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

Defendant

-and-

HUMAN RIGHTS WATCH
AMNESTY INTERNATIONAL
RIGHTS WATCH (UK)

First Interveners

OXFAM

Second Intervener

PRELIMINARY RESPONSE

TO THE INTERVENERS' SUBMISSIONS

Introduction

1. The Claimant's case as formulated in its pleadings and skeleton argument raises a complex set of issues which will involve the Court considering sensitive material in Closed Material Proceedings over three days. The parties have cooperated to ensure that the judicial review is before the Court in February. Permission was granted by Gilbart J on 30 June 2016 on the basis that the claim would be heard by the end of January 2017 and an extremely demanding timetable has been imposed and has been met. The Claimant has had ample opportunity to amend its grounds for judicial review following notice of the ambit of the proposed interventions, but has chosen not to do so, notwithstanding the fact that the directions permitted the Claimant to serve amended detailed grounds as late as 16 January 2017.

2. The Interveners arguments effectively represent stand-alone challenges. The Interveners seek to raise new legal and factual issues which form no part of the Claimant's pleaded case. The Claimant has asserted in a footnote to its skeleton (fn. 1) that many of the Intervener's points are relevant to the Claimant's case "*depending on the view the court reaches on them*"; but there is no substantive reflection of the points made by the Interveners in the Claimant's submissions, which focus solely on Criterion 2(c) and do not raise separate issues under Criterion 1(b). Moreover, the timing of these interventions has meant that the Defendant has had no opportunity to serve any evidence in response to these interventions, nor has the Defendant had a proper opportunity to prepare a detailed response to the new legal issues which they raise.

3. Accordingly the Defendant submits that the Court should not rule on any of the issues raised in the Interveners' submissions. However, the Defendant sets out below in these <u>preliminary</u> submissions at least some of the key legal arguments he advances in opposition to the new challenges made by the Interveners. Should this Court wish to hear full argument on the matters raised by the Interveners, it would be necessary for a fuller and more detailed response to be prepared and indeed for further evidence to be obtained

4. In summary, and on that basis, the Defendant's position is as follows:

   4.1. The submissions of Human Rights Watch, Amnesty International and Watch Rights UK ('the First Interveners') are misconceived in law since Article 16 of the International Law Commission's Draft Articles on State Responsibility ('the Draft Articles') forms no part of the Consolidated Criteria.

   4.2. The submissions of Oxfam ('the Second Intervener') also proceed on a misconceived legal basis, namely that there is a requirement in Criterion 1(b) to undertake an assessment of whether the export in question "*contributes to peace and security*" and/or whether there is an "*overriding risk*" that items could be used to commit or facilitate a serious violation of international human rights law ('IHRL').

<u>Criterion 1 does not include any requirement to comply with Article 16 of the Draft Articles</u>

5. The First Interveners have sought to rely upon Criterion 1 to the Consolidated Criteria (in contrast to the Claimant in these judicial review proceedings whose challenge relates solely to Criterion 2(c)). They suggest that, on a proper reading of Criterion 1, there is a requirement as a matter of *domestic* policy, enforceable in *domestic* law, to comply with Article 16 of the International Law Commission's Draft Articles on State Responsibility ('the Draft Articles') and that the UK is obliged to undertake an analysis of its compliance with Article 16 as part of any lawful operation of the export licensing regime. That is untenable.

6. Leaving aside the thoroughly controversial contentions made in relation to the Draft Articles[1], there is no sound basis on which the Consolidated Criteria can be read as imposing any obligation to comply with Article 16 of the Draft Articles.

