claimant (see §56 and footnote 42 of the Claimant's Grounds) the term "serious violation" has a particular meaning as a matter of IHL and is synonymous with "war crimes" and "grave breaches" as defined, in particular, in the four Geneva Conventions, Additional Protocol 1 and in Article 8 of the Rome Statute of the International Criminal Court ('the ICC Statute'). As stated at §2.11 of the User's Guide:

> "*Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non-international armed conflict, which it defines as war crimes (Article 8, sub-sections*

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[44] 'Turkel Commission Report, Part II, Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013)at p.109, §57 - http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

[45] *This principle, which finds expression in the FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS, supra note 13, at Articles 51(5)(b), 57(2). This principle has been recognized as reflecting customary law. See: ICJ Nuclear Weapons Advisory Opinion, supra note 9, at para.41.* [footnote 158 in the original]

b, c and e; for the full text of the Rome statute, see http://legal.un.org/icc/statute/romefra.htm."

39. In terms of the serious violations of IHL which are most pertinent to this particular arms export context, the following provisions in Art. 8 of the ICC Statute are relevant (Art. 8(2)(a)-(b) addressing international armed conflict and Art. 8(2)(c)-(e) addressing non-international armed conflict):

"***Article 8: War crimes***

... 2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; ...

... (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; ...

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; ...

... (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

... 3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

40. As is evident from these provisions of the ICC Statute and as indicated by international case law, war crimes generally require intentional or reckless conduct – see ICTY, *Delalić* case, Case No. IT-96-21-T, Judgment, Trial Chamber II, 16 November 1998, §§ 437 and 439 and see also Rule 156, ICRC Customary International Humanitarian Law Study "Definition of War Crimes". Whilst the precise mental element may vary depending on the crime concerned, some mental element will be necessary[46].

Investigative duties under IHL

41. It is common ground between the parties that under IHL the investigative obligation is confined to a requirement that war crimes be investigated. This is because there is a recognition by States of the difficulties associated with the imposition of investigatory duties in the theatre of armed conflict and of the need to keep such obligations within operationally practical bounds.

42. The Turkel Commission undertook a comprehensive and detailed study of the investigative obligation in international law.[47] The Turkel Commission's report provides a useful summary of the public international law approach to the obligation to investigate violations of the laws of armed conflict[48].

43. The Turkel Commission noted at p.73, §22:

> "*First, there is a general duty to broadly* examine *all suspected violations of international humanitarian law. Second there is an additional duty to* investigate *certain types of alleged violations known as 'war crimes'*" (original emphasis; see, too, p.99, §45).

44. The duty to "*examine*" is a duty to undertake a fact-finding assessment (Turkel Commission report, p.102 §49 and p.112, §61). As the Commission observed at p.110, §59:

> "*In summary, the death of an uninvolved civilian during hostilities that amount to an armed conflict (whether in an occupied territory or not) does not in itself give rise to an immediate duty to investigate, except in a case where a 'reasonable suspicion' arises, or a 'credible allegation' is made, that a war crime was committed. When the level of suspicion or the credibility of an allegation of a war crime has not been met and the information received is only partial or circumstantial, a fact-finding assessment must be*

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[46] And see also 'The absorption of grave breaches into war crimes law' Marko Divac Oberg, International Review of the Red Cross, Vol 91, No. 873, March 2009 at pp173-174

[47] 'Turkel Commission Report, Part II, Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013)at p.109, §57 - http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf.

[48] See in particular, Chapter A" The Normative Framework in International Law for the Duty to Examine and Investigate Complaints and Claims of Violations of International Humanitarian Law"

conducted in order to clarify whether there is a need to investigate."

See, too, p.106, §54:

> *"the death or injury of a civilian during the conduct of hostilities does not automatically give rise to a duty to investigate. However, a fact-finding assessment is required wherever there is a need to clarify the circumstances in order to establish whether there is a reasonable suspicion of an unlawful act (such as an attack resulting in significant unintended civilian casualties). This assessment may lead to a subsequent investigation."*

45. The duty to "*examine*" all suspected violations of IHL derives from the obligation to "*take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article*".[49] The requirement to "*suppress*", "*where necessary*", and "*to report to competent authorities breaches of the Conventions and the Protocol*" is imposed on military commanders: article 87(1) of API[50]. In this regard the ICRC Commentary on the Protocols contemplates fact-finding assessments conducted by the commander who would in such circumstances "*act like an investigating magistrate*"[51].

46. The jurisprudence of international tribunals also supports extension of the obligation to investigate to non-international armed conflict[52].

47. IHL requirements and standards of investigation and examination are therefore sensitive to the factual context for which they were designed, namely armed conflict. As Michael N. Schmitt observes in *Investigating Violations of International Law in Armed Conflict*, Harvard National Security Journal 2011, Vol. 2 p.31 at pp.54-55:

> *"Obviously, a State's ability to conduct investigations during an ongoing conflict is much less robust than in peace time. Evidence may have been destroyed during the hostilities, civilian witnesses may have become refugees or internally displaced persons, military witnesses may be deployed elsewhere or be engaged in combat, territory where the offense*

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[49] See the identically worded provisions of article 49(3) GCI, article 50(3) GCII, article 129(3) GCIII and article 146(3) GCIV. See, too, the distinction drawn between repression of grave breaches and suppression of all other breaches in article 86(1) of API.

[50] Commanders are also under an obligation, if they are aware that subordinates or other persons under their control are going to or have committed a breach of the Conventions or the Protocol, to initiate such steps as are necessary to prevent such violations and, where appropriate initiate disciplinary or penal action against violators (Article 87(3)).

[51] ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandos et al. eds. 1987).

[52] See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 111–27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). as discussed by Michael N. Schmitt, Investigating Violations of International Law in Armed Conflict, Harvard National Security Journal 2011, Vol. 2 p.31 at p48.

occurred may be under enemy control, forensic and other investigative tools may be unavailable on or near the battlefield, military police may be occupied by other duties such as prisoner of war handling, legal advisers may be providing conduct of hostilities advice, judicial bodies may be distant from the theatre of operations, communications may be degraded, travel may be hazardous, and so forth. Most importantly, it must be remembered that the military forces, which may represent the sole governmental authority in the area, have a mission to accomplish other than conducting investigations. Accordingly, human rights measures deemed appropriate in the relative stability of peacetime, such as the duty to conduct autopsies, involve family members, or maintain strict chains of custody, would generally be ill-suited to the realities of conducting an investigation in the midst of combat or its immediate aftermath."

E. DOMESTIC PUBLIC LAW RELEVANT TO THE CLAIMANT'S GROUNDS

Rationality

48. The nature of judicial review, including review by reference to the rationality or reasonableness of the decision, is a context-dependent question (per Lord Mance in *Kennedy v Charity Commission* [2015] AC 455 at §51). In essence the Claimant contends that the subject matter of the decision-making is a serious one and that this must lead to a more intensive review by the Court.

49. However, there are a number of important factors which properly call for judicial restraint in this area. In particular:

    a. The assessment which has been made by the executive under Criterion 2(c) is a predictive and judgemental one involving the evaluation of risk in a dynamic and ever-changing situation. It is inappropriate for review other than on strict rationality grounds (see *R (Lord Carlile) v Home Secretary* [2015] AC 945 at per Lord Sumption at §32 and Lady Hale at §88, and see Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at §57). As stated by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at §29:

        > *"Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen."*

    b. The Secretary of State has based his decision-making on information from a wide variety of sources (including sensitive information not publicly available) - there

are "*many channels of communication on all levels*"[53] - and, in each case, has made an assessment of an extremely complex (and dynamic) set of facts (see Lord Sumption in *Lord Carlile* at §32 and Lord Reed in *Bank Mellat* [2014] AC 700 at §93).

c. The decision-making is also informed by advice from those with considerable knowledge, experience and expertise in their field, including, for example, diplomats and MOD personnel working very closely with KSA counterparts. That expertise means that the executive's assessments in this area are entitled to great weight – see Lord Hoffmann in *Rehman* at §57 and Lord Sumption and Lady Hale in *Lord Carlile* at §32 and §88 respectively). That such an approach is appropriate when undertaking a proportionality review in a case involving ECHR rights (which was the question being addressed by the Supreme Court in *Lord Carlile*) means that *a fortiori* it must apply with considerable force in any rationality challenge[54].

d. The context is properly analogous to that in which national security assessments have to be made, which are matters of judgment and policy and are recognised as primarily matters for the executive (see *Rehman* at §50 per Lord Hoffman).

e. The decisions have been made following advice from key government departments and with the involvement of ministers at the highest level (see Crompton 1 at §25 and Crompton 2 at §§26-27, 29-31). Thus for example the Foreign Secretary visited Riyadh in December 2016 during which time he was able to discuss KSA's IHL compliance in detail (Crompton 2 at §31).

f. The role of the court can properly take into account that there is an expectation, consistent with democratic values, that a person charged with making assessments of this kind should be politically responsible for them (see Lord Hoffmann in *Rehman* at §62 and Lord Sumption in *Lord Carlile* at §32).

g. The decision makers have properly and responsibly acknowledged the difficulties and complexities involved in the assessment process including frank acceptances that the decision has, on occasion been "extremely finely balanced" or "very finely balanced"[55].

50. In brief, in those circumstances, this is a case which considerable respect or leeway is to be accorded to the decision maker.

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[53] See Crompton 1 at §34

[54] See also *R v Ministry of Defence ex parte Smith* [1996] QB 517, 558A-B where Sir Thomas Bingham MR (as he then was) rejected a complaint of irrationality of the MOD policy, in part, in reliance on the fact that the policy was "supported… by those to whom the ministry properly looked for professional advice."

[55] See Bell 2 at §15 and §20.

Tameside

51. The Claimant's *Tameside* challenge[56] i.e. for an alleged failure to ask the correct questions is closely linked to the rationality challenge. It is important to be clear about the correct test to be applied. The question is not whether the Claimant (or the Court) considers that further enquiries would have been sensible or desirable. The question instead is whether the decision-maker has failed to take into account matters which, in law, he should have taken into consideration. In *Tameside* itself Lord Diplock made clear that it was for the court to decide whether the Secretary of State had directed himself properly **in law** and had taken into consideration the matters which **the statute** required the Secretary of State to consider. This is emphasised at 1065A in Lord Diplock's speech:

> "*it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had* ***directed himself properly in law*** *and had* ***in consequence taken into consideration the matters which upon the true construction of the Act*** *he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation B [1948] 1 K.B. 223, per Lord Greene M.R., at p. 229*" (emphasis added)

52. This point was also emphasised by Pill LJ in *Badger Trust v Welsh Ministers* [2010] EWCA Civ 807 at 49-50 where he stated:

> "*49. The general principle to be applied was stated by Cooke J in the Court of Appeal in New Zealand in CREEDNZ Inc v Governor-General [1981] 1 NZLR, 172 at 183, cited with approval by Lord Scarman in re Findlay [1985] AC 318 , at 333:*
>
> > *"What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision."*
>
> *Cooke J added:*
>
> > *"I think that there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers collectively would not be in accordance with the intention of the Act."*
>
> *It is important to distinguish between factors the Minister is required to take into account and factors she is entitled to take into account, if she sees fit*."

