T3/2017/2079

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE DIVISIONAL COURT (LORD JUSTICE BURNETT AND MR JUSTICE HADDON-CAVE)

BETWEEN:

THE QUEEN
on the application of
CAMPAIGN AGAINST ARMS TRADE

Appellant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Respondent

-and-

(1) AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH AND RIGHTS WATCH UK
(2) OXFAM

Interveners

CLAIMANT'S UPDATED SKELETON ARGUMENT FOR APPEAL HEARING ON 9-11 APRIL

References follow the format "[**bundle/tab/page**]". References to the Divisional Court's judgment are in the form "DC [paragraph no.]". A version that is cross-referenced to the authorities bundle will be produced once the authorities bundles are available.

Estimated pre-reading time: 1 day

Estimated time for substantive appeal hearing: 3 days (including both OPEN and CLOSED)

Essential pre-reading: Judgment of the DC [**CB/7/85-142**]; Skeleton Arguments of Appellant, Special Advocates (**SAs**) and Secretary of State (**SoS**); Consolidated EU and National Arms Export Licensing Criteria; User's Guide to Council Common Position 2008/944/CFSP; Report of UN Panel of Experts on Yemen, 26 January 2016, Sections I, V, VI and Annexes 52-56 and 60-62 [**SB3/31/C205-223 & C226-258**]; Report of UN Panel of Experts, 11 January 2017, Section VIII (A) [**SB3/45/C338-351**].

Note: This is the Claimant's updated skeleton argument, filed in accordance with Irwin LJ's order of 4 May 2018. The Skeleton Argument filed in support of permission to appeal on 15 September 2017, and amended before the permission hearing, is no longer essential reading. Counsel are aware that this document runs to 30 pages (more than 25), but they respectfully submit that the extensive evidence and the complexity of the issues justify the extra pages.

Preamble

1 This appeal arises from a claim filed by the Appellant on 9 March 2016. The Appellant challenged:

(a) the ongoing failure to suspend extant export licences for the sale or transfer of arms and military equipment to KSA for possible use in the conflict in Yemen; and

(b) the SoS's decision, communicated on 9 December 2015, to continue to grant new licences for the sale or transfer of arms or military equipment to KSA.

2 Permission was granted by the late Gilbart J after a hearing on 30 June 2016. On 14 December 2016, a declaration was made under s. 6 of the Justice and Security Act 2013. SAs were then appointed; and the SoS served OPEN and CLOSED evidence.

3 In a joint report in September 2016, two House of Commons select committees recommended the immediate suspension of licences for the export of arms to KSA.[1] A third select committee concluded that "it is difficult for the public to understand how a reliable licence assessment process would not have concluded that there is a clear risk of misuse of at least some arms exports to Saudi Arabia".[2] It did not recommend immediate suspension, but noted at §111 that "[t]he courts are the appropriate body to test whether or not HMG is compliant with the law".[3]

4 After a hearing in February 2017 (partly in OPEN, partly in CLOSED), the Divisional Court (**DC**) (Burnett LJ and Haddon-Cave J) gave OPEN and CLOSED judgments on 10 July 2017, dismissing the claim. They refused permission to appeal.

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[1] *The use of UK-manufactured arms in Yemen,* First Joint Report of the Business, Innovation and Skills and International Development Committees of Session 2016-17 (HC 679). The key excerpt is cited in the DC's judgment at [71].

[2] *The use of UK-manufactured arms in Yemen,* Fourth Report of the Foreign Affairs Committee of Session 2016-17 (HC 688) §14. The relevant excerpts are cited in the DC's judgment at [72]-[73].

[3] The Appellant does not rely in these proceedings on the conclusions reached in these reports, but they were properly before the DC both as background and also to respond to the SoS's submission (see SGR §8 & fn 6 [**CB/13/259**]) that the decisions under challenge were more appropriately scrutinised in Parliament rather than in the courts. As noted, the Foreign Affairs Committee took precisely the opposite view.

5 The Appellant appealed to this Court. After a hearing on 12 April 2018 before Irwin and Flaux LJJ, this Court granted permission to appeal on three of the Appellant's four OPEN grounds: see [2018] EWCA Civ 1010. These were: 1 – error of approach to the open source material and findings of past breaches of international humanitarian law (**IHL**) by KSA; 2 – error in relation to the failure to ask the questions identified in the User's Guide; and 4 – failure to rule on the meaning of "serious violations" of IHL.

6 Permission to appeal was also granted on three closed grounds advanced by the SAs. CLOSED grounds 2 and 3 were said to be consequent on CLOSED ground 1.

7 On 16 July 2018, Irwin LJ permitted Amnesty International, Human Rights Watch, Rights Watch UK (which applied together) and Oxfam to intervene in writing on two issues: (i) the position under international law with respect to the interpretation of the threshold of "clear risk" of a "serious violation of international humanitarian law"; and (ii) the value, methodology and unique advantages of reports by non-governmental organisations (**NGOs**), United Nations (**UN**) organs and others as evidence of violations of international humanitarian law on the part of the Saudi-led Coalition in Yemen (**the Intervener Issues**).

Summary of the Appellant's case and the OPEN grounds of appeal

8 The export of arms and military equipment from the United Kingdom to Yemen is regulated by the Export Control Act 2002 (**the 2002 Act**), s. 9 of which permits the SoS to give guidance as to the exercise of his licensing powers. The SoS has formulated and, on 24 March 2014, laid before Parliament guidance in the form of the Consolidated EU and National Arms Export Licensing Criteria (**the Consolidated Criteria**). These incorporate and adopt as Government policy criteria set out in EU Common Position 2008/944/CFSP (**the Common Position**). They also give effect to the UK's obligations under the United Nations Arms Trade Treaty, signed in 2013 (**the Treaty**) as well as other international obligations.

9 Criterion Two of the Consolidated Criteria provides:

> "the Government will…
>
> > (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." (Emphasis added.)

10 The Consolidated Criteria make clear that the UK's economic, social, commercial and industrial interests "will not affect the application of the criteria in the common position" and go on to provide that:

> "In the application of the above criteria, account will be taken of reliable evidence, including for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations."

11 The Council of the EU has produced a User's Guide to Council Common Position 2008/944/CFSP (**User's Guide**). It lists a series of factors that Member States should consider when taking decisions under those criteria. It notes at §3.2.12:

> "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."

12 The conduct of the conflict in Yemen has been the subject of numerous investigations and findings by international bodies and officials. Taken together, these constitute compelling *prima facie* OPEN evidence of a pattern of violations of IHL by KSA, some of them serious:

(1) There are two detailed investigative reports by the UN Panel of Experts on Yemen (**the UN Expert Panel**), a body established by the UN Security Council with the active support of the UK. It has both the expertise and the mandate to investigate and make findings on (among other things) breaches of IHL by the parties to the conflict in Yemen, including the KSA-led coalition. Each of its reports (published in January 2016 and January 2017) finds the KSA-led coalition has committed violations of IHL, some of them serious, in its air campaign in Yemen. In the latter report, the UN Expert Panel identified 10 cases in which it was "almost certain" that there was a violation of IHL; and concluded that some of these may amount to war crimes.

(2) Similar findings have been made by senior UN Officials with a mandate to investigate the situation in Yemen, including the UN High Commissioner for Human Rights. Reputable NGOs, including Amnesty International, Human Rights Watch and others, have reached the same conclusions following detailed investigations (in many instances on the ground in Yemen and relying on first hand, eye-witness evidence).