7. The First Interveners attempt to import Article 16 into Criterion 1 of the Consolidated Criteria by relying on Criterion 1(f) which provides as follows:

> "CRITERION ONE
>
> *Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.*
>
> ***The Government will not grant a licence if to do so would be inconsistent with, inter alia,***
>
> *the UK's obligations and its commitments to enforce United Nations, European Union and Organisation for Security and Co-operation in Europe (OSCE) arms embargoes, as well as national embargoes observed by the UK and other commitments regarding the application of strategic export controls;*
>
> *the UK's obligations under the United Nations arms trade treaty;*
>
> *the UK's obligations under the nuclear non-proliferation treaty, the biological and toxin weapons convention and the chemical weapons convention;*
>
> *the UK's obligations under the United Nations convention on certain conventional weapons, the convention on cluster munitions (the Oslo convention), the Cluster Munitions (Prohibitions) Act 2010, and the convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (the Ottawa convention) and the Land Mines Act 1998;*
>
> *the UK's commitments in the framework of the Australia Group, the missile technology control regime, the Zangger committee, the Nuclear Suppliers Group, the Wassenaar arrangement and The Hague code of conduct against ballistic missile proliferation;*
>
> ***<u>the OSCE principles</u> governing conventional arms transfers and the European Union common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment***." (emphasis added)

8. The OSCE Principles i.e. the Principles Governing Conventional Arms Transfers dated 25 November 1993, provide as follows at Principle 4(b)(iii):

> "*Each participating State will avoid transfers which would be likely to:*

[1] Even the First Interveners accept that the interpretation of Article 16 is "*not straightforward*" and is the subject of much academic debate.

(iii) contravene its international commitments, in particular in relation to sanctions adopted by the Security Council of the United Nations, or to decisions taken by the CSCE Council, or agreements on non-proliferation, or other arms control and disarmament agreements..."

9. The First Interveners argue that the reference to "*contravene its international commitments*" in the OSCE principles, when read with Criterion 1 (including the preamble to that Criterion), means that the UK is obliged not to grant or maintain an export license if to do so "*would be likely to*" place the UK in breach of international commitments and obligations arising under customary international law ('CIL') and specifically under Article 16. They assert that the list of international commitments in Criterion 1 and in 4(b)(iii) of the OSCE Principles is not exhaustive and that such international commitments can include rules which arise as a matter of CIL, including Article 16 of the Draft Articles. However:

   9.1. OSCE Principle 4(b)(iii) goes no further than Criterion 1 does on its face. Criterion 1 relates to legally binding treaty obligations/commitments, and in particular UN, EU and other international sanctions and/or arms export control regimes or treaties. The list of examples of treaties and international commitments in Criterion 1 makes this clear.

   9.2. Criterion 1 – and any extension to OSCE Principle 4(b)(iii) – does not therefore engage Article 16 "*obligations*", as the First Interveners submit, as such obligations are, if engaged, ones that fall under CIL.

   9.3. The OSCE Principles fed into, and are encapsulated in, the drafting of the Consolidated Criteria (see, for example, Principle 4(b)(vii) which corresponds to Criterion 2(a)), but they are non-binding commitments which do not stand alone as treaty commitments in international law, and, in any event, are not justiciable domestically.

   9.4. Further, and in any event, there is a lack of any express language indicating that Article 16 (or indeed any rules of CIL) are incorporated as a matter of domestic policy in this context. It is wholly insufficient to say as the First Interveners do that the list of international commitments is not exhaustive (whether in Criterion 1 or the OSCE principles) and that this must mean that rules of CIL are imported as domestic legal obligations (see further Section B below).

   9.5. In circumstances where CIL does not give rise to domestically enforceable legal rights (see Section B below), there is no proper basis upon which it can be suggested that rules of CIL (including Article 16 of the Draft Articles) are to be implied into Criterion 1. Given the important constitutional principles in play in relation to the importation of CIL into domestic law, it would require the clearest language for any

such obligations to sound as a matter of domestic law (including as a matter of policy).

10. It is to be noted that, in practice the FCO does consider Criterion 1 in each case, on the basis of the treaty obligations described in that provision (see the first witness statement of Neil Crompton dated 5 August 2016 at §13). For example, some exports to KSA fall under the missile technology control regime (Criterion 1(e)), such as Storm Shadow missile components. In those cases, Criterion 1 is engaged and forms the part of the analysis of the recommendation.

