

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

BETWEEN:

THE QUEEN  
on the application of  
CAMPAIGN AGAINST ARMS TRADE

*Claimant*

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

*Defendant*

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WITNESS STATEMENT OF  
NEIL CROMPTON  
ON BEHALF OF THE DEFENDANT

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I. INTRODUCTION

1. I am the Director of the Middle East and North Africa Directorate ('MENAD') at the Foreign and Commonwealth Office ('FCO'). I am making this statement to assist the Court in relation to the judicial review challenges that have been brought by the Claimant. My statement addresses the role of the FCO in the impugned decisions. The information contained in this statement is either based on my own knowledge of the matters described or on information which has been provided to me by my colleagues in the FCO and is true to the best of my knowledge and belief.

2. I have held the post of Director of the Middle East and North Africa Directorate since 27 March 2015. I provide senior direction and oversight for the Arabian Peninsula and Iran Department, which includes dedicated Gulf and Yemen Teams, and I am the policy lead on Saudi Arabia and Yemen. MENAD is responsible for FCO bilateral relations, policy, operations and communication for the MENA region. The Yemen Team provides advice and information to the Arms Exports Policy Team ('AEPT') on developments in Yemen, as relevant to their arms export licensing work. The role of MENAD is set out in more detail below.
3. The FCO team, formerly known as and referred to herein as AEPT (which was part of the Arms Export Policy Department ("AEPD")), now part of the Export Controls Joint Unit ('ECJU'), hosted at the Department for International Trade ('DIT') is the FCO lead department for arms exports and is responsible for co-ordinating advice which is provided by the Foreign Secretary to the Secretary of State for International Trade on those export licence applications on which it is requested by DIT to comment. AEPT also represents the FCO in the UK Export Licensing Community. The role of the UK Export Licensing Community and of the AEPT is set out in more detail below.

**A. Summary of what the statement will address**

4. This statement will address the process by which officials in the FCO draw together the advice given to the Foreign Secretary on the Consolidated EU and National Arms Export Licensing Criteria ('the Criteria') in relation to the export of arms and military equipment to Saudi Arabia (KSA) and the basis for that advice. It will set out the FCO's role in the decisions which are under challenge.
5. The advice on the Criteria is used to inform the Foreign Secretary's recommendation to the Secretary of State for International Trade ('the Business Secretary') on arms export licensing decisions. This advice is informed by a great deal of relevant information drawn from a range of sources both from within Government Departments and external organisations including NGOs.

B. The sensitivity of the material upon which FCO advice is based

6. Much of the information on which the FCO's input and advice in relation to the export of arms and military equipment to Saudi Arabia and which informs its assessment under Criterion 2C is sensitive for national security reasons and consequently cannot be referred to in detail in open court.

II. CONTEXT

7. In September 2014, Houthi forces (a Zaydi movement from the north of Yemen) entered Sana'a and, backed by former Republican Guard forces loyal to former president Saleh, took control of key central government institutions. In January 2015, Houthi forces took control of areas in central and southern Yemen and placed President Hadi, former Prime Minister Bahah, and Defence Minister Subayhi, under house arrest. The latter remains under house arrest.
8. On 24 March 2015, a letter from the legitimate President of Yemen, President Hadi, was transmitted to the UN from the Yemen Permanent Representative to the UN (Exhibit NC1) in which President Hadi requested support "*by all necessary means and measures, including military intervention, to protect Yemen and its people from continuing aggression by the Houthis*". A further letter was sent on 26 March 2015 from the Gulf Cooperation Council countries which endorsed President Hadi's request. (Exhibit NC1)
9. In response to that request, a Saudi - led Coalition of nine states ('the Coalition') was formed, comprising Saudi Arabia, Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Qatar and Bahrain. The Coalition commenced Operation Decisive Storm on 25 March 2015 which transferred to Operation Restore Hope on 21 April 2015 with a change in emphasis to both political and humanitarian objectives.
10. There is therefore a sound legal basis for the intervention - the consent of the Government of Yemen, and a clear goal of stability and security in Yemen.