(3) The European Parliament (**EP**) has also concluded that KSA has committed serious violations of international law and that any exports of arms would breach the EU Common Position.

13 The Appellant's case under each of the OPEN grounds for which permission has been granted may be summarised as follows.

OPEN Ground 1

14 As to Ground 1, Irwin and Flaux LJJ, granting permission to appeal, said this at [9]:

> "It seems to us arguable that the Secretary of State, as a rational decision-maker, had an obligation to make some realistic overall assessment of whether, and if so to what extent, there had been historic serious violations of IHL by the coalition in the Yemen. There was no legal or evidential presumption at play. It is arguable the obligation arose from the facts as a necessary part of assessing the future risks."

15 The obligation arises because the existence or otherwise of a pattern of IHL violations by KSA, some of them serious, was centrally relevant to (even though not determinative of) the question whether Criterion Two (c) was satisfied. If the SoS's conclusion on the "pattern" question was flawed, the fundamental starting point for a proper analysis of the "clear risk" question was wrong and the decision as a whole flawed for that reason.

16 It was not[4] (and is not) the Appellant's case that the SoS was required to form a definite conclusion about each and every incident in which a violation of IHL was alleged – let alone that he was required to express such a conclusion in public. But, contrary to the DC's view, rationality did require him either: (a) to form a view about a sufficient number of them to displace the clear OPEN evidence showing a pattern of IHL violations, some serious; or (b) to accept that there was a pattern of such violations in the past and then go on to consider whether, in the light of that pattern, there was a clear risk of UK-supplied weapons being used in the commission of a serious violation of IHL in the future.

17 The open materials (including the SAs' OPEN notes and skeleton arguments summarising the CLOSED evidence) make clear that, even in CLOSED, the SoS did not approach the challenged decision on the basis that there was a pattern of past violations, some of them serious. They also show that he had no sufficient reason for concluding that no such pattern was established:

[4] The DC appears to have understood the Appellant's case in this way: DC [52] & [180] [**CB/7/99 & CB/7/130**]. Yet the Appellant had made clear to the DC in written reply submissions, at §1(d), that its submission "does not entail that the SoS must form a concluded view about each and every incident where an IHL violation is alleged" (emphasis in original) [**CB/9/189**].

(1) He did not conclude that the findings of the various UN bodies, the European Parliament and the NGOs were unreliable on account of their constitution or motives or methodology; nor did he reject their findings.

(2) The information available to him from the Ministry of Defence (**MOD**) provided no basis for assessing whether violations (or serious violations) had occurred in any particular case – let alone in a sufficient number of such cases to displace the conclusion of a pattern. In the majority of cases (three quarters in some reporting periods), the MOD "tracker" recorded that MOD had been unable to identify any legitimate target. The Foreign & Commonwealth Office (**FCO**) IHL updates also contained no analysis of whether any violation of IHL had occurred. This meant that there was no evidential basis for displacing the conclusions drawn in the OPEN reports.

18 Nor did the information available to the Government from KSA, such as it was, provide the missing information necessary to displace the OPEN evidence of a pattern of violations (some of them serious).

19 The DC erred in concluding that the demands of rationality were satisfied simply because the OPEN evidence had been "taken into account". A decision maker has to show not just that he has considered evidence but also what he made of it – in particular, whether he accepted it and, if not, why not. The SoS has not done so in OPEN. On the basis of the SAs' OPEN summaries of the CLOSED evidence, it appears that he has not done in CLOSED either. It follows that, applying orthodox principles of judicial review, the challenged decision was flawed and must be retaken adopting a proper approach to the OPEN evidence.[5]

OPEN Ground 2

20 Irwin and Flaux LJJ, granting permission, considered that Ground 2 "runs alongside Ground 1": see at [10]. Ground 2 hinges on the SoS's failure to consider, or inquire into, a series of matters identified as relevant by the User's Guide and set out by the DC at [178]-[179]. These included: (i) whether the state in question has legislation in place prohibiting violations of IHL; (ii) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; (iii) whether KSA has ever prosecuted or disciplined an official for violation of IHL; and (iv) whether there

[5] In taking any new decision, the SoS would of course also have to take into account evidence post-dating the DC's decision in July 2017.

is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL.

21 The DC erred by concluding that the SoS could rationally discharge his duty to consider whether the test in Criterion Two (c) was satisfied without knowing, or inquiring into, any of these matters. Whether in the light of the User's Guide or as a matter of rationality, it was not possible to reach a lawful judgment about a State's "past record" of compliance with IHL without considering these matters. At the very least, a decision to proceed without asking or answering these questions called for a reasoned justification – and there was none.

OPEN Ground 4

22 Irwin and Flaux LJJ said this at [13] of their ruling granting permission:

> "In our view it is arguable that there was an elision of meaning between 'grave breaches' of IHL, 'war crimes' and 'serious violations' of IHL, which may have been material because of some of the advice given bearing on the decision."

23 In short, at the hearing before the DC, there was a dispute as to the meaning of "serious violation". The Appellant's position before the DC, relying *inter alia* on jurisprudence of international criminal tribunals, was that the term "serious violation" had a broad meaning covering any "breach of a rule protecting important values" involving "grave consequences for the victim".

24 Below, the SoS advanced a much narrower definition under which the term "serious violation" was "synonymous with 'war crimes' and 'grave breaches' as defined, in particular, in the Geneva Conventions": see SoS OPEN Skeleton Argument below §§38-40 [**CB/10/203-206**].

25 The DC noted simply that that phrase "includes" "grave breaches" and "war crimes": DC [16]. It did not, therefore, resolve the dispute as to interpretation. It should have done so, because:

(1) the Appellant's interpretation was right;[6]

[6] The SoS's position on this is opaque. At the hearing before Irwin and Flaux LJJ, he did not advance the narrow construction advanced before the DC. However, attempts in correspondence to encourage the SoS to clarify what he contends is the correct interpretation of the phrase "serious violations" have been unsuccessful: see the Appellant's solicitor's email of 12 June 2016 [SB4/39/D81] and the SoS's letter in reply [SB4/40/D82-83].

(2) it is inherently likely, and in any event appears from the evidence, that the SoS's decision was based on the interpretation advanced by him before the DC;

(3) if so, that was a further error which – in the light of the OPEN evidence as to the basis on which the decision was taken – appears to have been material to the outcome.

The facts

26 The factual background before the DC[7] is set out in detail in that Court's DC [61]-[130] and [134]-[135]. In summary:

(1) A conflict commenced in around March 2015 between the mainly Houthi forces loyal to the former Yemeni president Ali Abdullah Saleh and forces loyal to the government of Abdrabbuh Mansur Hadi: see DC, [39]-[45]. On 25 March 2015, a coalition of states led by KSA[8] launched a military campaign in support of pro-government forces in Yemen: see [41].

(2) The United Kingdom has granted licences (and refused to suspend existing licences) for the supply of a range of military equipment and technology to KSA for use in Yemen, including ordnance for air strikes, gun turrets, ammunition, military communications equipment, components for military helicopters and jet aircraft: see Claimant's Statement of Facts and Grounds (**SFG**) §10 [**CB/14/287**]. Since December 2015, the FCO Arms Export Policy Team has made 10 recommendations that licences be granted for the transfer of arms or military equipment to KSA for possible use in Yemen: DC [99].