CIL is not a part of English law

11. There is a clear and consistent line of authority to the effect that CIL is not a part of the common law, but that it is a source of English law that a court may draw upon but only where it is constitutionally appropriate to do so:[2]

    11.1. In *R v Jones* [2007] 1 AC 136 Lord Bingham (at §11) explained:

> *"I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth in Brierly's contention ("International Law in England" (1935) 51 LQR 24, 31), also espoused by the appellants, that* ***international law is not a part, but is one of the sources, of English law****"* (emphasis added).

Further, at §23 of his speech, Lord Bingham stated: "*It is, I think, true, that customary international law is applicable in the English courts only where the constitution permits*" citing with approval an article by O'Keefe, 'Customary International Crimes in English Courts' (2001) BYIL 293, 335.

    11.2. In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Pirbhai* (1985) 107 ILR 461 at 474 Woolf J stated:

> *"There are rules or principles of international law, for example relating to human rights, which are not part of our domestic law and the domestic courts cannot apply or interpret them in the same way as they apply and interpret domestic law. In a situation of the sort under consideration here, if the Court has any jurisdiction to review, it can only intervene, quite apart from the question of prerogative, if it considers the Secretary of State could not reasonably take the view of international law which he did."*[3]

[2] Crawford, *Brownlie's Principles of International Law* 8th Edition pp 67-68

[3] As explained by O'Keefe in his comprehensive review of the doctrine of incorporation in the 2008 British Yearbook of International Law, the sole line of consistent application of the doctrine of incorporation was in respect of the doctrine of sovereign immunity (as in *Trendtex*); a rule which was

11.3. Most recently in *Yam v Central Criminal Court* [2016] 2 WLR 19, Lord Mance stated:

> "*The starting point in this connection is that domestic and international law considerations are separate. In accordance with R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696, R v Lyons (Isidore) [2003] 1 AC 976, para 13 and R (Hurst) v London Northern District Coroner [2007] 2 AC 189, para 56, per Lord Brown of Eaton-under-Heywood with whose reasons Lord Bingham of Cornhill and Lord Rodger of Earlsferry agreed at paras 1, 9 and 15, a domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate*."

12. Applying this approach, the primary law making power is reserved to Parliament and does not permit that legislative monopoly to be circumvented through the use of CIL. For the Courts simply to treat CIL as forming part of domestic law (including domestic policy) potentially hands law-making powers not to the executive but to foreign states.

13. As to the possible circumstances in which the constitution might admit rules of CIL into English common law, this again should be subject to well-established principles of constitutional restraint, as discussed in the article by Sales and Clement "*International Law in Domestic Courts: the Developing Framework*" (cited with approval by Lord Brown in *R (Corner House Research and another) v Director of the Serious Fraud Office* [2009] 1 AC 756 at §68). In particular any CIL rule should not be admitted into the English common law in a context in which Parliament has legislated or in which Parliament would have been expected to legislate if it had wished to do so.[4]

14. Further, whilst it is recognised that there can be situations in which the Courts interpret CIL when giving effect to it through the common law (as in the case of rules of immunity addressed in the recent *Freedom and Justice Party* case – see footnote 5 below), the position as regards obligations between States is different and is non-justiciable since the

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well-suited to determination by the English Courts. But those cases provide no support for an assertion that all CIL forms part of domestic law. Such an approach would be unsound for a variety of reasons of constitutional principle.

[4] Cf the position in *R (oao Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin), in which the Divisional Court: (i) held that the case for giving effect to CIL would normally be more compelling where the national court was concerned with a rule which required the grant of immunity and where a failure to give effect to that rule would result in the UK being in breach of its international obligations; and (ii) rejected the claimant's contention that it would be inappropriate for the courts to recognise the immunity of members of special missions from criminal proceedings on the basis that such recognition would conflict with constitutional or common law values.

domestic courts are not equipped to decide such matters (see e.g. *R (Gentle) v Prime Minister* [2008] 1 AC 1356 per Lord Hope at §24).