11. The subsequent UN Security Council Resolution 2216 (2015) 14 April 2015 (Exhibit NC2) noted President Hadi's letter to the UN in which he outlines the request for support, including military intervention. The Resolution also condemns "*in the strongest terms, the ongoing unilateral actions taken by the Houthis*".

### III. OVERVIEW OF THE FCO PROCESS

#### A. Introduction

12. The following sections address the process by which officials in the FCO draw together the advice given to the Foreign Secretary on the Criteria in relation to the export of arms and military equipment to KSA and the basis for that advice, which is then used to inform the Foreign Secretary's recommendation to the Business Secretary.
13. I will begin with an outline of the Criteria assessment process and what the FCO assesses against. This is below, as drawn from the Strategic Export Controls Annual Report 2014 (Exhibit NC 3):

**Criterion One** When assessing an Export Licence Application (ELA) under Criterion One, the International Organisations Department at the FCO is consulted to confirm whether the country of final destination is currently subject to any embargoes or other relevant commitments.

**Criterion Two** When assessing an ELA under Criterion Two, British Diplomatic Posts, Geographical Desks, Legal Advisors and the Human Rights and Democracy Department ('HRDD') at the FCO are consulted if the end destination of a proposed export is of concern.

**Criterion Three** When assessing an ELA under Criterion Three, British Diplomatic Posts and Geographical Desks at the FCO are consulted to assess the risk of a potential export provoking or prolonging armed conflict or aggravating existing tensions or conflicts in the country of final destination.

**Criterion Four** When assessing an ELA under Criterion Four, the views from staff at the British Diplomatic Post(s) in the country of destination and Geographical Desks at the FCO are sought to assess the peace, security and stability of the region.

**Criterion Five** When assessing an ELA under Criterion Five, the MOD is consulted to consider whether a proposed export could have an impact on the security of the UK, UK assets overseas and

the security of allies, EU member states and other friendly countries.

**Criterion Six** When assessing an ELA under Criterion Six, the FCO is consulted to assess the behaviour of the buyer country with regard to the international community, in particular its attitude to terrorism, the nature of its alliances and respect for international law.

**Criterion Seven** When assessing an ELA under Criterion Seven, the MOD and FCO are consulted if the proposed export could have a military end-use or if there are concerns about the military capabilities of the importing country. An assessment is also made of whether the goods could be diverted to an undesirable end-user in either the importing country or to an undesirable end-user in another state.

**Criterion Eight** When assessing an ELA under Criterion Eight, DFID is consulted if the importing country is on the World Bank's International Development Association list (Annex B), and the value of the application exceeds the threshold set by the Criterion Eight methodology. DFID then considers the potential impact of the proposed export on the sustainable development of the recipient country.

14. For the assessment of applications for licences for the export of arms and military equipment to KSA for possible or likely use in Yemen, the focus has been mainly, though not exclusively, on Criterion 2C of the Criteria which requires respect by the country of final destination for international humanitarian law and provides:

*"Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:*

*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" ('IHL').*

15. Where, after an assessment against the Criteria's four mandatory Criteria (1-4), Ministers conclude that the threshold for refusal has been met in relation to a particular licence application, FCO advice to DIT would be that the export licence should be refused.
16. However, if Ministers conclude that there is no "clear risk" under the four mandatory Criteria, an assessment is made against the other four (non-mandatory) Criteria to determine whether on balance the arguments favour approval or refusal.

17. Once all the Criteria have been considered, it is then permissible (under Article 10 of the EU Common Position) for other factors, such as the effect of proposed exports on (i) the UK's economic, commercial, industrial and social interests; (ii) the UK's international relations; (iii) collaborative defence production or procurement projects with allies or EU partners; and (iv) counter-terrorism cooperation. Consideration of these factors will not, however, override the application of the Criteria.