[56] *Secretary of State v Tameside* [1977] AC 1014

53. The principles to be applied were usefully summarised in *R. (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB); [2015] 3 All E.R. 261 at §100 and 139:

> "*100. … 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.*
>
> *2. Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R(Khatun) v Newham LBC [2005] QB 37 at §35, per Laws LJ).*
>
> *3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406).*
>
> *4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R(Khatun) v Newham LBC (supra) at §35).*
>
> *5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education at page 323D).*
>
> *6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G).*
>
> *….*
>
> *139. The Tameside test can be formulated as follows: Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same?*"

F. RESPONSE TO THE CLAIMANT'S GROUNDS

1) Alleged failure to ask relevant questions

54. For the reasons set out below, the Secretary of State asked himself the right question and took reasonable (and on any view rational) steps to obtain and consider information bearing on that question.

The question asked by the Secretary of State

55. The relevant question for the Secretary of State is whether there is a clear risk that the items to be licensed might be used in the commission of a serious violation of IHL. That has been the question consistently addressed by the Secretary of State.

56. In addressing that question, the Secretary of State has considered (and continues to consider) the three key factors identified in the User's Guide (at §2.13)[57] namely:

    a. the recipient's past and present record of respect for IHL;
    b. the recipient's intentions as expressed through formal commitments;
    c. the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with IHL and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

The information obtained by the Secretary of State

57. As made clear in the Secretary of State's evidence, the assessment undertaken by the Secretary of State pursuant to Criterion 2(c) with respect to the licensing of arms for export to KSA is carried out on a case-by-case basis.[58] It is made by reference to expert advice from both the FCO and the MOD. The situation is kept under careful and continual review and this has included periods of "intensive" engagement with KSA, in the light of incidents of very real concern[59].

58. The Secretary of State's assessment is informed by the following particular strands of information and analysis:

    a. A considered analysis by the MOD of all IHL allegations that come to its attention, predominantly arising from air strikes in Yemen;

    b. An understanding and knowledge of KSA military processes and procedures, including by reference to information provided by the Defence Attaché at the British Embassy in Riyadh and UK Liaison Officers located in KSA Air Operations Centre in Riyadh. This understanding and knowledge is also informed by logistical and technical support and training provided to KSA and engagement with the Saudi targeting process at the strategic, operational and tactical levels;

[57][C/115-C/269 at C/168]. See the Defendant's letter dated 16 February 2016 at §16.
[58]See Bell 1 at 7-12 and Cf to the Claimant's Grounds at §8 which suggests a blanket decision to "*grant new licences*" has been taken.
[59] See Crompton 2 at §20.

c. Ongoing engagement with KSA including meetings at the highest level of the respective governments.

d. Post-incident dialogue, including with respect to investigations, which are kept under close review;

e. Statements by KSA officials, including public commitments to IHL compliance; and

f. Analysis of developments in Yemen relevant to IHL compliance of the Coalition, including regular IHL assessments ('IHL Updates') (and occasional ad hoc assessments) which draw together a wide range of information (principally from the FCO and the MOD) on the IHL situation, including updates from the MOD on alleged incidents of IHL violations that have recently come to its attention.

59. Each strand takes into account a range of sources and analyses, including (unsurprisingly) those of a sensitive nature to which the third parties cited by the Claimant simply do not have access.

Analysis of allegations of violations of IHL – MOD

60. As explained in Watkins 1 §§39-61, 80-90, Watkins 2 at §§20-31 and Crompton 1 §§38-41, the MOD monitors and analyses allegations of IHL violations, predominantly arising from air strikes in Yemen conducted by the Coalition[60]. There are two branches conducting this process: the Operations Directorate within MOD ("Ops Dir") and the Permanent Joint Headquarters J3 (Current Operations) ("PJHQ")[61]. They are assisted in this process by MOD's lawyers.

61. All allegations that come to the attention of the MOD are recorded by Ops Dir. Allegations are identified from a range of sources. This includes the sources cited by the Claimant (UN agencies and officials, European Parliament and reports of NGOs such as Amnesty International and Human Rights Watch). It also includes additional sources such as open source media reports including social media, foreign governments, the FCO, the British Embassy in Riyadh and DFID and classified reports. Once an allegation of an IHL violation is identified and listed by Ops Dir, PJHQ and Defence Intelligence will analyse it.

[60] Watkins 1 at §39

[61] The PJHQ, based in Northwood, commands joint and combined military operations and provides politically aware military advice to the MOD

62. All allegations that come to MOD's attention are recorded by Ops Dir officials in a central database known as "the Tracker" which is shared with PJHQ[62]. As at 13 January 2017 the MOD was tracking a total of 251 allegations from a number of different sources[63]. Rigorous efforts have been made by the MOD to ensure that the Tracker is as up to date and reliable as possible – see Watkins 2 at §23.

63. In the five annexes to the Claimant's Grounds[64] there are 72 "*potential serious breaches of [IHL]*" described as either "*committed by*" or "*attributed to*" the Coalition.[65] Of those allegations, there are 14 duplicate reports[66] and 14 examples of general statements as opposed to specific examples of an individual allegation.[67] Of the remaining 44 allegations, which relate to Coalition activity, not exclusively that of KSA, only three were not already listed on the MOD's Tracker and these were immediately added to be analysed[68]. A further six allegations were included in the Claimant's exhibits to the second statement of Ann Feltham and identified in an OHCHR (not UNHCR) report dated 4 August 2016[69]. The further evidence submitted by the Claimant on 17 January included updated versions of four of the five annexes. Additional evidence was also submitted by the Interveners. The MOD was already tracking every specific airstrike alleged to have breached IHL by the Claimant in its annexes and by the Interveners in their updated evidence. It is noted that the MOD is still monitoring a greater number of allegations than are listed in the five annexes to the Claimant's Grounds.

64. In carrying out its analysis the MOD has access to a wide range of information to which the third parties relied upon by the Claimant do not have access including:

    a. Coalition fast jet operational reporting data passed to the UK Liaison Officers;
    b. Sensitive MOD sourced imagery which can represent a more comprehensive and immediate picture than that provided by third party commercial imagery; and

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[62] Watkins 1 at §43
[63] Watkins 2 at §31
[64]The annexes are organized according to the source: Annex I (UN organs), Annex II (European Parliament), Annex III (Médecins Sans Frontières), Annex IV (Amnesty International) and Annex V (Human Rights Watch).
[65]Annex I uses the term "*committed by*" in its heading. The other four Annexes use the term "*attributed to*".
[66]Watkins 1 at §70. There is a great degree of cross-reporting of incidents across third party reports. The MOD tracker lists incidents chronologically which assists in identifying such duplicate reporting.
[67]Watkins 1 at §69. Annex II at p. A48 references the expulsion of the UNHCHR from Yemen. This was a decision taken, and then reversed, by the Government of Yemen and is unrelated to the Coalition and its IHL compliance.
[68] Watkins 1 at 68-74
[69] Watkins 2 at §24

c. Other reports and assessments, including UK Defence Intelligence reports and some initial battle damage assessment (BDA) which makes an assessment of the impact of a strike on the intended target[70].

Much of this information is sensitive and necessarily cannot be referred to in detail for national security reasons.

65. The third party reports cited by the Claimant are often prepared by organisations who are unable to visit Yemen to conduct investigations or gather evidence directly, and are therefore relying on second or third-hand information, including interviews with eyewitnesses and photographs.[71] By their nature, such evidence is often limited in scope (including as to the circumstances of an incident) and may not be reliable. Moreover, witness interviews need to be treated with caution and witnesses may draw conclusions without sufficient insight into all relevant information. It is to be noted that a number of the allegations in the reports cited by the Claimant appear to be taken directly from media reporting; these must be treated with an even greater degree of caution, particularly those originating from media organisations with known links to parties to the conflict.

66. On the basis of all the relevant information available to it, MOD analyse so far as possible (sharing its analysis both within MOD and with the FCO as appropriate):

a. Whether it is possible to identify a specific incident. In particular steps are taken to identify the location and date of the alleged airstrikeallegation[72];
b. Whether the incident was likely to have been caused by a Coalition airstrike[73]. Each allegation is categorised as either "*likely coalition*", "*unlikely/not coalition*" (i.e. where no evidence of damage is identified or where the incident is assessed as likely to be caused by something other than a Coalition airstrike, for example damage caused by artillery), "*not known*" (i.e. where the allegations are not specific enough for further analysis to be conducted due to a lack of information as to the location or date, or where all the evidence available is inconclusive) or "*tbc*" (where analysis is still underway)[74];
c. Whether it is possible to identify the Coalition nation involved[75]. For example if the incident can be linked to a Mission Report (which are sensitive and are available to the UK Government, but not NGOs[76]).

[70] Watkins 1 at §53
[71] As noted in the Claimant's Grounds at fn 5.
[72] Watkins 1 at §48-50
[73] Watkins 1 at §§51-55
[74] Watkins 1 at §54
[75] Watkins 1 at §56
[76] Watkins 1 at §55

d. Whether a legitimate military object is identified[77];
e. Whether the strike was carried out using an item that was licensed under a UK export licence[78].

67. As is properly acknowledged by Peter Watkins in his first statement (§§46-57), there are inevitably gaps in the MOD's analysis. The UK is not a member of the Coalition and the MOD is monitoring and analysing an armed conflict in an extremely volatile area. For example, as the MOD is not involved in identifying targets and making decisions about targeting and as it does not have access to the operational intelligence which is used by the Coalition, analysis of whether the target of an airstrike was a military object can be difficult (a point which would be relevant to an overall assessment of whether future serious breaches of IHL might occur). But it is clear that the MOD's approach is rigorous and that it is refining and enhancing the data collected[79] and that it provides a vitally important tool in delivering relevant information to Ministers, including assisting with the FCO preparation of IHL updates (discussed further below). [80]

Knowledge of KSA military processes and procedures

68. As explained at Crompton 1 §§42-51, Watkins 1 at §§18-38 and Watkins 2 at §§11-19, the UK has considerable insight into the systems, processes and procedures that the KSA has in place. The information comes both from MOD (as set out below) and the FCO (eg. through the British Embassy in Riyadh, HM Ambassador and senior Embassy Staff). The UK has a longstanding defence relationship with KSA and this framework of co-operation has enabled the provision of related support, sharing of operational expertise and training together. As a result the UK has insight into the systems, processes and procedures that the KSA has in place[81].