15. In the export licensing context there is primary legislation which makes provision for export licensing powers, including the provision of guidance about the exercise of such powers (see §§3-4 of the Annex to the Secretary of State's OPEN Skeleton Argument). But nowhere in that statutory scheme, or in the guidance given pursuant to it, is there any indication that rules of CIL (including Article 16 of the Draft Articles) are to apply to decisions whether or not to grant export licenses. In those circumstances there are sound constitutional reasons why the First Intervener's strained interpretation of Criterion 1 is fundamentally unsound.

16. It is submitted that the foregoing is a complete answer to this challenge on the part of the First Interveners. The submissions below are advanced without prejudice to the contention that Article 16 of the Draft Articles has no application in this context, including that there was no obligation on the part of the Secretary of State to consider Article 16 when making the decisions at issue in this case.

The interpretation of Article 16 of the Draft Articles

17. Article 16 of the Draft Articles states as follows:

> *"Article 16*
> *Aid or assistance in the commission of an internationally wrongful act*
>
> *A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
>
> *(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
> *(b) the act would be internationally wrongful if committed by that State."*

18. It is accepted that this Article represents an existing rule of customary international law[5] and HMG has publicly stated that this is so[6]. However, its interpretation and effect is controversial.

19. The leading case on the interpretation of Article 16 is the International Court of Justice (ICJ) decision in the *Bosnian Genocide* case[7]. In March 1993, Bosnia and Herzegovina

[5] See the Bosnian Genocide case, discussed below, at §420.

[6] See The Government's reply to the 23rd report from the Joint Committee on Human Rights "Allegations of Complicity in Torture", October 2009.

commenced proceedings in the ICJ against Serbia and Montenegro, alleging, *inter alia*, that Serbia and Montenegro had breached the Genocide Convention[8]. One of the questions that fell to be determined by the ICJ was whether the Respondent was complicit in acts of genocide[9]. To determine this, the Court considered the meaning of complicity under Article 16. It concluded that the Respondent was not liable, because, at the time of supplying aid, the Respondent was not *'clearly aware'* that the aid would be used for the purpose of carrying out the genocide.

20. Whilst the ICJ was primarily concerned with interpreting Article III, paragraph (e), of the Genocide Convention[10], the ICJ considered that there was "*no reason to make any distinction*" between the use of the word "*complicity*" the Genocide Convention and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of Article 16 of the Draft Articles (see §§419-420). On that basis the ICJ reached the following key conclusions:

> *"421. ...**there is no doubt** that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide **unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity.** ...*
>
> *422. ... the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. **One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.***
>
> *423. ... It has therefore not been conclusively established that, at the crucial time, **the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide."***

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[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), International Court of Justice, 26th February 2007 ('the Bosnian Genocide' case).

[8] *Bosnian Genocide* case, §1.

[9] *Bosnian Genocide case*, §379.

[10] The Convention on the Prevention and Punishment of the Crime of Genocide.

21. Consequently the ICJ concluded that the assisting state needs to have actual knowledge in order to be in breach of Article 16, rather than constructive knowledge.

22. This is confirmed by a number of leading academics in this area. For example, Dominicé concludes that[11]:

    22.1. Article 16(a) underlines the importance of the element of intention on the part of the State which provides aid or assistance. The assisting State must have **clear knowledge and intention** to collaborate in the commission of an intentionally wrongful act of another State[12].

    22.2. The standard required by Article 16 (as applied by the ICJ) is one of **specific knowledge of the alleged accomplice**, crucially of an internationally wrongful act with a **high degree of particularity**'[13].

23. Professor Crawford reaches a very similar conclusion[14]. He quotes from Ago, the Special Rapporteur from 1963-1979 who had responsibility for one of the initial drafts of the Articles and who stated:

> *"The very 'idea' of complicity in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered,* ***knowledge of the specific purpose for which the State receiving supplies intends to use them****. Without this, there can be no question of complicity"*[15].