(3) The humanitarian impact of the conflict had been immense. Critical civilian infrastructure, including hospitals, medical clinics, schools and sewerage treatment facilities have been destroyed by documented coalition air strikes.[9] A widespread

[7] It is accepted that, on this appeal, this Court must focus on whether the decision of the DC was wrong on the evidence before it. The Appellant does not understand it to be suggested that events since the DC's judgment in any way diminish the public importance of determining this issue. Given the conduct of KSA in the Yemen conflict and generally since that time, any such suggestion would be misconceived.

[8] States participating in the Coalition include Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait and Bahrain. In addition, Djibouti, Eritrea and Somalia have made their airspace, territorial waters and military bases available to the coalition.

[9] See eg UN Panel of Experts Report, January 2017 §131, where the Panel stated that "violations [of international humanitarian law] associated with the conduct of the air campaign are sufficiently widespread to reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure". Report S/2017/81 [**SB3/45/C344**].

cholera epidemic has consequently broken out and much of the country faces famine.

(4) The responsibility for violations of IHL in the prosecution of its air campaign in Yemen has been investigated and is the subject of findings by independent international institutions with expertise in the investigation of violations of IHL and human rights law. They include, *inter alia*, the UN Expert Panel, the UN High Commissioner for Human Rights, reputable NGOs (whose findings and investigative methodology are regularly accepted by the UK Government as reliable in other contexts), the EP and others. The evidence about these findings is set out in the DC's judgment at [61]-[80] and in the SFG at §§11-25 [**CB/14/287-293**]. Each of these investigations has concluded that KSA has committed repeated violations of IHL, some of them serious. These include, *inter alia*, targeting which is indiscriminate in nature; failing to respect the principle of distinction between civilians and combatants in military attacks; failing to take "all feasible precautions" in attack to avoid death or injury to civilians; and causing disproportionate death or injury to civilians. On a significant number of occasions, KSA airstrikes have resulted in mass civilian casualties.

(5) In 2016, the UN Expert Panel concluded that the Coalition targeted civilians in air strikes, by bombing residential neighbourhoods and by treating by treating the entire city of Sa'ada and the region of Maran as military targets. It concluded that Sa'ada was "systematically" targeted and "devastated" by coalition strikes and that the "targeting of an entire city was in direct violation of international humanitarian law", that such violations were carried out "in certain cases" in a "widespread and systematic" manner and in "grave violation" of the principles of distinction, proportionality and precaution: §128 [**CB3/31/C211**]

(6) In 2017, the UN Expert Panel reported on its detailed investigation of 10 KSA air strikes (a very small proportion of the total number about which concerns had been raised), together resulting in 292 civilian fatalities, including at least 100 women and children. The Panel found it "almost certain" that the Coalition did not comply with IHL in each of the 10 incidents investigated and that "some of the attacks may amount to war crimes": §127 [**SB3/45/C342-343**]. In 8 of the 10 incidents investigated, the Panel found no evidence of a legitimate military target. The Panel further found that an attack on Hajjah Hospital on 15 August 2016, leaving 19 dead further violated specific IHL rules relating to the protection of hospitals and medical personnel, the protected of the wounded and sick and those *hors de combat* (whom it is impermissible to target under IHL): §128 [**SB3/45/C343**]. Finally, the

Panel found that "violations associated with the conduct of the air campaign [by KSA] are sufficiently widespread to reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure".

27 The DC explained the coalition's internal investigations and their findings at [128]-[133]. Essentially:

(1) Prior to July 2016, KSA had shared with the UK Government the results of just one investigation into one attack. This was an attack on a Médecins Sans Frontieres hospital in Haidan on 25 October 2015. The investigation exonerated KSA of violating IHL on the basis that the strike was a "mistake": see Crompton 1 §53 [**SB1/5/B155-156**].

(2) Following international pressure, the Joint Incidents Analysis Team (**JIAT**) was established in February 2016: see DC [130]. It published its first findings in August 2016. On 4 August and 6 December 2016, JIAT made known the results of around 14 investigations: Crompton 2 §23 [**SB2/13/B468**].

(3) The SoS relied on the limited investigations said to have been conducted by KSA and, more recently, JIAT, as providing reassurance that the "clear risk" test in Criterion Two (c) has not been met: Crompton 1 §§52-55 & Crompton 2 §23 [**SB2/13/B468**].

(4) The DC accurately recorded the Appellant's submission that there was "little comfort to be gleaned" from the existence of these investigatory procedures because: (a) they had been too slow (as recognised by Tobias Elwood MP, Parliamentary Under Secretary for Foreign and Commonwealth Affairs, in a statement to the House of Commons on 12 January 2017), they had been too few in number (the 14 reports to date amounted to only 5% of the total number of incidents reported) and (c) and JIAT reports and methodology and the "exiguous" published summaries have been the subject of justifiable criticism (in particular by Human Rights Watch in a letter to JIAT on 13 January 2017): see DC [132]. However, without rejecting any of these points, it held that KSA's "growing efforts to establish and operate procedures to investigate incidents of concern" was "of significance and a matter which the SoS was entitled to take into account as part of his overall assessment of the Saudi attitude and commitment to maintaining [IHL] standards": see DC [133]. (In any event, it may be noted that there was very little evidence of any such efforts at the time when the challenged decisions were taken.)

28 The SoS relied on a selection of statements made by various KSA Government officials said to indicate "positive steps in relation to IHL compliance": see DC [134]-[149]. Some of these statements were taken into account when concluding in February 2016 that arms exports could continue. The documents available in OPEN do not, however, indicate any engagement with other statements (in some cases made by the same senior officials), which have been condemned by the UN Expert Panel as disclosing or reflecting a lack of understanding of fundamental rules of IHL:

(1) On 8 May 2015, Brigadier General Assiri[10] issued what has become known as the "the May Declaration". Its purpose was to declare the entirety of the Houthi-controlled city of Sa'dah and the area of Maran to be military targets. The declaration was intended for public consumption. General Assiri's remarks at that news conference on 9 May 2015 are quoted in the DC judgment at [138]. The UN Expert Panel noted that the targeting of an entire city was "in direct violation of [IHL]".

(2) On 1 February 2016, Brigadier General Assiri spoke to Reuters about coalition military operations along the Yemen/KSA border, which has been the site of significant hostilities. He informed Reuters: "[n]ow our rules of engagement are: you are close to the border, you are killed": DC [139].

(3) The DC held at [140] that "viewed in context, neither of these statements indicates that the Coalition were, or were intent on, employing targeting practices that were incompatible with [IHL], or that there was a clear risk that they would do so". It was wrong to do so.