69. There are a considerable number of UK personnel and officials working on KSA including staff working at the British Embassy in Riyadh, liaison officers working in KSA operational HQ, UK Service personnel providing logistical and technical support to

[77] Watkins 1 at §57
[78] Watkins 1 at §46.5
[79] Watkins 1 at §§58-61 and Watkins 2 at §20-22
[80] The Secretary of State has explained in his response to the Special Advocates' disclosure submissions that when the Tracker was initially created it was thought that the MOD would be able to come to conclusions in relation to individual allegations of breaches of IHL. Although it was quickly realised that this was not the case this was not immediately rectified administratively. The decision to change the column heading was reached on approximately July 2016. As to whether or not the Secretary of State is required to reach conclusions in relation to individual allegations of breaches of IHL see further below at §106-116.
[81] Watkins 1 at §§18-19

projects for the Royal Saudi Armed Forces and trainers working to improve the capability of the KSA Armed Forces[82]. More specifically:

70. The **Defence Attaché (DA)** (**British Embassy Riyadh)** holds regular meetings with senior Saudi Military leaders, raises requests for information directly with the Saudi authorities, visits Saudi operational HQ to monitor Saudi processes and helps co-ordinate British defence engagement activity in the country. The UK's DA Riyadh is one of only two Western DAs in Riyadh of 1* rank[83] (the other being the French DA) and one of only 13 British DAs worldwide of this seniority. The only British DA of more senior rank is DA Washington. The seniority of DA Riyadh (and indeed that of Her Majesty's Ambassador ('HMA'), who is one of only three Director General-grade British Ambassadors) and the relationships he has developed with senior Saudi Military leaders, including through the support and training to KSA explained elsewhere, gives him a level of insight and access to the Saudi Military system matched by very few other nations. He enjoys very privileged access to the intelligence, operational, training, force development leadership of the MOD, as well as the commanders of the Services as a top tier partner of Saudi Arabia. The constant contact between the DA and the Saudi authorities enables the MOD to understand capabilities and KSA intent and swiftly raise concerns over IHL allegations at senior levels. The DA regularly provides updates to the MOD and the FCO about the actions he has taken[84].

71. The UK **Liaison Officers** located in KSA Air Operations Centre, Royal Saudi Air Force HQ and the MOD increase the flow of information between the UK and KSA to give UK Ministers a better degree of insight into KSA's processes[85]. Specifically in relation to KSA's targeting processes, the liaison officers are given insight via:

    a. Access to the Saudi MOD in Riyadh which provides another mechanism for engagement and access to those who run the targeting process;
    b. Access to the Saudi Air Ops Centre (SAOC) Riyadh, where air operations are coordinated and the liaison officers have access to post strike mission reporting;
    c. Access to the Royal Saudi Naval Force HQ Riyadh and Royal Saudi Navy Western Fleet Command Jeddah, notably with respect to Maritime Force levels, post event interdiction operations and linkage to the Maritime Coalition Coordination Cell (MCCC) and the UK Maritime Component Commander (UKMCC) in Bahrain;
    d. Reporting of choice of weapons used for strikes and use of precision guided munitions.

[82] Watkins 1 at §19
[83] Commodore, Brigadier or Air Commodore
[84] Watkins 1 at §21
[85] Watkins 1 at §§24-25 – it should be noted that these Liaison Officers remain under tight UK command and control, answering questions to the UK military chain of command.

72. In addition the Royal Air Force has a permanent liaison officer (Group Captain rank), namely the **Chief of Air Staff Liaison Officer (CASLO)** to the RSAF HQ in Riyadh (where senior RSAF intent and routine training engagements are carried out). The CASLO is personally appointed to the Commander of the RSAF in order to maintain the very strong relationship between the RAF and the RSAF[86]. CASLO is a unique post. No other country working with the Saudi Arabia Armed Forces has a dedicated Chief of Air Staff senior officer working alongside Commander RSAF and the RSAF. His access to the decision-makers in the RSAF is unparalleled. He has been instrumental in the identification and facilitation of training support, workshops and providing generic advice.

73. The DA together with PJHQ, and CASLO monitor and analyse targeting processes conducted by KSA.

    a. The MOD has **knowledge of targeting guidance** issued by KSA to reduce civilian casualties[87]. That knowledge includes the Special Instructions (SPINS)[88] which set out time sensitive, regularly updated relevant Air Operational information. Coalition operational lawyers are present in the Saudi Ministry of Defence and at the Air Operations Centre and provide reviews of specific targets and investigations into civilian casualties.

    b. The DA and Liaison Officers have also noted e**xamples of restraint** throughout the conflict, and concern to minimise civilian casualties, being exercised in fact in pre-planned targeting processes.[89]

74. **Logistical and technical support** is also provided to KSA[90]:

    a. The MOD Saudi Armed Forces Projects team (MODSAP) team which currently consists of 207 UK armed forces and MOD civilian personnel, with 103 located in KSA, ensure that the supply of modern military aircraft, naval vessels, weapons, training and associated support services by BAE Systems and its sub-contractors is in accordance with KSA Armed Forces' requirements.
    b. MODSAP personnel also monitor, assure and report on the progress and performance of BAE Systems in delivering contracted equipment and services, including Saudi-based training which provides further insight into RSAF practices and procedures;

[86] Watkins 1 at §§26-27.
[87] Watkins 2 at §18-19 and Watkins 1 at §78.
[88] Watkins 2 at §14
[89]As referred to further in closed and in the 16 February 2016 letter at §§21 and 23.
[90] Watkins 1 at §§28-33

c. MODSAP staff also fulfil broader HMG commitments including briefing the RSAF on developments in RAF equipment and operational doctrine and to ensure that the military capability delivered under government-to-government arrangements best meets KSA's defence needs.
d. RAF staff assist with regular joint exercises and there is technician training provided to RSAF personnel alongside the RAF;
e. KSA has invited UK and US targeting experts to their military headquarters to better understand its targeting processes.
f. There was a UK Joint Terminal Air Controller awareness visit in April 2016 which focussed on Air Land Integration.
g. The MOD has also supported the development of the Coalition Joint Incident Assessment Team (JIAT) and delivered two training sessions in KSA on the process of investigating alleged violations of International Humanitarian Law (May 2016/September 2016)[91].

75. In addition, extensive **UK training** has been provided by the MOD to the RSAF both in the UK and Saudi Arabia, including training on targeting and IHL compliance[92]. This has included:

a. International Targeting Courses in the UK and Saudi Arabia. These courses have run on four occasions: in the UK at the Air Warfare Centre on three occasions (July/August 2015, January 2016 and July/August 2016) and in the KSA (October 2015).
b. Individual training in the use of specific precision guided munitions, such as Paveway IV and Storm Shadow, and aircraft is provided.
c. RSAF Typhoon pilots have undertaken the Qualified Weapons Instructors Course in the UK.
d. The UK led a senior airman's workshop on SPINS from 10-11 January 2017 and provided advice on further improvements to Coalition procedures.

76. By virtue of the fact that the UK is not a party to the Yemen conflict and is not a member of the Coalition, the access of the liaison officers (who remain under UK command and control) is understandably moderated and controlled by KSA. As the UK is not involved in the conflict or present on the ground in Yemen, it is difficult to know whether processes observed in KSA are being complied with. However:

a. The UK has been given extensive access to KSA's processes, far in excess of what would normally be provided to a non-member of a military coalition.

[91] It is to be noted that the UK has not been directly involved in investigations undertaken by the JIAT.
[92] Watkins 1 §34, Watkins 2 at §14

b. The UK has friendly and mutually important relations with the KSA. This has led to the extensive access just referred to and informs the UK's approach to information provided to it by the KSA.
c. The Liaison Officers have access to sensitive post strike Coalition mission reporting.
d. Incidents are analysed by the MOD in the light of all the information available to it.

Ongoing engagement with KSA and post incident dialogue

77. As explained in Crompton 1 at §§52-55, 85ff, 90-94, Watkins 1 at §§35-38, Crompton 2 at §§20-21, 31 and Watkins 2 at §§11-17, there has been ongoing and extensive engagement with KSA (including at a very senior level) with respect to the conduct of operations in Yemen, including IHL compliance.

78. In particular, there have been meetings and phone calls involving the Prime Minister (meetings with the King of Saudi Arabia on 27 January 2016 and 6 December 2016), the Foreign Secretary (visit to Riyadh 15 December 2016 and 14 November 2015 meeting with Saudi Foreign Minister (Al Jubeir) to discuss IHL issues), the Secretary of State for Defence, the Minister of State for Defence Procurement, the FCO Minister for the Middle East and Africa, the Vice Chief of the Defence Staff, the Chief of the Air Staff, the Deputy National Security Adviser (visit 5 December 2016), the Defence Senior Adviser to the Middle East, the Director General of MODSAP, the Director General of Security Policy in the MOD, the Assistant Chief of the Air Staff, Her Majesty's Ambassador to the KSA and the Defence Attaché to the UK Embassy in the KSA. This senior engagement has focused on the conduct of the campaign in Yemen (reinforcing the insight derived from more routine insight), offers of UK support such as training, the provision of munitions, the establishment of the Saudi investigatory process and specific allegations of IHL breaches.

79. The KSA has mounted investigations into incidents of concern. Key developments (which can be referred to in open) have included:

    a. An investigation into the MSF hospital incident in Haidan on 25 October 2015 as reported in the KSA press conference of 31 January 2016[93].

    b. On 4 December 2015 KSA issued a statement committing to investigate the 3 December 2015 attack on a mobile clinic in Tiaz[94].