24. Professor Crawford is also of the view that the assisting State has to know that its aid or assistance is furthering an internationally wrongful act, rather than liability being incurred because this *should* have been known. In support of this conclusion he notes that some states, notably the Netherlands, have attempted to have the scope of the Article widened to include constructive knowledge, but they have been unsuccessful[16].

25. The academic viewpoint is also consistent with the Commentary produced by the ILC which accompanies Article 16 and which states:

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[11] Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State, in J Crawford et al, The Law of International Responsibility (2010).*

[12] Dominicé, page 286.

[13] Ibid.

[14] J Crawford, *State Responsibility: The General Part* (2014) (**"Crawford"**).

[15] ILC Yearbook, 1978/II(i), 58, cited in Crawford, p. 406.

[16] ILC Yearbook, 2000/II(I), 52, cited in Crawford, p. 406.

> *"(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act.* ***If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.***
>
> *(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16* ***unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.*** *There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act"*[17].

26. The Commentary also has a specific section dealing with allegations of aiding or assisting where allegations concerning the breach of human rights are made. It states:

> *"Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct*[18]*."*

27. Consequently the position is as follows:

27.1. The assisting State must aid or assist the assisted State "*with knowledge of the circumstances of the internationally wrongful act*" (Article 16(a)). In other words, if the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

27.2. Contrary to what has been suggested by the First Interveners[19], actual knowledge, not constructive knowledge, is required.

27.3. The assisting state must have clear knowledge and intention to collaborate in the commission of an internationally wrongful act of another State. It is incorrect that Article 16 does not include any requirement of intention[20]

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[17] *Draft Articles on Responsibility for Internationally Wrongful Acts with commentaries 2001*, page 66.

[18] Op cit, page 67.

[19] See e.g. 13.2 and 14.2 of the First Intervener's written submissions

27.4. The standard required by Article 16 – as applied by the ICJ – is one of specific knowledge of the alleged accomplice, crucially of an internationally wrongful act with a high degree of particularity.

27.5. Aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so.

28. As to the meaning of "*aid or assistance*" within Article 16, the following conclusions can be drawn from the academic material and the Commentary on the Draft Articles:

28.1. The required standard would...appear to be one of *substantial involvement* on the part of the complicit state.[21]

28.2. 'Aid or assistance' does not include mere incitement (though incitement may breach other rules of international law).[22]

28.3. 'Aid or assistance' does not include omissions.[23]

28.4. 'No limitation is placed on the precise form of the aid or assistance in question- all that is required is a causative contribution to the particular act'[24].

28.5. However, in the *Commentary to the Draft Articles adopted on the First Reading of Articles*, the International Law Commission ('ILC') stated that the aid or assistance must have the effect of making it '*materially easier*' for the assisted State to commit the internationally wrongful act[25]. This implies that the contribution of the assisting state must be, at least, more than minimal to fall within Article 16.

28.6. There is no clear test for what acts will constitute aid or assistance. Professor Crawford concludes that this must be a '*case-specific concept*', whose content will always have to be determined according to the particular situation[26]. However, the

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[20] See §15 of the First Intervener's written submissions

[21] Crawford, pp. 401-405.

[22] Dominicé, p. 285; Crawford, p. 403.

[23] Crawford, pp. 403-405, citing the ICJ in the *Bosnia Genocide* case, and rejecting Aust's reference to *Corfu Channel*.

[24]Crawford, p. 402.

[25] ILC Yearbook, 1978/II(2), 99f, cited in Crawford, p. 402.

[26] Crawford, p. 405.

commentary and the case law all refer to clear-cut situations as amounting to complicity.

29. In summary therefore, the scope and content of the principle on aid or assistance has the following core elements:

    29.1. it must be shown to a high degree of particularity that the aiding or assisting State (a) had knowledge of the commission of the internationally wrongful act; and (b) acted with deliberate intent to cause or facilitate the commission of the wrongful act;

    29.2. there must be a clear causal connection between the aid or assistance and the wrongful act;

    29.3. the aid or assistance must have made a significant contribution to the commission of the wrongful act; and

    29.4. the principal act must be wrongful whether committed by either the acting State or the aiding or assisting State.