(4) Insofar as the DC held that the May Declaration was "in accordance with proper practice" by providing a warning to civilians affected by military operations (DC [142]), it missed the point being made by the UN Expert Panel. It is, of course, appropriate to warn civilians of impending attacks. But giving such a warning does not absolve a state of the obligation to observe the principle of distinction. Even with a warning, it is – as the UN Expert Panel said – a violation of IHL to treat as a military target an entire city in which many tens thousands of citizens live. Yet

[10] Brig. Gen. Assiri was then the official spokesman for the KSA-led coalition. On 15 November 2018, the BBC reported that Gen. Assiri (who had by this time been promoted) was the man who had ordered to Istanbul the "negotiations team" which had murdered and dismembered the *Washington Post* journalist Jamal Khashoggi. Although it was the head of that team, who was said to be primarily responsible for the murder, Gen. Assiri was one of two officials "sacked" in the aftermath of the affair. The BBC was apparently reporting a public statement made by KSA's Deputy Public Prosecutor, who (beyond reporting that he had been sacked) "did not say what had happened to Gen. Assiri": see https://www.bbc.co.uk/news/world-middle-east-46222337

the evidence shows that is precisely what KSA did. Having given the warning, the cities of Sa'ada and Marran were "systematically targeted and devastated" by KSA.

(5) Insofar as the DC thought the 1 February 2016 statement had been "designed to encourage civilians to leave the vicinity of the border" (DC, [142]), it may have been correct. But it was still, on its face, a clear threat to act in flagrant violation of IHL.

(6) These matters show that the DC erred in its understanding of IHL and in its assessment of the key evidence relied upon to demonstrate KSA's lack of respect for and understanding of it. In any event, the key point was that, so far as apparent from the OPEN document before the SoS, he had not grappled with this evidence.

29 As explained in the DC's judgment at [88], the SoS relied on six strands of information and analysis in support of his conclusion that the "clear risk" test was not met. In respect of several of them, both OPEN and CLOSED material were considered: see DC [89]. The factual background to each of these strands of information is set out at [91]-[175].

30 Before considering these in more detail, three preliminary points should be noted:

(1) As to the MOD Tracker, the SAs observe at §7(i) of their OPEN Skeleton Argument [**CB/3/27**] that "no evaluation of specific incidents was in fact performed" and "there was no process by which the Tracker was used to reach a view as to the likelihood of a violation [of IHL] having occurred in any individual case". It is understood that this is not disputed. Nor, therefore, was there any process "by which it could be identified as to whether a pattern of breaches emerged" from the incidents of which the Defendant was aware. It is understood that this too is not disputed: see Defendant's letter of 14 October 2016 [**SB4/35/D68-70**]).[11]

(2) Nor, apparently, did the FCO's "IHL Updates" (disclosed in OPEN in gist) contain any analysis of whether any specific incident involved a breach of IHL. Although these contained a section entitled "Overall Assessment of Saudi Compliance with IHL", the analysis in these sections "was not informed by a process which considered the likelihood of there having been a breach in relation to specific allegations of violations": SAs' OPEN Skeleton Argument §7(ii) [**CB/3/27**]. Indeed, it now appears that holds even in respect of the most serious incidents to have resulted from coalition airstrikes such as the attack on a large funeral

[11] This letter states that the government has "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".

ceremony in the "Great Hall" in Sana'a in October 2016, in which around 140 civilians were killed and which was "strongly condemned" by the UK ambassador to the UN. The SAs record that the IHL update before the SoS at the time of his decision "reached no conclusion" as to whether IHL was breached on that occasion.

(3) Furthermore, the Government has not formed a view as to whether the findings of the UN Expert Panel, NGOs or the EP (that serious violations of IHL have occurred) are right or wrong. The SoS pleaded that Criterion Two (c) "imposes no burden on the SoS to find or explain why the views expressed by these or any other third parties are wrong" (emphasis added). According to the SoS, his only obligation was to ensure that these findings were "taken into account": SGR §46 [**CB/13/272**].

31 The process followed by the MOD is described in the DC [104]-[125]. The following additional points, which are apparent from the evidence, are also important:

(1) Allegations of breaches of IHL come to MOD from a variety of sources, including media, NGO reporting and UN bodies [**SB1/7/B268-269 §§41-42**].

(2) All such "incidents of concern" are recorded in a central database known as "the Tracker" [**SB1/7/B269 §43**]. As at January 2017, some 251 incidents had been recorded on the Tracker; DC [111].

(3) The issues addressed by the MOD in its "analysis" are: whether (a) it is possible to identify a specific incident; (b) the incident was likely to have been caused by a Coalition strike; (c) it is possible to identify the Coalition nation involved; (d) a legitimate military object is identified; and (e) the strike was carried out using an item that was licensed under a UK export licence [**SB1/7/B270 §46**].

(4) Issue (b) (whether the incident was likely to have been caused by a coalition airstrike) is one to which sensitive material, in particular "Mission Reports", may be relevant. But even here, the Ministry of Defence has "no insight into incidents caused by artillery attacks or attack helicopters as we have almost no visibility of Coalition ground force operations" [**SB1/7/B272 §54**].

(5) When considering issue (d) (whether a legitimate military object is identified), the MOD "do not have access to any of the operational intelligence which the Coalition use" and "without being directly inside the RSAF [Royal Saudi Arabian Air Force] targeting process and understanding the rationale and the specific situation on the ground at the time of a strike… are not in a position to interpret whether a target was legitimate or not from a Mission Report" [**SB1/7/B273 §57**].

(6) The evidence makes clear that it is even more difficult to assess "dynamic" than pre-planned targeting and that the assessment in January 2016 was that "procedures for dynamic targeting were less robust" than procedures for pre-planned targeting: see Crompton §§60 & 66B [**SB1/5/B157 & SB1/5/B159-160**].

(7) The issues considered by the MOD do not include "the alleged consequences of a strike, including the reported civilian casualties": Watkins 2 §26 [**SB2/15/B547**]. This is significant. It means that, even in those cases where there is an identifiable military target, the MOD (and the UK Government generally) is in no position to gainsay what appears from other reports about casualty numbers. Some very general statements about the casualty numbers in reports can be found in the evidence, e.g. "high levels of civilian casualties can raise concerns, particularly around the proportionality criteria": Crompton §58 [**SB/189**]). But the analysis conducted by the MOD does not appear to involve its own assessment of the compatibility of the strike with the principle of proportionality under IHL.

(8) Nor, apparently, does the MOD consider whether the strike was against a target (such as a hospital) that attracts special protection under IHL. So, it appears, the MOD (and the UK Government generally) does not analyse whether a strike involves a breach of (for example) Article 11 of Additional Protocol II. This is a matter of some importance given that aerial attacks on hospitals and clinics by the KSA-led coalition have been a feature of the conflict: see generally the material from Médécins Sans Frontières [**SB1/10/B319-322 & SB3/30/C197-198**].

(9) It is therefore clear that the information gathered by MOD is insufficient to enable the MOD (or the UK Government generally) to say "whether the responsible party's actions are assessed as compliant with IHL or not" (as stated in GLD's letter of 16 February 2016 [**SB4/27/D39-49**]), or even "whether any [IHL] concerns are raised by the strike: SGR §23(c) [**CB/13/264**]).

32 As is clear from above, the role of the MOD is limited to gathering certain information on particular incidents. The MOD does not even purport to analyse whether IHL has been, or may have been, complied with in any particular incident by KSA. It would not be possible to perform such an analysis on the basis of the information gathered. In any event, the SoS's evidence was that the MOD had been unable to identify a military target in the majority of cases [**SB1/5/B174-175**]. In the later reporting periods, the MOD had been unable to identify a military target in three quarters of the cases examined [**SB3/44/C327-328**].