[93] Crompton 1 at §53(a)
[94] Crompton 1 at 53(b)

c. On 1 February 2016, KSA issued a statement reaffirming its respect, commitment and compliance with the rules of IHL, reaffirming that "*all possible measures*" are taken to protect all civilians in Yemen, and confirming the establishment of an independent high level team of civilian and military experts (known as the **JIAT – Joint Incident Assessment Team**) to assess reported incidents of civilian casualties, investigation procedures and mechanisms of precision targeting.[95] The Saudi government confirmed the creation of this team in a letter to the UN Security Council on 1 February 2016[96].

d. A Coalition investigation into the 15 March 2016 attack on the marketplace in Mastaba, Haijah province[97]

e. On 4 August 2016 the Coalition held a press conference where they announced the JIAT conclusions of 8 investigations, including into the 3 December 2015 attack and the 15 March 2016 attack referred to above[98].

f. On 6 December 2016 JIAT released the results of a further 5 investigations, including its investigation into the Abs Hospital incident on 15 August 2016[99].

g. Other incidents including the Great Hall Incident and the MSF Hospital incident in Haidan are addressed in the Defendant's closed skeleton.

80. The January 2017 IHL Update indicates that the steady trend of incremental improvement has continued with no major incidents of concern.

81. The Claimant has said that there is "little comfort to be gleaned" from the investigative efforts of the KSA because they are slow, few in number and have been criticised by some NGOs (see §§40-42 of the Claimant's skeleton). But those efforts have to be considered in the light of the investigative duties which arise under IHL, which realistically take into account the difficulties associated with investigations in theatres of armed conflict (as summarised in Section D above) and against the background of the broader range of information which is available to the Secretary of State and is relevant to their attitude and commitment to the standards demanded by IHL. The position was summarised in Watkins 1 at §§78-79 and Watkins 2 at §39:

> "*The Saudis have always been receptive to UK offers to provide training and advice to help them improve their processes and they have changed their approach. Examples include:*

[95] UN/2016/301 [D/69-D/70], Watkins 1 at §54
[96] Crompton 1 at §85(a)(i) and Exhibit NC4
[97] Crompton 1 at 53(c)
[98] Crompton 2 at 23A
[99] Crompton 2 at §22A, 23C, Watkins 2 at §34

sending more personnel on targeting training (see para 35); being more transparent with NGOs and hosting visits; establishing the investigations committee using UK-provided advice on standards; and preparing investigation reports with the intent of publicly identifying lessons. They have accepted offers to help train their legal advisors and allowed legal advisors to visit from the UK. They have allowed UK liaison officers access to their systems from the start of the campaign, reflecting the confidence developed through our longstanding relationship."

"*The Saudis continue to seek to improve their processes and increase the professionalism of their Armed Forces and continue to be receptive to UK offers to provide training and advice, as demonstrated by the JIAT workshop (para 12) and SPINS/TD workshop (para 14). The Saudis have been receptive to high-level military visits from the UK including into the SAOC, and have shown a willingness to learn from UK experience and take on-board UK advice. I asses that our engagement since August has further helped the RSAF develop their capabilities and practices, and we have increased confidence that the RSAF operate in a manner compliant with the standards demanded by the Law of Armed Conflict.*"

Statements by KSA officials

82. The Secretary of State has also noted and taken into account statements and commitments made by senior officials of KSA during the course of this ongoing engagement and dialogue[100]. Such statements and commitments are just one factor considered in a wider context, as part of an overall assessment.[101] The Claimant refers to this as follows "*Saudi Officials have offered the government an assurance that SA will seek to adhere to IHL in the conflict in Yemen*", citing the 31 January 2016 press conference (Claimant's Grounds §26). In fact (i) there has been a series of statements and commitments made by senior KSA officials at regular intervals (see Crompton 1 at §§47-51 and §85, including key statements on 1 February 2016 and 31 May 2016) (ii) the statements and commitments have not been limited to an aspirational statement of "*seeking*" to adhere to IHL, but to a commitment to such adherence.[102]

The role of the FCO and MENAD, including IHL updates

83. The Middle East and North Africa Directorate ('MENAD') at the FCO is responsible for FCO bilateral relations, policy, operations and communication for the MENA region. Within MENAD the Arabian Peninsula and Iran Department provides advice and information to the Export Policy Team ('EPT') (formerly known as the Arms Export Policy Team ('AEPT')) which leads FCO arms export licensing control policy and which

[100] See e.g. Crompton 1 at §§85(a)

[101] As stated in the 16 February 2016 letter at §§21 and 28.

[102] See e.g. Crompton 1 at §51. The Claimant contends that they "*must be treated with great caution*". The Secretary of State does not accept the need for "*great caution*" but emphasises that they are but part of a number of different factors that are taken into account in his overall assessment.

is now part of the Export Control Joint Unit ('ECJU'), hosted within the DIT[103]. The EPT is responsible for co-ordinating advice which is provided by the Foreign Secretary to the Secretary of State for International Trade on those export licensing applications on which it is requested by DIT to comment[104].

84. In terms of the role of the Foreign Secretary, since the commencement of the Coalition operations in Yemen in March 2015, EPT has sent its recommendations in respect of all applications for licences to export precision-guided weapons systems and munitions that are likely to be used by the RSAF in Yemen to the Foreign Secretary[105]. The Foreign Secretary is thus given an opportunity to comment on all such applications. In respect of particularly sensitive or finely balanced applications the Foreign Secretary is specifically requested to give a decision[106].

85. The process by which FCO officials draw together the advice given to the Foreign Secretary on the Consolidated Criteria and on the basis of which the Foreign Secretary makes a recommendation to the Business Secretary (now the International Trade Secretary) is set out at Crompton 1 at §§12-17.

86. To assist him in his assessment, the Foreign Secretary is provided with relevant information from MENAD, together with details of the export licence application. MENAD carefully monitors all developments in Yemen with the assistance of FCO staff, including at least bi-weekly, or even daily, updates from the Yemen Office and updates from posts in the region. There is also regular contact between MENAD and NGOs with an interest in the area[107].

87. Staff in the Arabian Peninsula and Iran Department collate specific information relevant to the IHL risk and, since October 2015, this is promulgated in regular '**IHL Updates**' specifically addressing IHL. The purpose of these updates is to ensure that the Foreign Secretary is aware of the developing factual situation in relation to IHL in Yemen and that a regular analysis of IHL compliance and attitudes by KSA is undertaken.

88. The process by which these IHL Updates are put together is explained at Crompton 1 §35 and Watkins 1 at §87. As is evident from that summary of the process, it involves assimilating a wide range of information from different sources, including updates from the MOD on newly reported incidents of IHL violations. The MOD also provides information on the state of the conflict, Saudi targeting processes, investigations and the

[103] Crompton 1 at §§1-3 - the Export Control Joint Unit brings together operational and policy expertise from the DIT's Export Control Organisation, FCO and MOD to promote global security through strategic export controls and facilitate responsible exports.
[104] Crompton 1 at §3 and Bell 1 at §10-12
[105] Crompton 1 at §25
[106] Crompton 1 at §25
[107] Crompton 1 at §32

application of lessons learnt, an analysis of potential incidents of concern and action taken by the UK including senior Defence engagement and training provided.

89. These IHL Updates have been provided in the closed evidence (see the closed statements of Crompton) and they are summarised in the open evidence at Crompton 1 §§56-78 and Crompton 2 at §24, with some extracts from the January 2016 IHL Update at Exhibit NC6. In addition, short and ad hoc updates are provided, particularly where there are important changes to the fluid and evolving situation, as explained in Crompton 1 at §37[108].

THE CLAIMANT'S SPECIFIC CRITICISMS ABOUT OBTAINING INFORMATION

90. The Claimant relies primarily upon the following:

    a. that certain questions referred to in the EU User's Guide have not been considered by the Secretary of State;[109]
    b. two sentences reportedly stated by Brigadier (now Major General) Assiri which the Claimant asserts discloses targeting practices incompatible with IHL;[110]
    c. the alleged failure of the Secretary of State to consider adequately the risk of diversion of weapons.[111]

91. In addition, the Claimant (see §§46-59 of its skeleton) and the Special Advocates (in their OPEN submissions) have advanced a separate criticism which is that there is no determination by relevant decision-makers of the likelihood of a breach of IHL having been committed by the Coalition in respect of specific past allegations of breaches of IHL. It is said by the Special Advocates that this is "*plainly a failure to make sufficient inquiry and/or is irrational and/or a failure to take relevant information into account.*"

92. Each of these specific criticisms has been addressed in turn below. In this regard, the Secretary of State repeats the legal submissions set out at Section E above, in terms of the test to be applied, including the proper test in any *Tameside* challenge.

Questions referred to in the EU User's Guide

[108] For example, ad hoc updates were sent to the Foreign Secretary to inform him of the alleged missile strike on the Omani Embassy, the alleged use of cluster munitions in Sana'a in January 2016, the strike against the MSF clinic in Saada in January 2016, the UN Panel of Experts Report and the progress of the peace talks and the CoH commencing in April 2016.
[109] Claimant's Grounds §45.
[110] Claimant's Grounds §50.3.
[111] Claimant's Grounds §48.

93. The EU User's Guide is non-binding guidance. As made clear at the outset of the document it is "*intended to help*" members states in applying the EU Common Position (which is reflected in the Consolidated Criteria).

94. In making his assessments, the Secretary of State considered the three key factors identified in §2.13 of the guidance (see §56 above) which are said to be central to a "*thorough assessment*" of the "*risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law*".[112]

95. The further guidance factors referred to by the Claimant are not mandatory (as appears to be accepted: see the Claimant's skeleton argument for the permission hearing at §21). Those guidance factors (which appear at p51 and p55-56 of the User's Guide) are simply designed to assist in addressing the key question posed by Criterion 2(c) i.e. whether there is a clear risk that items to be licensed might be used in the commission of serious violations of IHL. They are not expressly or impliedly identified in the Secretary of State's policy as matters that must be taken into account – see *In re Findlay* [1985] AC 318, 333-334 and *R(Khatun) v Newham LBC* [2005] QB 37 at §§34-35.

96. The further guidance factors are properly to be characterised as subsidiary questions identified by the General Secretariat as assisting in addressing the three key factors, the application of which are dependent on the context. The focus of the Secretary of State's enquiry in assessing respect for IHL by KSA in the particular context of the conflict in Yemen was (correctly and on any view lawfully) on the actual incidents of concern and the utilization of the range of sources at the UK's disposal for assessing the situation on the ground and making an assessment of future conduct.

97. The fact that the Secretary of State did not expressly consider those subsidiary factors does not mean that he failed to discharge his *Tameside* duty. It was for him to decide the specific matters that he considered bore centrally on the issues arising under Criterion 2(c). The flexibility properly and lawfully inherent in that process is wide – particularly having regard to the points made in Section E above.