Alleged *prima facie* case that the decision is in breach of Article 16

30. Importantly the First Interveners have made it plain that they do not ask (and are not in a position to ask) the Court to make a finding that the UK is liable under Article 16 (see §21 of their submissions). Instead the First Interveners say that there is at least a *prima facie* case, based on publicly available material, that the Defendant's decision to continue the export licences breach the UK's obligations arising under Article 16 (see §22 of their submissions) and that, in the absence of any analysis that Article 16 obligations were considered, this is an additional reason why the decision is unlawful (see §33 of their submissions).

31. These submissions are not understood. In particular:

    31.1. It is not understood how the First Interveners can assert that a "prima facie" case of a breach of Article 16 (even if it does apply) is sufficient to establish unlawfulness in the decision-making process.

    31.2. Further and without prejudice to that, given (1) the tests under Article 16 discussed above and (2) the Secretary of State's open and closed evidence in these proceedings, there is no proper basis upon which this court could conclude that there is any case ('prima facie' or otherwise) that the UK is in breach of Article 16 and the First Interveners submissions should be dismissed by this Court.

Preliminary Response to the Second Intervener's Submissions

32. The Second Intervener has asserted in its written submissions that Criterion 1(b) imposes an obligation to make an assessment of compliance with International Human Rights Law ('IHRL') (as distinct from IHL).

33. Criterion 1(b) of the Consolidated Criteria provides as follows:

> "*CRITERION ONE*
>
> *Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.*
>
> ***(a) The Government will not grant a licence if to do so would be inconsistent with, inter alia:***
>
> ***(b) the UK's obligations under the United Nations arms trade treaty;...***" (emphasis added)

34. The Second Intervener asserts that Article 7 of the Arms Trade Treaty ('ATT') requires an assessment of whether an export to KSA would "*contribute to...peace and security*" and whether there is an "*overriding risk*" of any of the negative consequences in Article 7(1), including the "*potential that the...arms or items...could be used to commit or facilitate a serious violation of international human rights law...*" (see §24 of the Second Intervener's submissions). It is said that this imports a more exacting standard of assessment than is to be found in Criterion 2. However:

34.1. The obligations contained in the ATT are reflected in the Consolidated Criteria and, on a proper reading of the Consolidated Criteria, there is no requirement to separately consider the obligations in the ATT each time those Criteria are applied.

34.2. The key provision as regards IHRL is Criterion 2(a) which requires refusal of a licence where there is a "*clear risk*" of "*internal repression*", which is defined broadly in the penultimate paragraph of Criterion 2 to include: "*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.*".

34.3. In those circumstances the relevant test for domestic purposes is whether there is a "*clear risk*" of a serious/major violation of IHRL, including torture and CIDT.

34.4. There is no proper basis upon which it can be said that the ATT falls to be applied directly as a matter of domestic policy or that the two stage test identified in §§25-26 of the Second Intervener's submissions applies.

34.5. In particular there is no requirement to refuse exports if they would not "*contribute to...peace and security*", nor is there a requirement to assess whether there is an "*overriding risk*" of items being used to commit a serious violation of IHRL.

34.6. The obligations identified in §7 of the ATT are reflected domestically in Criterion 2 of the Consolidated Criteria and there is no justification for imposing further tests, which cannot be found in the express language of the Consolidated Criteria itself.

34.7. In addition and without prejudice to the above, the proper interpretation of the ATT is not a matter which is justiciable domestically.

35. Further and without prejudice to this:

35.1. Assessments under Criterion 2(b) are in fact carried out as made clear at §13-14 of Neil Crompton's first statement.

35.2. If it is to be alleged that the Secretary of State has failed to make a proper assessment of whether there was a "clear risk" of a serious/major violation of IHRL, the Secretary of State should be given a proper opportunity of responding to that allegation, including by submitting relevant evidence.

JAMES EADIE QC

JONATHAN GLASSON QC

KATE GRANGE

JESSICA WELLS

6 February 2016