33 In addition to the tracker system, the Defendant also relies on the insight the MOD is said to have into KSA military processes and procedures in respect of operations in Yemen: DC [121]-[125]. However, the evidence discloses a number of important limitations in to the MOD's insight into KSA processes, which are not recorded in the judgment:

(1) The MOD "do not have access to any of the operational intelligence which the Coalition use" and "without being directly inside the RSAF [Royal Saudi Arabian Air Force] targeting process and understanding the rationale and the specific situation on the ground at the time of a strike… are not in a position to interpret whether a target was legitimate or not from a Mission Report" [**SB1/7/B273 §57**].

(2) The UK Government's insight into KSA targeting processes is largely limited to one category of aerial strike. As the FCO documents reveal, the MOD "only has insight into Saudi processes in respect of pre-planned strikes" but has "very little insight into so-called 'dynamic' strikes – where the pilot in the cockpit decides when to dispatch munitions – which account for a significant proportion of all strikes": see FCO Advice, February 2016 [**SB1/EB11/B91-97**]. This is significant. Although not recorded in the DC judgment, the evidence makes clear that it is even more difficult to assess "dynamic" than pre-planned targeting and that the assessment in January 2016 was that "procedures for dynamic targeting were less robust" than procedures for pre-planned targeting: see Crompton §§60 & 66B [**SB1/5/B157 & SB1/5/B159-160**]. It is understood a similar position pertains in respect of artillery strikes. The Government's evidence reveals no insight into processes in place to ensure effective and IHL compliant targeting in this regard.

34 Since October 2015 the FCO has produced a series of "IHL Updates" for the SoS, based on the MOD's tracker system as well as input from UK diplomatic staff in Riyadh and Washington and ministerial contacts with their KSA counter-parts: see DC [150]. At times, these updates have noted thematic concerns (e.g. the January 2016 update expresses concern that "two thirds of the allegations concerned attacks on hospitals"): Crompton 1 §66 [**SB1/5/B159**]). But they <u>do not</u> seek to form or express a view as to whether KSA has, or may have, violated IHL in any specific incident during the reporting period.

Ground 1: Error of approach to the open source material and findings of past breaches of international humanitarian law ("IHL") by KSA

Overview

35 Both the SoS and the DC made a fundamental error of approach in relation to the independent OPEN evidence showing a pattern of violations of IHL, some of them serious. Where, as here, there is a body of independent evidence demonstrating such a pattern, rationality requires the SoS to consider that evidence and reach a view about whether such a pattern has been shown or not. This is because the existence of a pattern of violations is, given the SoS's own policy and the considerations set out in the User's Guide, obviously and centrally relevant to the question whether there is a "clear risk" that UK-supplied weapons might be used to commit serious violations in the future. Indeed, the Defendant positively asserts that, in accordance with the User's Guide, he sought to consider "three key factors", including KSA's "past and present record of respect for IHL": see SGR §15(a) [**CB/13/261**].

36 The Appellant's argument before the DC was that, on his own evidence, he had failed to reach any conclusion (even in private); and that as a result he had failed to have regard to a centrally and obviously relevant factor. This was a classic public law error, which vitiated the SoS's "finely balanced" decision [**SB1/EB14/B103**]. The DC's failure to identify this error was itself an error of approach, which this Court can and should correct.

The starting point: was there a pattern of violations of IHL?

37 It was common ground that the SoS was obliged to start by considering Saudi Arabia's "past and present record of respect for IHL" (albeit this was only the beginning of the analysis). Indeed, the SoS describes this as one of "three key factors" to be addressed in reaching a conclusion on Criterion Two (c): see SGR § 15).[12] The analysis that the SoS was required to perform as part of this assessment included consideration of whether "a pattern of violations could be discerned": User's Guide §2.13. On any view, if there was such a pattern, that fact was relevant to the question whether there was a clear risk that KSA would commit serious violations of IHL in the future.

38 As noted above, the Appellant accepts that it is possible – in the abstract – to imagine a lawful decision to continue to licence exports to a State whose past record showed a

[12] The other factors include KSA's "intentions as expressed through formal commitments; and KSA'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 [IHL]". The SoS positively asserts that, in reaching a decision on arms transfers to KSA, he directs himself by reference to these "three key factors": see SGR §15 [**CB/13/261**].

pattern of violations, but there would need to be very strong evidence to justify a conclusion that, despite this pattern of past violations, there was no clear risk that weapons might be used to commit serious violations in the future. At a minimum, the existence of a pattern of violations in the past would colour the extent to which other matters such as commitments by the state could be relied upon to negative the "clear risk".

The OPEN evidence of a pattern of violations of IHL, some of them serious

39 The reports relied upon by the Claimant (including the 2016 and 2017 reports of the UN Expert Panel) constituted an overwhelming body of evidence establishing that there was a pattern of violations of IHL, some of them serious. These violations continued to occur after training had been provided to some KSA military personnel by the UK Government and after statements had been made by KSA officials that were relied upon by the SoS as indicating respect for IHL.

40 The Claimant always accepted that it was in principle open to the SoS to reject the conclusions drawn in these reports if there were reason to regard them as unreliable, or if there were other evidence – not available to the authors – to contradict them. But, as set out below, neither the SoS nor the DC said that there was such evidence.

The SoS's defective approach to the pattern of violations of IHL established by the OPEN evidence

41 As noted above, it was not the Claimant's case that the SoS was required to form a DC about every violation of IHL identified in the OPEN reports. The DC may therefore have been right to say (at [181]) that the SoS is under no duty to make a DC about "every past incident" and (at [208(8)]) that it was "not legally necessary to engage directly with everything that had been said by others on the topic" (emphasis added). But, as a matter of logic and rationality, it was necessary either (i) to consider a sufficient number of these incidents to displace the conclusion that there was a pattern of past violations or (ii) to accept that there was a pattern of past violations and then consider whether, notwithstanding that pattern, there were reasons to suppose that KSA's conduct would improve in the future. This was not the approach of the SoS.

42 The OPEN evidence establishes that the SoS has not examined compliance with IHL in any incident and has simply not engaged with the question whether – as the reports overwhelmingly show – there has been a pattern of violations of IHL, some of them serious. It was his case that he was under no duty to "find or explain" why the reports are

wrong (SGR §46 [**CB/13/272**]) and that it was sufficient simply to "take them into account" without reaching any conclusion about them generally or individually.

43 The SoS's own evidence showed that, in the great majority of incidents of concern recorded by the Tracker (some three quarters in some of the later reporting periods), the MoD was unable to identify any military target. This did not mean that there was no such target, but it did mean that the Tracker (and the SoS's own sources of information) could not provide a basis for displacing the conclusions in the UN Expert Panel and other reports that a pattern of violations of IHL had been established.

44 Furthermore, as regards the IHL updates, these provide no proper basis for reaching a view on KSA's past and present record of respect for IHL, a question the SoS himself identifies as a "key factor" in deciding whether Criterion Two (c) had been satisfied (in line with the User's Guide §2.13). The high-level discussion contained in these updates did not consider or evaluate IHL compliance in any particular incident. According to the Special Advocates the analysis in the IHL Updates "was not informed by a process which considered the likelihood of there having been a breach in relation to specific allegations of violations". This was so even in relation to grave incidents like the "Great Hall" funeral bombing: see the SAs' OPEN Appeal Skeleton §7(ii). As matters stand, the SoS has simply formed no view, even in private, as to whether KSA is violating IHL in the conflict in Yemen, or has done so in the past. This analysis is not consistent with what the legal and policy scheme created by the Consolidated Criteria requires.