98. In any event and without prejudice to the above, the Secretary of State has made inquiries which are relevant to the thrust of these subsidiary questions i.e. what action has been taken by KSA in response to alleged violations of IHL and what is their attitude towards relevant principles established by IHL ("attitude" being a key factor highlighted in Criterion 2 of the EU Common Position[113], which the Consolidated Criteria seeks to

[112] Those three key factors included "*an inquiry into the recipients past and present record of respect for IHL and the recipient's intentions as expressed through formal commitments*" – see §56 above. It is wrong to state that this factor was not taken into account (see §45.3 of the Claimant's Grounds).

[113] which states: "*Having assessed the recipient country's attitude towards the relevant principles of international humanitarian law, Member States shall: ...*" (emphasis added)

implement domestically). As is evident from the Secretary of State's evidence careful consideration has been given to the KSA's processes, investigations and subsequent actions and procedures for learning lessons[114].

99. In those circumstances there is no merit in the criticism that legally relevant factors have not been considered.

The two statements of Brigadier Assiri

100. The Claimant relies upon two sentences reportedly stated by Brigadier (now Major General) Assiri on 8 May 2015 and 1 February 2016 respectively,[115] and asserts that these two sentences indicate that KSA rules of engagement in a 12 month military campaign are flawed, specifically that it fails to distinguish between civilians and combatants.

101. In response, **first**, these two sentences do not establish a clear risk that UK licensed items might be used in the commission of a serious violation of IHL. As explained earlier in this skeleton, that process of risk assessment required an assimilation of a wide range of complex factors, including the detailed understanding of KSA processes which were in place, how the rules of engagement were operated in practice and the facts on the ground.

102. **Secondly,** there are examples of the principle of distinction being respected by KSA. This is addressed in more detail in the Secretary of State's closed evidence.

103. **Thirdly,** and in any event, the two sentences must be placed in their proper context:

a. With respect to the 8 May 2015 statement (which significantly pre-dated the December 2015 decision which is sought to be impugned in these proceedings), Brigadier (now Major General) Assiri was referring to the fact that the Coalition, through media platforms and leaflets distributed in both Sa'ada and Ma'aran, had put the civilians in those two cities on notice to evacuate. As highlighted by the Claimant at §39.2 of its Grounds IHL requires effective advanced warning to be given of attacks which may affect the civilian population.

b. With respect to the 1 February 2016 statement, at the time of the interview, Houthi/Saleh forces were targeting KSA with ballistic missiles, supported by rocket and artillery strikes, sniper fire, IEDs, laying of mines, raids and deliberate attacks on Saudi positions. The constant attacks have led to hundreds of civilian

[114] See Crompton 1 at 42-51, in particular at 49 and 51, Watkins 1 at §§78-79, §87 and Crompton 2 at 20-23.

[115]The 8 May 2015 statement is cited at Claimant's Grounds §§14.4, 50.3 and 59. The 1 February 2016 statement is cited at Claimant's Grounds §§15, 50.3 and 60. The original transcripts are not provided.

fatalities, along with military fatalities from the RSLF and Border Guard. His comments therefore have to be seen in the light of the very particular circumstances pertaining to that border at that time.

c. Brigadier (now Major General) Assiri has made clear the Coalition's commitment to IHL in a series of engagements, conferences and interviews which are not cited by the Claimant. For example, in his 31 January 2016 press conference he cited details of Saudi processes, including no strike lists, illustrating the principle of distinction[116]. For example, he stated:

> *"If you remember at the beginning of the crisis we mentioned that we have limits for the military operation, there is not targeting for infrastructure, residential areas or places where civilians exist if there are hostile elements there, as I mentioned in the previous press conference we have accurate intelligence regarding the places of command and control centres, in addition to information regarding locations of arms stores and facilities belonging to the Houthi militia inside the residential buildings, hotels and other buildings that are hard to attack, where there could be a great loss among civilians, so we have what we call tactical patience and we do not deal with such targets."*

d. Further, on 29 February 2016, Brigadier Assiri spoke to the Royal United Services Institute[117] audience about the efforts made by the Coalition to avoid civilian casualties[118] and has spoken many times subsequently with the Western media and think tanks[119].

104. It is not accepted that the Secretary of State has simply accepted IHL-compliant statements from the Coalition and ignored other statements which may give rise for greater concern[120]. The open and closed evidence of the Secretary of State, taken in its entirety, demonstrates that there has been the special caution and vigilance which is required in this context. There has certainly been no complacency about the need to be satisfied that the Saudi-led Coalition understands and is committed to implementing the necessary safeguards under IHL.

Diversion of weapons

[116] Crompton 1 at §85a and see Exhibit NC4 to that statement where the full text of the statement made appears.
[117] An independent think tank on international defence and security.
[118] Crompton 1 at §85(a)(iii)
[119] See, for example the BBC interview with Frank Gardner http://www.bbc.co.uk/news/world-middle-east-38239782
[120] As suggested at §37 of the Claimant's skeleton.

105. The Claimant alleges that "*the Defendant does not appear to have considered adequately the risk of diversion of weaponry in Yemen*".[121] There is no basis for this speculation and it is not correct:

a. As explained in Bell 1 at §§39-41, in assessing any licence, the Secretary of State, having considered advice provided by FCO and MOD, considers the risk of diversion of weaponry pursuant to criterion 7, including in the specific case of licences issued to KSA. There are a series of factors to which regard is had in making this assessment including:

i. Does the end-user have a legitimate need for this equipment? (E.g. who are they, what activities are they known to be involved in, who are they linked to, have they purchased this equipment before, etc.)
ii. Is the end-use credible? (Are the goods designed for the stated-end-use; are they of the right technical specification?)
iii. Are the quantities reasonable/proportionate to the stated end-use?
iv. Does all the information in the application and supporting documentation tell a consistent story? Are there doubts about the veracity of any of the information or documentation?
v. Does the end-user have proper means to safeguard the equipment? Does the recipient state have proper controls over possession, transfers, exports (as appropriate)?
vi. Does corruption in the destination country indicate a higher risk of diversion?
vii. Are the type of goods known to be subject to illicit procurement? Are there known or suspected illicit procurement channels in the country or region? Is there any evidence of past diversion from this end-user / country?
viii. Are any intermediaries involved? What is known about them?

b. There are instances where licences were refused because of a risk of diversion to undesirable end users[122]:

i. In 9 April 2015, 3 Standard Individual Export Licences[123] ("SIELs") were revoked and Yemen was removed as a permitted destination from one Open Individual Export Licence[124] ("OIEL").

[121]Claimant's Grounds §48.
[122] Bell 1 at §40
[123] These licences permit a named exporter to export specific items to specific end-users in specific destinations.
[124] These licences permit a named exporter to export multiple shipments of specific goods to specific countries; the end-user does not normally need to be specified at the time an application is made.

ii. In March 2016, 7 Standard Individual Trade Control Licences (SITCL) to supply ammunition and arms to KSA were refused.

c. The risk of diversion of the air launched precision guided munitions and supply and service of aircraft including air platforms licensed for export to KSA is assessed as being very low[125], given their very high value, size, the need for considerable additional equipment, the requisite resources to support the platform, as well as sophisticated technical knowledge and training in order to operate them.

Alleged failure to assess likelihood of IHL breach

106. The Claimant and the Special Advocates have criticised the Secretary of State for failing to make his position clear in terms of what assessments are and are not carried out in terms of past alleged IHL breaches by the Coalition. The Special Advocates go further and have asserted (in grounds which have been made OPEN) that it is unlawful for the Secretary of State not to make a determination of the likelihood of a breach of IHL having been committed by the Coalition in respect of each specific allegation of a breach which is examined. It is said that this is "*plainly a failure to make sufficient inquiry and/or is irrational and/or a failure to take relevant information into account.*"

107. The criticisms about the Secretary of State's position have in fact been addressed by the Secretary of State some considerable time ago. As explained in the first witness statement of Mr Crompton dated 5 August 2016, in June 2016 it was brought to HMG's attention that there were inconsistencies in two Parliamentary responses addressing this topic and steps were taken at the earliest opportunity (on 21 July 2016[126]) to correct that with a further ministerial statement to Parliament[127]. The letter from GLD dated 14 October 2016 accurately set out the position. That stated as follows:

> "*In accordance with the EU's User Guide, in assessing whether there is a "clear risk", a number of factors are relevant, including Saudi Arabia's past and present record in relation to IHL, Saudi Arabia's intentions, as expressed through formal commitments and evidenced in its response to incidents of concern, and its capacity to ensure that equipment transferred is used in a manner which is consistent with IHL. Accordingly, whilst allegations of serious violations of IHL are manifestly relevant to the "clear risk" assessment, it is not necessary to establish conclusively whether any such violations have occurred. A "clear risk" of a serious violation of IHL might arise where there is no established violation of IHL and conversely, if it were to be concluded that a particular incident constituted a violation of IHL, it would not necessarily follow that the "clear risk" threshold for Criterion 2C had been established.*

[125] Bell 1 at §41
[126] See Exhibit NC8 attached to Crompton 1
[127] Crompton 1 at §§109-111.

The UK is not a party to the conflict in Yemen. Consequently, the MOD and the FCO have not thus far been in a position to reach a conclusion as to whether or not an IHL violation has taken place in the conflict, and in the circumstances consider that it is unlikely that they would be in a position to do so in relation to each and every incident of potential concern that comes to their attention. The Government continues to believe that Saudi Arabia has the best insight into its own military procedures, allowing them to understand whether anything went wrong and to apply the lessons learned as required. In the same way, when allegations have been made against the United Kingdom in relation to actions in Afghanistan and Iraq, we have investigated those claims ourselves and would not expect other states to form judgments on our behalf.

The MOD does, however, monitor and analyse all allegations of IHL violations which come to its attention. Its analysis includes matters which might give rise to concerns about the Kingdom of Saudi Arabia's approach and attitude to IHL, such as the equipment used and whether a military target has been identified. This analysis, together with other information about Saudi processes and attitudes, is used to form an overall view on the approach and attitude of Saudi Arabia to IHL for the purposes of the "clear risk" assessment under Criterion 2C."

108. For the avoidance of doubt it is not accepted that there was anything inaccurate or misleading in the Secretary of State's Summary Grounds of Defence. The reference to "*whether any concerns are raised by the strike*" in §23(c) of those Grounds was accurate and consistent with the position as set out in the 14 October 2016 letter above.