#### **B. The role of AEPT**

18. DIT seeks advice from other Government departments on export licence applications. AEPT coordinates the advice provided by FCO to DIT. FCO (through AEPT) provides advice on the Criteria to DIT on all applications for licences to export material to Saudi Arabia and Yemen. As noted above, AEPT co-ordinates advice to DIT on those export licence applications on which it is asked by DIT to comment.
19. AEPT handles up to 16,000 licence applications for licences to export items to a wide range of countries each year. Its staff of 13 conducts a case-by-case risk assessment of each application against the Criteria, in particular Criteria one to four, the mandatory Criteria; and Criterion seven, which examines diversion risk, including where such a risk may trigger other (mandatory) criteria.
20. The types of goods AEPT look at in export licence applications are those subject to strategic export controls. Broadly speaking, as set out in the Export Licensing Community Joint Mission Statement (**Exhibit NC3**), these controls relate to:
  - a. Items specially designed or modified for military use, including components
  - b. Dual use items (those that can be used for both civil and military purposes), including those listed under EC Regulation 428/2009 or on the UK Dual-Use List
  - c. Items caught by Military and Weapons of Mass Destruction end-use controls
  - d. Transfers of software and technology, including transfers by electronic means e.g. by email
  - e. In some circumstances, technical assistance related to the above

- f. Items that might be used for capital punishment, torture or internal repression
  - g. Items and activities which are controlled to destinations, entities or persons subject to UN, EU, OSCE and UK sanctions and embargoes.
21. In making an assessment of an export licence application, AEPT takes account of the possible uses of the equipment to be exported, the proposed destination country and the proposed end user.
22. In general terms, detailed relevant reporting and advice is sought as necessary from other FCO departments.
23. In relation to criterion 2A (human rights) AEPT will receive assistance and information from HRDD and from the relevant geographic department (in this instance that would be the Gulf team in MENAD) and from diplomatic and defence posts overseas.
24. In relation to the criterion 2C clear risk test for applications for licences to export to Saudi Arabia, the relevant information is collated by the Yemen team in MENAD.

### **C. The Role of the Foreign Secretary**

25. Since the commencement of the Coalition operations in Yemen in March 2015, AEPT has sent its recommendations in respect of all applications for licences to export precision-guided weapons systems and munitions<sup>1</sup> that are likely to be used by the Saudi Royal Air Force in Yemen to the Foreign Secretary. The Foreign Secretary is thus given an opportunity to comment on all such applications before AEPT's recommendation is sent to DIT. The Foreign Secretary is requested to give a decision in respect of particularly sensitive or finely balanced applications. Copies of the 10 recommendations which have been sent by AEPT to the Foreign Secretary since December 2015 are contained in a closed exhibit.

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<sup>1</sup> This does not include the air platform or other non-lethal componentry attached to the aircraft, such as head-up displays, electronics, consumables, but it does include laser or GPS guidance systems for weapons systems.



26. In these documents, the Foreign Secretary is either referred to or reminded of the most recent IHL update from MENAD (which I explain further below) as part of this consultation (and, in relation to the most recent recommendation dated 5 July 2016, a specific assessment on allegations regarding the use of cluster munitions). He is also provided with details of the export licence application – namely description and quantity of goods, end-user, and end-use.
27. Once the Foreign Secretary has indicated that he is content with the recommendation, it is finalised by AEPT and provided by AEPT to officials at DIT in order to inform the final decision on the application.
28. To date this recommendation, for all licence applications for precision-guided weapons systems and munitions that are likely to be used by the Saudi Royal Air Force in Yemen, to KSA, has been to grant the licences.

#### IV. THE CRITERION 2C ANALYSIS

##### A. Introduction

29. As noted above, for the assessment of applications for licences for the export of arms and military equipment to KSA for possible or likely use in Yemen, the focus has been mainly, though not exclusively, on Criterion 2C of the Criteria – that is, whether there is a *“clear risk that the items might be used in the commission of a serious violation of international humanitarian law.”*
30. I will describe in more detail below how this threshold has been applied in practice, in the context of particular issues of concern which have arisen in relation to the coalition campaign in Yemen. However, in general terms, AEPT (in this case as in all the cases on which it advises) conducted the analysis for Criterion 2C on the understanding that:
  - a. “Clear risk” is more than just a possibility;