45 In addition, while it is true that the IHL Updates appear to have considered matters such as: KSA processes to ensure compliance with IHL; the existence of "No Strike Lists"; whether KSA military decision-making in general appears to include IHL considerations; as well as information concerning overall numbers of civilian casualties in a given period – such information and analysis is inadequate in reaching a conclusion on Criterion 2 (c).

46 As to this:

(1) Although such general process-related information is informative on the question of KSA's "capacity to ensure that the equipment… is used in a manner consistent with IHL…" (the third "key factor" the SoS considered as per the User's Guide), it does not enable assessment of KSA's "record" of past and present compliance. A state with the capacity to comply with IHL (appropriate processes etc.) – may simply not comply in practice and thus have a poor "record" of compliance. Separate analysis of a state's record is therefore required (both by the Users' Guide and, in any event, as a matter of logic in assessing whether there is a clear risk that weaponry will be used in a violation.

(2) Moreover, the very fact that the User's Guide §2.13 identifies (a) record of compliance and (b) capacity to comply as separate considerations which "should" be considered indicates that it is not enough for Criterion Two (c) to be considered by factors going to capacity alone. An analysis of KSA's record of compliance is all the more important where, as here, there are credible findings of serious violations, by the UN Panel of Experts and other authoritative bodies, even though the Defendant seems to think KSA has satisfactory processes of compliance in the abstract.

(3) Finally, while high-numbers of civilian casualties may raise real concerns as to IHL compliance – such information does not enable assessment of KSA's "record" of compliance, without analysis of the lawfulness of those casualties in at last some particular incidents. Such analysis requires assessment of a concrete incidents (including matters such as proportionality). But this is precisely the kind of assessment that was not carried out.

The other material relied upon by the SoS and the DC could not cure this defect

47 The DC placed great emphasis on other aspects of the material considered by the SoS as relevant to the assessment of the risk that KSA would commit serious violations of IHL in the future – in particular, information obtained through the UK Government's engagement with KSA. But, if the SoS's analysis of KSA's "past and present record" of compliance was deficient, none of these other matters could, in law, cure the defect. It is enough for the Claimant to show that the SoS's assessment of one key factor was flawed.

48 In any event, the DC also erred in its conclusions on the other matters taken into account by the SoS:

(1) The OPEN evidence of the investigations by JIAT provided no basis for concluding either that there has been no pattern of violations of IHL or that effective steps have been taken to prevent such violations from recurring, given that (a) JIAT had been slow in producing its reports; (b) it had produced reports into only a very small percentage of reported incidents (5%); and (c) its methodology and reports had been subject to justifiable and unanswered criticism: see generally §27 above.

(2) The statements of KSA military officials relied upon by the Claimant, some made contemporaneously with those relied upon by the Government, provided good evidence that KSA both adopted and advertised targeting practices that were in flagrant disregard for IHL. The DC was wrong to conclude otherwise: see [§28]

above. The failure to attach weight to these statements was a further flaw in both the SoS's decision and the DC's judgment.

Ground 2: Error in relation to the SoS's failure to ask the questions identified in the User's Guide

49 Like ground 1, ground 2 identifies an error of approach in both the SoS's and the DC's reasoning.

50 In its judgment, at [178], the DC set out a series of further questions, identified in the User's Guide as relevant to Criterion Two (c). These included: (i) whether the state in question has legislation in place prohibiting violations of IHL; (ii) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and (iii) whether there is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL. The Claimant's case was that, by failing to ask these questions, the SoS had breached his common law duty to "ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly": *SoS for Edcuation and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1065, per Lord Diplock.

51 On the evidence before the DC, the state of the SoS's knowledge on these matters was as follows:

(1) In his response to Leigh Day's letter before claim, the SoS explained that the government is "not in a position to advise on the domestic legislation of the KSA" [**SB4/52/D48 §65**]. By the time of the decision under challenge there was no OPEN evidence to show that he had taken any steps at all to acquaint himself with the state of KSA law on this topic, whether by making its own enquiries (perhaps through the UK post in KSA) or by asking the KSA Government. Yet, it is difficult to think of a more basic or necessary starting point when examining "the recipient's past and present record of respect for [IHL]" (the first of the general topics mentioned in §2.13, which the SoS says <u>was</u> considered). Each of the four Geneva Conventions contains a materially identical obligation on States to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article": see eg Article 146 of GC IV. Equally, it is hard to imagine how one could properly evaluate KSA's "capacity to ensure that military equipment is used in a manner consistent with IHL" (the third question the

SoS says he considered (SGR §15 [**CB/13/261**]) without knowing whether KSA had domestic law prohibiting and criminalising breaches.

(2) As with the state of the KSA law, the SoS's response to the Claimant's letter before action makes clear that he does not know whether KSA has *ever* prosecuted or punished a member of its armed forces for a breach of IHL. He also does not know whether KSA has ever instigated any form of disciplinary investigation into any of its armed forces in respect of an allegation of breach of IHL (in the Yemen conflict or elsewhere) [**SB4/52/D48 §64**]. Despite the claimed close liaison with KSA officials, the question has apparently not been asked. Yet the importance of accountability measures, including the availability of sanctions, is clear from both the User's Guide and the ICRC's recently published *Arms Transfer Decisions: A Practical Guide*.

(3) In similar vein, there is no evidence of any consideration of the question whether KSA has an independent and functioning judiciary capable of prosecuting serious violations of IHL. That may be though a striking omission, given the conclusion reached in 2014 by the US State Department in its report on KSA that:

> "The law provides that judges are independent and are subject to no authority other than the provisions of sharia and laws in force. Nevertheless, the judiciary was not independent, as it was required to co-ordinate its decisions with executive authority, with the king as final arbiter."

52 The DC held as follows:

(1) The principles governing the extent of the *Tameside* duty were those set out in *R (Plantagenet Alliance Ltd) v SoS for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261, at [100]. The "basic test" was: "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?" DC [37]-[38].

(2) The User's Guide contained non-binding guidance only: DC [179(2)]. The questions identified in the User's Guide were "merely the sort of questions which the decision-maker might consider in order to assist him or her in addressing the three key matters highlighted in paragraph 2.13 [of the User's Guide]": DC [179(5)]. These were: "the recipient's past and present record of respect for IHL"; "the recipient's intentions as expressed through formal commitments and the

recipient's capacity to ensure that the equipment… is used in a manner consistent with IHL".

(3) It was for the SoS to decide how to inquire into these three matters. The fact that he did not expressly address each of the subsidiary questions does not mean that he failed to discharge his *Tameside* duty: DC [179(vi) & (vii)].

53 If correct, the effect of this is that:

(1) The SoS can properly conclude that there is no "clear risk" that UK weapons "might" be used in the commission of serious violations of IHL without having any idea (i) whether the state in question has legislation in place prohibiting violations of IHL, or (ii) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL, or (iii) whether there is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL.

(2) It does not matter whether the SoS's is ignorant of these matters because of a deliberate decision not to inquire into them or because they have simply been overlooked. Not only is there no duty to inquire into these matters; there is also no duty to explain why no inquiry has been undertaken.