109. The Special Advocates assert that it is unlawful and irrational for the Secretary of State not to make an assessment of the likelihood of a past IHL breach in relation to specific incidents, when making the Criterion 2(c) assessment. It is unclear whether the Claimant adopts that position (it being a matter for the Claimant and not the Special Advocates to advance such an open point). Without prejudice to that, the criticism is unfounded for the following reasons:

110. **First**, it is not accepted that the sorts of incidents which are considered as part of this assessment process are not being examined from the perspective of the IHL principles summarised at §33 above. That is the fundamental premise upon which those allegations are being considered by the Secretary of State, upon advice from the MOD/FCO.

111. **Secondly**, the Secretary of State has not said that the MOD/FCO would never reach a conclusion as to whether an IHL violation has taken place in any specific instance. Whilst the FCO/MOD consider that it is unlikely that they would be in a position to do so in relation to specific incidents of potential concern, the possibility that this might occur in the future has not been ruled out.

112. **Thirdly**, there are reasons why it may be extremely difficult for the FCO/MOD to reach a concluded view (or even an assessment of likelihood) about whether particular incidents did or did not constitute violations of IHL. As explained in the witness statements of Peter Watkins, the MOD makes rigorous efforts to monitor and analyse alleged breaches of IHL which come to its attention, but there will inevitably be gaps in the information available. The UK is not a part of the Coalition and does not have access to information such as operational intelligence used by the Coalition and coverage of Coalition ground force operations - see Watkins 1 at §§54, 57 and Crompton 1 at §87, which would be necessary in order to reach a view on this issue. For example, without knowing all of the information available to the targeting decision maker and the basis of the targeting decisions made, a view cannot be reached on: whether there was a military necessity to strike the target; whether there was distinction between military objectives and civilians and civilian objects and whether the intended target was a military objective; whether any expected incidental civilian loss of life, injury or damage was proportionate to the expected military gain; and, whether all feasible precautions were taken to avoid and minimise incidental civilian loss of life, injury or damage. Of course neither the Claimant nor the sources on which the Claimant relies has access to the information available to the targeting decision maker or the basis of the targeting decisions made. The Claimant simply infers violations of IHL on the basis of reported civilian casualties and damage. However, IHL is much more sophisticated than this.

113. The Claimant asserts at §59(b)(vii) of its skeleton that the MOD ought to be making an assessment of the number of civilian casualties (by reference to open source reports) as part and parcel of an assessment of the compatibility of any strike with the principle of proportionality under IHL. In fact the MOD Tracker does record civilian casualties, as reported with reference to allegations (noting that the MOD is generally unable to verify alleged numbers of casualties), and this information is provided to the FCO to support their criteria 2c assessment. But it is to be noted that the Claimant's position misrepresents the principle of proportionality which requires a balancing exercise of anticipated casualties versus anticipated military advantage *before* an attack is carried out rather than an *ex post facto* assessment of whether the predictions were correct[128]. Again that highlights the potential importance of the information available to the targeting decision-maker.

114. **Fourthly**, it is to be emphasised that the Government is not acting as, or in the position of, a Court charged with determining the question whether a sovereign state has or has not acted in breach of IHL. Nothing remotely approaching that sort of exercise or approach is required by the policy and context in question here.

[128] For example Rule 14 of the ICRC Commentary summarises this principle as follows: "*Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.*"

115. **Fifthly**, and perhaps most importantly, it is not necessary for such judgements to be made about specific past incidents in order for a lawful forward-looking assessment under Criterion 2(c) to be made. That criterion, considered in the present context, simply requires overall judgements (many of which will be prospective) to be made by the Secretary of State on the basis of the information and materials he considers it appropriate to focus upon. More specifically:

a. The assessment under 2(c) involves assimilating a wide range of information, including:
    i. Analysis of alleged breaches of IHL in the context of the air campaign in Yemen;
    ii. The context of the overall campaign and KSA's role in that campaign;
    iii. The extent to which the KSA has given the UK access to information about the Yemen campaign;
    iv. The capabilities of the Saudi military and the procedures which they employ in identifying targets and carrying out air strikes;
    v. The response of the KSA to incidents of concern and, in particular, the extent to which it has been willing to learn from errors. (see Crompton 1 at §30(c)).

b. The risk assessment is conducted by looking at all that information in the round. The fact that there is no established violation of IHL does not and could not, by itself, mean that there is no clear risk under Criterion 2(c). Conversely, even if there were established serious violations of IHL, that would not automatically mean that a clear risk in the future had been established[129]. Past behaviour may be a helpful indicator of attitude towards IHL and of future behaviour, but is not necessarily determinative.

c. The analysis which is conducted by the MOD does provide useful and relevant information which feeds into the overall assessment process (even though it has, to date, not resulted in an assessment of the likelihood of IHL breaches having occurred in respect of specific incidents). For example the analysis by the MOD:

    i. Provides important information on the pattern of Coalition attacks, their frequency, nature and intensity, see e.g. Watkins 2 at §36;
    ii. Assists in identifying whether a military object was within the vicinity of the allegation, see e.g. Watkins 1 at §57;
    iii. Can help when assessing the Coalition explanation for a particular incident;

[129] Crompton 1 at §30(d)-(e)

iv. Enables decision-makers to focus on particular incidents of concern, as explained at Watkins 2 §35 and Crompton 2 at §§14-19. For example, for the purposes of preparing the December 2016 IHL update the MOD was asked by the FCO to provide a summary of analysis on four particular incidents of concern, including the strike on the Great Hall on 8 October 2016;

v. Assists in identifying priority areas for discussion/engagement with the Coalition. For example details of incidents of concern are passed on by the MOD to KSA so that thorough and conclusive investigations can be conducted by the Coalition JIAT[130].

d. In addition, the test refers to the risk of specific items being used in the serious violation of IHL, not just the risk of a serious violation taking place. The analysis is conducted by looking at the specific items in question which are the subject of the licence application[131].

116. In those circumstances, it is incorrect to describe the analysis as "*confined to asking whether it is possible to identify "a legitimate military target""* (see §16(e) of the Claimant's skeleton). The analysis is far more sophisticated and complex than that. Nor do the (inevitable) gaps in the analysis mean that the analysis has no value (as implied at §59 of the Claimant's skeleton). In addition, the Special Advocates have (wrongly) implied that because an assessment of likelihood of IHL breach is not made in relation to specific incidents, that means that information about past incidents is not taken into account at all. But that is demonstrably not the case, as is evident from the extent to which the MOD/FCO's analysis of past incidents does feed into the overall assessment process.

117. Finally the Country Guidance on Yemen report from the Home Office (referred to at §10 of the Claimant's skeleton), simply records that there have been "*reports*" of indiscriminate violence by both sides. In keeping with the Home Office's approach in producing such country guidance reports, the report is neutrally reflecting "*external information sources*" to assist Home Office decision makers.[132] There is no inconsistency with the Secretary of State's risk assessment pursuant to Criterion 2(c).

2) Alleged failure to apply the suspension mechanism

118. As explained in Bell 1 at §§18-20 the Secretary of State's policy to consider suspending licensing and extant licences is triggered where, in the light of new evidence and information, it would be considered that a proper risk assessment against the

[130] See Watkins 1 at §66
[131] Crompton 1 at §30(f)
[132] See the Preface to the report at p.2 [B(UK)/2]

Consolidated Criteria would be difficult. The policy makes clear that suspension will not be invoked "*automatically or lightly*" and that a "*case by case assessment of a particular situation will be necessary to determine whether a licence suspension is appropriate*" (see §9 of the Annex to this skeleton). Special caution and vigilance is, in fact, exercised with respect to approving licences for the export of items to KSA pursuant to Criterion 2.

119. As to the application of that policy, there are some gaps in the UK's knowledge, as is inevitable in a conflict to which the UK is not a party[133]. But nevertheless, the UK does have an unprecedented level of access to the Saudi military, providing an extraordinarily broad insight into their processes and conduct and therefore the Secretary of State considers that he is in possession of sufficient information to conduct the requisite risk assessment pursuant to Criterion 2(c). As set out above and in Crompton 1 at §§86-89, a regular flow of information is received from a range of sources, including from within Government, through the Embassy in Riyadh, through the Defence Attaché, UK Liaison Officers, ministerial engagement, foreign governments, as well as open sources including NGOs and international organisations and the media. His conclusion that he has sufficient information for this purpose[134] is one he was entitled to reach. That conclusion is amply supported by the IHL updates which the Court has available to it in the closed evidence.

120. Specifically:

a. The Secretary of State does not accept that "*without knowing the results of [KSA] investigations the Defendant cannot properly form its own view*" as to whether the test in Criterion 2(c) has been satisfied.[135] The fact of investigation is important in its own right. The results of an investigation will be taken into account once known; but are not a precondition to satisfaction of Criterion 2(c). However, in any event, the results would only be one factor in an overall, balanced assessment under Criterion 2(c) taking into account the range of factors as identified above.

b. The Secretary of State does not accept that he is "*not in a position to assess whether the finding of the UN Panel of Experts (or other UN agencies) following their investigations, can be rejected so as to conclude that there is no "clear risk" that the Coalition "might" use UK equipment in serious violation of IHL*".[136] For the reasons

[133] Crompton 1 at §87

[134] As stated in Crompton 1 at §88 "*With respect to the position adopted on 9 December 2015, and thereafter, it was not considered that the risk had changed suddenly, and that whilst there were clearly conflict conditions it was and is the view of AEPT, on the basis of the information provided to them, that they remained able to conduct the necessary risk assessments against the Criteria. AEPT considered as of the 9 December 2015, and thereafter, that it was in possession of sufficient information, despite not being in possession of complete information, to conduct the necessary Criteria assessment.*"

[135] As asserted by the Claimant (see Claimant's Grounds §55).

[136] As asserted by the Claimant (see Claimant's Grounds §55).

already set out above (and discussed further below), the Secretary of State is in a position to assess the findings of UN agencies (including by reference to range of sources to which such agencies do not have access).

3) Irrationality

121. In support of this ground of challenge the Claimant places central[137] reliance on the reports of third parties (namely UN officials and agencies), the European Parliament and NGOs (AI and HRW) and asserts that "*the Government does not challenge the findings of these organisations nor does it offer any reasonable basis to suggest that the findings of these bodies…..are wrong*".[138]

122. But, there is no proper basis upon which it can be said that the approach taken by the Secretary of State is irrational.

123. **First**, as appears to be accepted by the Claimant (see §73 of its skeleton), Criterion 2(c) imposes no burden on the Secretary of State to find or explain why views expressed by these or any other third parties are wrong. The fact that those views have been expressed and the bases for such views are matters which would naturally be, and have been, taken into account when making the overall assessment required by Criterion 2(c). However, they are to be considered alongside all of the information available to the Secretary of State – some of which, as already noted, may not be publicly available.

124. **Secondly**, the Claimant seeks to create a false legal position – asserting that the views and conclusions of these agencies either (a) creates an inference of irrationality; or (b) casts a burden of public explanation on the Secretary of State.

125. As to (a) and the inference of irrationality:

a. Civilian casualties, although deeply regrettable, are not determinative of a violation of IHL (see the discussion at §§35-37 above). The principle of distinction between legitimate military targets and civilians and civilian objects is precisely that – a principle of distinction; not a guarantee that in military conflict civilians will not be killed, or that accidents and unintended consequences resulting in such deaths will not occur.

b. The Claimant's case amounts to the suggestion that where bodies have made *general* statements about IHL con-compliance, a burden then shifts to HMG to

[137]The Claimant also relies on Brigadier Assiri's statements and the User's Guide. These have been dealt with above in answer to the first Ground.
[138]Claimant's Grounds §57.

determine whether IHL was violated in respect of a specific incident. But it cannot be right that a mere assertion of civilian casualties (which does not automatically equate with a breach of IHL) imposes a burden on the Secretary of State to determine whether IHL was breached in relation to each specific allegation.

c. Furthermore, even if isolated incidents of IHL violations were identified, this does not equate to the finding of a "*clear risk*" that UK licensed items might be used in the commission of "*serious violations*" of IHL pursuant to the forward-facing test required under Criterion 2(c), as expressly acknowledged in the EU User's Guide. As it acknowledges: "*isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern*".[139]

d. In any event, as already noted, the Secretary of State has carefully considered these reports alongside the wide range of other information and analyses available to him. Contrary to the suggestion at §73 of the Claimant's skeleton, it is not the case that these reports have simply been ignored. As explained in Watkins 1 and 2, that has included not merely the UN Panel of Experts Report dated 22 January 2016[140], but other allegations from numerous sources including allegations from Human Rights Watch ('HRW'), Médecins Sans Frontière ('MSF'), UN Children's Fund (UNICEF), High Commissioner for Human Rights (OHCHR), the UN High Commissioner for Refugees (UNHCR), UN International Children's Emergency Fund (UNICEF) and the World Health Organisation (WHO), together with other press reporting and 9 additional allegations brought to the MOD's attention by the Claimant[141]. The lawfulness of the substantive decision is to be judged on that basis.

e. To that end it is important that the UN Panel of Experts Report is viewed in its proper context. As explained in Crompton 1 at §§63-65 and Watkins 1 at §§63-64:

    i. The mandate for the report was wide:

[139] It should also be noted that claims of IHL breaches by both sides are made as part of information warfare.
[140] Claimant's Volume 1 B(UN) 90-150.
[141] Watkins 1 at §§42, 68-74 and Watkins 2 at §31. Allegations have also been considered from Oxfam, Amnesty International, Mwatana Organisation of Human Rights, Save the Children, USAID and the US State Department.

1. It was to monitor the implementation of sanctions measures;
2. The report runs to some 266 pages and covers a number of issues relating to sanctions as well as commenting more generally on the situation in Yemen.

ii. The allegations of IHL violations are, in many instances, very general:

1. At paragraph 123, the UN Panel concludes that "*all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution…*" Paragraphs 127 to 129 and 136 to 139 raise, in general terms, allegations of IHL breaches by the Coalition. At paragraph 137 it is noted that "*The Panel documented 119 Coalition sorties related to violations of IHL.*" Annex 47 of the Report comprises a table of "*Documented IHL Violations*". These are outlined in very general terms – for instance "*Attacks on farms and agricultural areas – 3*"; "*Attacks on mosques – 3*". Further details of certain allegations are contained in Annexes 52 – 56 and 61-63.

2. Many of the alleged violations included in the report are not set out in any detail and consequently could not be recorded by the MOD on the Tracker. For example, Annex 54 states that the Panel documented "*3 cases of attacks on fishing vessels and dhows[142], and 2 cases of attacks upon fishing markets and their communities*" but only goes on to provide information about 2 of these attacks: alleged airstrikes on an Indian Fishing Vessel on 8 September 2015 and alleged airstrikes on Ogbaan and Kadmaan islands in the Red Sea on 22 and 23 October 2015.

3. The Report does not, therefore, contain a detailed and exhaustive analysis of the 119 allegations of IHL violations by the Coalition.

iii. The sources used to compile the report were necessarily limited and are not as sophisticated as other sources available to the MOD:

1. Section V of the Report covers "*Acts that violate international humanitarian law and human rights law and cross-cutting issues*". Paragraph 121 describes the methodology of this section, noting that the Panel conducted interviews with refugees, humanitarian organisations, journalists and local activists, and that it obtained satellite imagery (paragraph 138 makes clear that this is

[142] A type of ship used in the Red Sea and Indian Ocean region.

commercial satellite imagery) to assist in substantiating certain "widespread" or "systematic " attacks.

2. As explained in Watkins 1 at §53 and §55 the MOD (and specifically PJHQ) is able to base its analysis on a wide range of information to which NGO's do not have access, including sensitive MOD sourced imagery which can represent a more comprehensive and immediate picture than that provided by third party commercial imagery.

f. However, the allegations which were raised in the UN Report were clearly of concern and were taken seriously by those responsible for conducting the IHL assessment under Criterion 2(c). In particular, MENAD (which received an advance copy of the Report) immediately forwarded it to the MOD who carried out a preliminary assessment of the 119 allegations.

i. As part of the January 2016 IHL update the Report was carefully and conscientiously considered[143]. Although the additional allegations were concerning they did not trigger a change in the overall analysis of Saudi compliance with IHL. In particular, further work was required by MOD to identify whether the alleged attacks had been carried out by the RSAF, rather than one of its coalition partners. MENAD also requested additional information from the UN Panel of Experts with regards to seven of these incidents[144]. No further detail has been forthcoming to date.

ii. In the event some 39 allegations on the MOD tracker were added as a result of the report.

iii. In terms of the "clear risk" threshold for Criterion 2(c), it is also relevant that most of the allegations were historic and therefore the increase in the number of incidents being tracked by the MOD did not in itself reflect a deterioration in Coalition behaviour or processes.

g. For the avoidance of doubt, the UN Secretary General's Report on Children and Armed Conflict dated 20 April 2016 (see §30 of the Claimant's skeleton) needs to be treated with some caution. On 6 June 2016 the UN Secretary General agreed to remove the listing of KSA from the report's Annex pending a review of the

[143] See Crompton 1 at §65-66 and Watkins 1 at §63
[144] Crompton 1 at §66

cases cited in the report[145]. That review is still pending. In those circumstances KSA should not be considered to be 'listed' as suggested by the Claimant.

126. As to (b) and the asserted burden of explanation, there is no such burden (and nor is one created by these proceedings). The law requires in this context that the decision be rational. There is no legal requirement to provide reasons to the Claimant or in public. Accountability is ensured as noted in *Hasan*[146] by the existence and operation of the Parliamentary processes, including specifically the CAEC. Indeed, in many contexts involving allegations of this kind, it will not be possible to provide reasons, or at least full reasons, because of e.g. national security and/or international relations concerns. The Secretary of State in his evidence and submissions in these proceedings has indicated sufficiently the basis on which, and processes by which, the decisions under challenge were taken. It is submitted that that indication undermines any suggestion that irrationality should be inferred.

127. In fact,

a. The Secretary of State, with the assistance of other involved Departments and on the basis of all the relevant information before him, properly considered the application of Criterion 2(c). The situation is kept under careful and continual review.

b. He reached a rational conclusion that the significant standard in Criterion 2(c) had not been met. He recognised that the equipment in question might be used in the Yemeni conflict. However, he concluded in the light of all the matters referred to above that there was no clear risk that KSA might use it to commit serious violations of IHL. In particular, the Secretary of State considered that: (1) the Coalition are not targeting civilians; (2) KSA processes and procedures have been put in place to ensure respect for the principles of IHL; (3) the Coalition is investigating incidents of controversy, including those involving civilian casualties; (4) the KSA has throughout engaged in constructive dialogue with the UK about both its processes and incidents of concern; (5) the KSA has been and remains genuinely committed to IHL compliance[147]. That is a process which is very far removed from the inaccurate and over-simplistic analysis which appears at §75 of the Claimant's skeleton.

[145] see UN press release here: http://www.un.org/press/en/2016/sgsm17824.doc.htm
[146] *R (oao Hasan) v Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin) at §§21-22
[147] For a recent assessment of KSA's approach and capability – see Watkins 2 at §39 and see also Watkins 1 at §§78-79.

The conclusions of Parliamentary Committees on Arms Export Controls ("CAEC")

128. Finally the Claimant appears to place some "background" reliance on the CAEC Reports which were published on 14 September 2016 – see §§13-15 of the Claimant's skeleton argument and footnote 4. As is rightly acknowledged by the Claimant, those reports cannot be relied upon for the purpose of establishing that the Criterion 2(c) test was satisfied (whether on the basis of open material or otherwise), given the question of Parliamentary privilege which arises. In any event and without prejudice to that, such material does not assist the court in these proceedings in circumstances where those committees were not engaged in a forward-looking assessment (as the Secretary of State must do under Criterion 2(c)) of whether there is a clear risk that items to be licensed might be used in the commission of a serious violation of IHL. The Court is also referred to the Government's responses to these reports, including its response to the suggestion by the Business, Innovation and Skills and International Development Committees' Report that the UK should suspend export licences to KSA pending a "*United Nations-led inquiry into reports of violations of IHL*"[148].

Cluster munitions

129. The Claimant has referred to a report by Amnesty International alleging that KSA has used UK-supplied cluster munitions in the conflict in Yemen (Claimant's skeleton argument for the permission hearing §10).

130. As soon as the allegation of the use of UK-supplied cluster weapons was made by Amnesty International (May 2016), the MOD started analysing the information available

[148] In particular the Government stated:

> *"We disagree with this recommendation. The Government is confident in its robust case-by-case assessment and is satisfied that extant licences for Saudi Arabia are compliant with the UK's export licensing criteria.*
>
> *We continue to assess export licence applications for Saudi Arabia on a case-by-case basis against the Consolidated EU and National Arms Export licensing Criteria, taking account of all relevant factors at the time of the application. The key test for our continued arms exports is whether there is a clear risk that those exports might be used in a commission of a serious violation of International Humanitarian Law (IHL). A licence will not be issued for any country, including Saudi Arabia, if to do so would be inconsistent with any provision of the mandatory Criteria, including where we assess there is a clear risk that the items might be used in the commission of a serious violation of IHL.*
>
> *The conflict in Yemen is being monitored closely, and relevant information gathered from that monitoring is taken into account as part of the careful risk assessment for the licensing of exports to Saudi Arabia.*
>
> *Our export licensing system allows us to respond quickly to changed circumstances, with the option to suspend or revoke any export licence, including those for Saudi Arabia, where we consider that this is a necessary and appropriate step."*

and sought clarification from the KSA, requesting an investigation.[149] The Secretary of State for Defence responded to Amnesty International by letter dated 26 June 2016[150]. In that letter it was made clear, *inter alia*, that the UK, as a signatory to the Convention on Cluster Munitions, does not use cluster munitions, nor does it supply them to others. The UK last provided cluster munitions to KSA almost 30 years ago.