54 This was wrong as a matter of law:

(1) Article 13 of the Common Position provides that the User's Guide "shall serve as guidance for the implementation of this Common Position". That means that it should be regarded as having a status similar to that of statutory guidance (i.e. guidance provided for by statute) in domestic law. In the case of statutory guidance, it is well established that public law imposes a duty (a) to follow the guidance or (b) to provide "cogent reasons" for departing from it: see e.g. *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, at [21], per Lord Bingham.

(2) The User's Guide introduces the questions set out at §2.13 with the words "relevant questions include…" That suggests that these questions are to be regarded as relevant unless – at minimum – there is some cogent reason for not asking them. But the Government's OPEN evidence contained no reason whatsoever for not asking or answering these questions. It was not said, for example, that it would have been unduly onerous or practically difficult to examine whether KSA law prohibits violations by the armed forces of IHL.

(3) In any event, even if compliance with the *Tameside* duty could be reduced to the question whether it was rational for the SoS to take a decision without asking or answering the questions in the User's Guide, the answer to the latter question is context-specific, as the formulation in the *Plantagenet Alliance* case makes clear. One important part of the present context is the obligation, under Criterion Two (b), to exercise "special caution and vigilance*"* in a case such as the present, where "serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union".

(4) In that context, one good way of answering the question is to consider what the position would be if (i) there were no legislation in place prohibiting violations of IHL, (ii) there were no mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and (iii) there no were independent and functioning judiciary capable of punishing members of the armed forces who violate IHL. If those were the facts, and they were known to the decision-maker, could he rationally leave them out of account? Obviously not. They would be of such central importance to KSA's "past and present record" of compliance with IHL (and therefore to any assessment of the risk of future serious violations of IHL) that no reasonable decision-maker would leave them out of account – particularly in a case where the decision was, on the SoS's own case, "finely balanced". They would be "so relevant that they must be taken into account": see *R (National Association of Health Stores) v SoS for Health* [2005] EWCA Civ 154, at [63], per Sedley LJ. It must follow that a decision-maker who simply ignores these questions also acts irrationally, especially where – as here – he gives no reasons for deciding not to ask or answer them.

Ground 4: Failure to rule on the meaning of "serious violations of IHL"

The dispute between the Parties

55 The Appellant's position before the DC was that the term "serious violation" has the specific meaning adopted in international criminal jurisprudence, namely a "breach of a rule protecting important values" involving "grave consequences for the victim": *Prosecutor v. Tadic*, Appeals Chamber, IT-94-1 Decision on Interlocutory Appeal on

Jurisdiction [91]-[94] and *Prosecutor v. Galic*, Trial Chamber, DC, IT-98-29-T [106]-[108]: see Appellant's Reply Note §2 [**CB/9/190-191**]).

56 The SoS's position was that "the term 'serious violation' … is synonymous with 'war crimes' and 'grave breaches' as defined, in particular, in the Geneva Conventions"[13] (emphasis added) (see SoS's OPEN Skeleton below §§38-40 [**CB/10/203-206**]). The claimed significance of this interpretation was identified by the SoS: "war crimes generally require intentional or reckless conduct" and that "while the precise mental element may vary depending on the crime concerned, some mental element will be necessary" (emphasis added) (see SoS's OPEN Skeleton below §40 [**CB/10/206**]). The only proper inference is that this understanding informed his decision-making process.

The DC's approach to this issue

57 The DC did not rule on the meaning of "serious violation" of IHL. It noted simply that that phrase "includes" "grave breaches" and "war crimes": DC [16]. There is nothing in the judgment to indicate that the DC considered that it was resolving any dispute on the meaning of the term "serious violation". More fundamentally, if the DC had in fact resolved the dispute in favour of the Appellant, it would have had to go on to consider whether its conclusion meant that the SoS's decision had been taken on a flawed legal basis and whether this error was material. As will be seen, on the evidence, the answer to that question was "Yes". But the question of whether an error of law on the part of the SoS was material cannot be resolved without knowing (a) what approach he, in fact, adopted and (b) what approach he should, in law, have adopted. The SoS appears reluctant to address either of these two questions, despite repeated efforts by the Appellant to obtain clarification. In correspondence since the permission hearing, the Appellant has asked the Respondent to explain what interpretation he says should be given to the term "serious violations" [**SB4/64/D81**]. He has declined to do so [**SB4/65/D82**].

Why the SoS erred in law in his interpretation of the phrase "serious violations"

58 In IHL instruments, the terms "grave breach" and "serious violation" are not interchangeable or synonymous, as the SoS contended below, and appears to have

[13] In fact, the term "grave breaches" denotes a particular category of war crime enumerated in the Geneva Conventions in respect of which additional obligations are imposed on States (and the concept does not refer to breaches of IHL committed by a State). War crimes require proof of *mens rea* – i.e. intent or recklessness on the part of individual commanders or soldiers or "wilful blindness" on the part of a superior or commander (e.g. intentional disregard of crimes committed by subordinates).

believed at the time of his decision. The true position (which does not now appear to be seriously challenged now by the SoS) is demonstrated by other provisions of the Geneva Conventions:

(1) Article 90 of Additional Protocol I to the Geneva Conventions ("**AP I**") provides for the establishment of international fact-finding commissions. Article 90(2)(c) provides for the jurisdiction of such commissions stating that they shall be competent to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol" (emphasis added). The language clearly indicates that "serious violations" denotes a broader category than "grave breaches".

(2) Similarly, Article 89 of AP I imposes a duty on states to cooperate with the UN "in situations of serious violations of the Conventions or of this Protocol" (emphasis added). The term "grave breach" – used in other parts of AP I – was not used.

(3) The International Committee of the Red Cross (**ICRC**) commentary on Article 89 of AP I (which was cited to the DC and is widely regarded as authoritative) specifically addresses the question whether "serious violations" is synonymous with "grave breaches":

> "3591. The principal elements of the answer can be found in Article 90 (International Fact-Finding Commission), of which the above-mentioned paragraph 2(c)(i) distinguishes grave breaches as defined in the Conventions and the Protocol, and other serious violations of the Conventions or of the Protocol. The latter term therefore refers to conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of 'grave breaches'.
>
> 3592. We do not need to have in mind exactly what conduct could fall under this definition, to be able nevertheless to distinguish three categories that qualify:
>
> - isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature;
> - conduct which is not included amongst the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;
> - 'global' violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol." (Emphasis added.)

(4) The ICRC has returned to the issue in its newly published commentary *Arms Transfer Decisions: A Practical Guide*, which addresses the concept of "serious violations". It states at §3.3:

> "Violations of IHL are serious if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or [protected] objects (e.g. civilian objects or infrastructure) or if they breach important universal values. The most serious violations of IHL involve causing death or injury or the destruction or unlawful taking of property. War crimes are serious violations of IHL that entail individual criminal responsibility and that States have the obligation to prosecute and punish pursuant to treaty or customary law." (Emphasis added.)

This correctly identifies war crimes as a specific kind of "serious violation" (viz. those that entail individual criminal responsibility).

59 The same distinction has repeatedly been drawn in the jurisprudence of international criminal tribunals between "grave breaches" of IHL (a specific category of acts giving rise to individual criminal responsibility) and "serious violations" (a broader category):

(1) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, whose jurisdiction was limited to "serious violations of international humanitarian law" by Security Council Resolution 808 (1993), explained the concept in its seminal *Prosecutor v. Tadic* DC (IT-94-1). At [94] it said this:

> "The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: [14]
>
> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met … ;
>
> (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of

[14] At the relevant time, Article 3 stated: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property."

international humanitarian law' although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." (Emphasis added.)