131. On 19 December 2016 Major General Assiri made a statement on behalf of the Coalition confirming that there had been limited use of UK manufactured BL-755 cluster munitions by Coalition aircraft, that they had been used against legitimate military targets, and that KSA had decided to cease use of these cluster munitions[151].

132. As explained in Watkins 1 at §75 (and as has been made clear to Parliament by the Defence Secretary in a statement to Parliament on 19 December 2016), the UK Government has taken this allegation very seriously, raised it with the Saudi-led Coalition at senior levels and welcomed their investigation into the matter. The current overall assessment of KSA's approach and capability remains as set out in Watkins 2 at §39, as reflected in the assessments referred to in Bell 2 at §20-23.

133. The Amnesty report provides no basis for concluding that the decisions under challenge were irrational. It cannot provide a basis for criticising the factors or information considered and/or taken into account. It post-dates much of the decision-making which is sought to be challenged in these proceedings. Nor is there any basis for some new 'present' challenge – the matter is being properly considered consistently with the approach to keeping decisions under review outlined above.

JAMES EADIE QC

JONATHAN GLASSON QC

KATE GRANGE

JESSICA WELLS

3 February 2016

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[149] The ownership and use of cluster munitions by states that are not signatories of the Convention (such as the KSA) is not necessarily unlawful, provided that they are used in a way that does not contravene international law, and particularly IHL. However, the United Kingdom as a signatory to the Convention on Cluster Munitions, does not use cluster munitions, nor supply them to others, and actively encourages KSA, along with other non-parties to the Convention, to accede to it.

[150] Exhibit PW3 of Watkins 1

[151] Watkins 2 at §38

ANNEX - THE LEGAL FRAMEWORK FOR UK ARMS EXPORTS

Background to the Consolidated Criteria

1. The Scott Inquiry in 1996 into the export of arms to Iraq[152] recommended that there should be a thorough review of strategic export controls and export licensing procedures. Following the May 1997 general election the Labour Government introduced new national export licensing criteria and supported the creation of a voluntary EU Code of Conduct on Arms Exports. That Code came into effect in 1998[153].

2. In October 2000 the Government first introduced the 'Consolidated EU and National Arms Export Licensing Criteria' ('the Consolidated Criteria') which brought together the UK's national export licensing criteria with those of the EU Code of Conduct.

Export Control Act 2002

3. The Export Control Act 2002 ('the 2002 Act') gave the government new powers, including allowing controls to be imposed in new areas including the transfer of WMD-related technology.

4. Section 9 of the 2002 Act provided for the giving of guidance about the exercise of export licensing powers. It provided as follows:

> *"9 Guidance about the exercise of functions under control orders*
>
> *(1) This section applies to licensing powers and other functions conferred by a control order on any person in connection with controls imposed under this Act.*
>
> *(2) The Secretary of State may give guidance about any matter relating to the exercise of any licensing power or other function to which this section applies.*
>
> *(3) But the Secretary of State must give guidance about the general principles to be followed when exercising licensing powers to which this section applies.*
>
> *(4) The guidance required by subsection (3) must include guidance about the consideration (if any) to be given, when exercising such powers, to –*
>
> > *(a) issues relating to sustainable development; and*
> >
> > *(b) issues relating to any possible consequences of the activity being controlled that are of a kind mentioned in the Table in paragraph 3 of the Schedule;*
> >
> > *but this subsection does not restrict the matters which may be addressed in guidance.*
>
> *(5) Any person exercising a licensing power or other function to which this section applies shall have regard to any guidance which relates to that power or other function.*

[152] The Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution, 15 February 1996

[153] European Union Council, 5 June 1998 (OR.en), 8675/2/98.

(6) A copy of any guidance shall be laid before Parliament and published in such manner as the Secretary of State may think fit.

(7) In this section "guidance" means guidance stating that it is given under this section.

(8) The consolidated criteria relating to export licensing decisions announced to Parliament by the Secretary of State on 26th October 2000 shall (until withdrawn or varied under this section) be treated as guidance which –

(a) is given and published under this section; and

(b) fulfils the duty imposed by subsection (3) in respect of any export controls and transfer controls which may be imposed in relation to goods or technology of a description falling within paragraph 1 or 2 of the Schedule."

5. As is evident from s.9(8) above, the 2002 Act provided that the Consolidated Criteria dated October 2000 was to be treated as given and published under that section and fulfilled the duty under s.9(3) for the Secretary of State to give guidance about the general principles to be followed when exercising licensing powers.

Export Control Order 2008

6. The specific controls which are introduced by the 2002 Act are contained in secondary legislation to the 2002 Act, namely the Export Control Order 2008 ('the 2008 Order'). Article 26 of the 2008 Order provides for the granting of UK licences to export military goods (which also authorises the export or transfer of the minimum technology required for the installation, operation, maintenance and repair of the goods). Any such licence can be general or granted to a specified person, limited to expire on a particular date or subject to, or without conditions (see Article 26(6)).

7. Article 32 of the 2008 Order empowers the Secretary of State to "amend, suspend or revoke" a licence. Article 32(1) provides as follows:

"32. – Amendment, suspension and revocation of licences

(1) The Secretary of State may by notice –

(a) amend, suspend or revoke a licence granted by the Secretary of State;

(b) suspend or revoke a general licence granted by the Secretary of State as it applies to a particular licence user.

Policy on suspensions

8. The 2008 Order does not set out the circumstances in which licences will be suspended, however that has been addressed as a matter of policy. That policy is explained in Bell 1 at §§18-20. As Mr Bell makes clear, following the Arab Spring, on 13 October 2011 the Government announced its conclusions of a review of defence and security export policy. The Government announced a package of proposals including the introduction

of a mechanism for the immediate suspension of pending license applications to countries experiencing a sharp deterioration in security or stability. That mechanism covers suspending both extant licenses and the process of issuing new licenses.

9. In a statement to Parliament by the Secretary of State for Business, Innovation and Skills dated 7 February 2012 that policy was set out in detail:

> *"The new suspension mechanism will allow the Government to quickly suspend the processing of pending licence applications to countries experiencing a sharp deterioration in security or stability. Suspension will not be invoked automatically or lightly, but triggered for example when conflict or crisis conditions change the risk suddenly or make conducting a proper risk assessment difficult. A case-by-case assessment of a particular situation will be necessary to determine whether a licensing suspension is appropriate.*
>
> *Any decision to suspend will be taken by the Licensing Authority based on advice from relevant Government Departments and reporting from our diplomatic posts. Parliament, industry and the media will be informed of any suspension.*
>
> *Suspension will be tailored to the circumstances in play and will not necessarily apply to all export licence applications to a country, but may instead be for applications for particular equipment (for example crowd control goods), or for applications for equipment going to a particular end-user.*
>
> *If a decision to suspend is made, work on licence applications in the pipeline will be stopped and no further licences issued pending ministerial review. Once the suspension is lifted, applications will not be required to be resubmitted."*[154]

10. The Government has also made clear the circumstances in which the power to revoke licences will be exercised, as explained in Bell 1 at §§21-22.

EU Measures

11. After a long period of negotiation, a revised version of the EU Code of Conduct (originally dating from 1998 – see §1 above), was adopted by EU Member States in December 2008. European Council Common Position 2008/944/CFSP ('the EU Common Position') called "*The Common Rules Governing the Control of Exports of Military Technology and Equipment*" incorporated measures which increased the scope of the Code to include intangible technology and physical exports for licensed production in third countries. It also expanded and strengthened the criteria against which export licences are assessed. It is to be noted that Criterion 2 of the Common Position is reflected and interpreted, as a matter of domestic policy, in Criterion 2 of the Consolidated Criteria, discussed further below. Criterion Two of the Common Position provides, *inter alia*, as follows:

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

"Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

– Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

(a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

(b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;

For these purposes ... Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

– Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

(c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law."

EU User's Guide

12. Article 13 of the EU Common Position states that "*the 'User's Guide to the European Code of Conduct on Exports of Military Equipment, which is regularly reviewed, shall serve as guidance for the implantation of this Common Position*". The current version of the EU User's Guide[155] is dated 20 July 2015. As made clear at the outset of that Guide[156] it is "*intended to help Member States apply the Common Position*" and "*does not replace the Common Position in any way, but summarises agreed guidance for the interpretation of its criteria and implementation of its articles*".

13. The User's Guide goes on to provide assistance on how to apply the Criteria in the Common Position, including Criterion 2.

14. Whilst it is accepted that regard must be had (and is had) to the EU User's Guide, it is to be noted that this is non-binding guidance designed to assist in addressing the question

[155] General Secretariat of the Council of the European Union "*User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*", 20 July 2015 COARM 172 CFSP/PESC 393 ("EU User's Guide") at [C/115-C/269 at C/168].
[156] See p2

of whether there is a clear risk that licensed items might be used in the commission of a serious violation of IHL, with reference to three key factors.[157] The application of the series of subsidiary questions identified in the EU User's Guide as assisting in answering that key question and considering those three key factors is context specific.[158] This is addressed further under Ground 1 of the Claimant's challenge.

The Arms Trade Treaty

15. The Arms Trade Treaty ('ATT') is an international treaty, the final text of which was adopted by the UN General Assembly on 2 April 2013 and which was ratified by the UK on 2 April 2014. In order to ensure consistency between the treaty's scope and the UK's export controls, the Export Control (Amendment) Order 2014 was introduced and came into force on 9 April 2014. In particular, there was a need to address 'extra-territorial' brokering controls in domestic secondary legislation.

[157] Namely, (i) an inquiry into the recipient's past and present record of respect for IHL (ii) the recipient's intentions as expressed through formal commitments and (iii) the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

[158] Cf to the Claimant's rigid approach set out at §38 of the Claimant's Grounds "*must follow it unless there is a good reason not to do so*".