As can be seen from the above, the requirement that the violation be serious is distinct from the requirement that it entail the individual criminal responsibility of the perpetrator.

(2) The same approach has been endorsed and applied in a series of subsequent cases and can be regarded settled as a matter of international law: see e.g. *Prosecutor v. Galic* IT-98-29-T §§106-108; *Prosecutor v. Delalic*, Appeals Chambers, DC IT-96-21A [127] & [136].

Materiality: Why the SoS's misdirection matters in principle

60 As noted above, the DC did not rule on the meaning of "serious violation" of IHL. It noted simply that that phrase "includes" "grave breaches" and "war crimes" (DC [16]) and noted, by reference to Article 8 of the Statute of the International Criminal Court, that a "grave breach" required a mental element "i.e. a wilful or deliberate or intentional act": DC [18]. The SoS no longer contends that the interpretation he advanced below is correct, accepting, at least by implication, that the true test is broader (without explaining how): see SoS's Updated Statement on Permission to Appeal §32. But the distinction between the correct approach and that advocated by the SoS at trial was important and, it is submitted, material. In particular:

(1) It is often much more difficult to establish the mental elements necessary for a war crime (intent or recklessness) than to establish a serious violation of IHL. For some important rules of IHL, including rules of particular relevance in Yemen such as the prohibition on targeting which fails to discriminate between civilians and combatants or the duty to take all feasible cautions in attack, there is no requirement for proof of either intent or recklessness.[15] Although war crimes always require "some mental element", this is not true in relation to violations of IHL (which are perpetrated by a State). The International Law Commission's authoritative Commentary on the Articles on State Responsibility, explains this as follows:

[15] See Articles 57 and 58 of Additional Protocol I.

> "A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. … In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention."[16]

Getting this right mattered in the context of the present decision. For example, a single non-deliberate breach of the principle of distinction could constitute a "serious violation" of IHL on the part of a State, if such a breach has grave consequences for victims. As the SoS indicated in the Court below, this is not the case for "war crimes" or "grave breaches" which "necessarily require some mental element" (SoS Skeleton Argument before the DC at §§38-40) (emphasis added).

(2) Second, the focus of the SoS's analysis was also wrong in a fundamental sense. Crimes under international law, including war crimes, are necessarily committed by individuals. In contrast, serious violations of IHL are attributable to the State as a whole (its institutions, apparatus and officials collectively). The analysis required to assess the risk of the apparatus of a State as a whole seriously breaching IHL is much broader than that required merely to determine the specific risk of individuals committing war crimes, given that the actions of many individuals are collectively attributable to the state.

(3) Third, assessing the risk of a "serious violation of IHL" (properly understood) requires focus on the likely consequences of a breach for victims and the character of the rules which may be breached. The SoS's analysis therefore lacked the correct focus when assessing risk. It is relevant to note, in this context, that the MOD did not even purport to evaluate the consequences of an alleged breach (numbers of civilian casualties etc). As explained by Peter Watkins in his second witness statement at §26 "when the MOD analyses breaches of IHL no view is expressed on the alleged consequences of a strike, including the reported civilian casualties" [**SB2/15/B547**].

61 By limiting his assessment to the risk that individual KSA officials may commit war crimes (including having the necessary mental requirements so to so), the SoS erroneously set a higher threshold than he should properly have applied when assessing the prospective risk of a serious violation of IHL by KSA. Even if the retrospective analysis carried out by the SoS considered breaches of IHL (and not merely war crimes), this does not answer the point. If (as the SoS contends) the DC agreed with the Appellant

[16] International Law Commission's *Articles on State Responsibility*: Article 2 "Elements of an Internationally Wrongful Act of a State", p. 36 §10.

as to the proper interpretation of the term "serious violation of IHL", it should have gone on to consider what effect that had on the legality of the SoS's decision. Had it done so, it could only have concluded that the wrong test was applied. Given that the decision was "finely balanced" (see §36 above and **SB1/EB14/B103**), the error could have affected the outcome.

Materiality: the evidence

62 The evidence demonstrates that the SoS's misdirection was material.

63 The Director of the FCO's Middle East and North Africa Division Director addressed the findings of the October 2015 IHL Update (Crompton §58 [**SB1/5/B157**]), saying:

> "The [October] Update, at paragraph 7, expressed concern at the 'worrying levels of civilian casualties' in some reports and note that 'high levels of civilian casualties can raise concerns particularly around proportionality criteria'. The Update notes that intent is a key element in assessing IHL compliance and acknowledges that there is often insufficient information to determine intent. However, it is also clear from the Update that those making the assessment were well aware that 'a consistent pattern of non-deliberate incidents (with the same cause and without remedial actions being taken to address that cause) could amount to a breach' […] We are ensuring that we are meeting our responsibility to avoid any risk of 'wilful blindness'.[17]
>
> In the light of all of these considerations, the Update concluded at paragraph 9 that 'on the information currently available, given that we do not have evidence establishing deliberate incidents that could amount to an IHL breach by Saudi Arabia, in particular in relation to items previously supplied by the UK we do not currently assess that extant export licences need to be revisited in relation to Criterion 2 (c).'" (Emphasis added.)

64 The November 2015 Update appears to have adopted the same analysis, observing "a consistent pattern of non-deliberate incidents that have the same cause and where remedial action is not taken to address that cause could amount to a breach" (DC §156). But this analysis fails to appreciate that a single non-deliberate breach of IHL could constitute a "serious violation" of IHL, where it has grave consequences for victims.

65 Mr Crompton's explanation of the Defendant's overall decision is also telling: see §82(a) [**SB1/5/B162**]:

> "[The view that] extant licences did not meet the mandatory refusal threshold was based on the reasoning set out in the IHL Updates for October and

[17] It is noted that "willful blindness" is a concept exclusively drawn from international criminal law, relating to the establishment of the responsibility of a military commander. The concept of willful blindness has no direct role in the establishment of State responsibility for a violation of IHL.

> November 2015. This reasoning included: (a) our assessment of Saudi Arabia's targeting process, in particular observations that the Saudi's operated in a manner which was broadly compliant with our own NATO standards, and the targeting training of UK personnel (b) our ongoing analysis of IHL compliance and the position that there was no evidence of deliberate incidents that could amount to an IHL breach by KSA (c) KSA confirming recognition [of] the importance of IHL compliance and indicating willingness to investigate alleged breaches." (Emphasis added.)

66 All of this suggests that the perceived absence of evidence of "intent" or of "deliberate incidents" was key to the SoS's assessment under Criterion Two (c). At the very least, it cannot be said that the result would have been the same if the SoS had recognised that even non-deliberate (or even non-reckless) breaches of the principle of distinction, could amount to serious violations, where the consequences are grave.

Closed grounds of appeal

67 The Appellant relies also on the CLOSED grounds of appeal advanced by the SAs.

Conclusion

68 For these reasons, the Court is invited:

(1) to allow the appeal;

(2) to quash the challenged decisions;

(3) to remit the matter to the SoS to be reconsidered in accordance with the judgment of the Court on the basis of up-to-date evidence.

MARTIN CHAMBERLAIN QC

CONOR McCARTHY

19 March 2019