- b. Our approach is informed by consideration of the principles of international humanitarian law, including the principles of distinction, discrimination and proportionality, as referred to in the User's Guide to the EU Common Position.
- c. In relation to "serious violation" of IHL, there is no exhaustive list within international humanitarian law; however for these purposes we would consider grave breaches of the four Geneva Conventions of 1949 and Additional Protocol 1 of 1977. We would also consider the conduct that would constitute the actus reus of the serious violations listed in the Rome Statute of the International Criminal Court. This approach is consistent with para. 2.11 of the User's Guide. In considering whether there is a "clear risk" a wide range of information and assessments are relevant, including:
  - i. Allegations of activities on the ground which might constitute serious violations of IHL;
  - ii. The context of the overall campaign and KSA's role in that campaign;
  - iii. The extent to which the KSA has given the UK access to information about the Yemen campaign;
  - iv. The capabilities of the Saudi military and the procedures which they employ in identifying targets and carrying out air strikes;
  - v. The response of the KSA to incidents of concern and, in particular, the extent to which it has been willing to learn from errors.
- d. Where there is no established violation of IHL this does not, by itself, mean there is definitely no clear risk with respect to Criterion 2C. The risk assessment is something conducted by looking at all of the information in the round. It is not essential for a violation to be established before a clear risk can be said to exist, and in cases in which there is a regular flow of new information, AEPT remains alive to the possibility that the clear risk analysis could change;
- e. Conversely, even if there were an established serious violation of IHL by the proposed end user, this would not automatically mean that a clear risk for the purposes of Criterion 2C had been established. Past behaviour is a helpful indicator of attitude towards IHL and towards future behaviour, but is not necessarily determinative. For example, if AEPT was informed of an allegation of a serious violation of IHL by KSA which was said to have taken place 6 months ago, and assessed that the allegation appeared to be well-founded it might nevertheless be the case that KSA has taken significant steps to learn from it, put new processes in place

to try to avoid a repeat. In these circumstances, it might appropriately be concluded that there was not a clear risk that items to be exported might be used in the commission of a serious violation of IHL in the future;

- f. Further, the test refers to the risk of *the items* being used in that serious violation of IHL, not just the risk of a serious violation taking place. The analysis is conducted by looking at the particular items that are the subject of the licence application, and the existence of any clear risk that those items might be used in a serious violation of IHL. This is a different analysis to looking at the existence of any clear risk that a serious violation of IHL may take place, albeit that the general IHL picture is still relevant to that analysis.

31. AEPT's conclusion that to date this 'clear risk' threshold at which refusal would be mandatory has not been met is based on numerous sources of information and analysis. This information is channelled through and collated by the Yemen team in MENAD.

#### **B. The role of MENAD**

32. As I have stated above, MENAD is responsible for FCO bilateral relations, policy, and communication for the MENA region. MENAD carefully monitors all developments in Yemen including the nationwide ceasefire and de-escalation of the conflict, in parallel to progress on the political negotiations. It does so via receipt of at least bi-weekly and often daily e-mail updates from the Yemen Office.<sup>2</sup> The updates cover political and military activity in Yemen and more recently the nation-wide cessation of hostilities and progress on political negotiations. MENAD also receives updates from posts in the region. MENAD is also in regular contact with NGOs with an interest in the area, both through formal contacts, such as at roundtable meetings and through less formal communications with MENAD officials.

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<sup>2</sup> The British Embassy in Sana'a suspended operations in February 2015 due to the deteriorating security situation. A small Embassy team of seven UK-based staff relocated to Saudi Arabia in March/April 2015 to form Yemen Office Saudi (YOS). HMA, DHM, Second Secretary and PA/HMA are based at the British Consulate-General in Jeddah. The DA, ADA, and DFID representative are based at the British Embassy in Riyadh.

33. In addition to its general expertise on the situation in Yemen and the surrounding area, the Yemen team in MENAD is responsible for collating specific information relevant to the IHL risk. This was initially done in the form of standard short updates as and when any relevant information arose. Since October 2015, however, this information has been promulgated in regular updates specifically addressing IHL ('IHL Updates'). The purpose of the IHL Updates is to ensure that (i) the Secretary of State is aware of the developing factual position in relation to the IHL situation in Yemen and (ii) a regular analysis of IHL compliance by Saudi Arabia is undertaken.
34. To date, 7 such updates have been produced, in October 2015, November 2015, January 2016, March 2016, May 2016 and June 2016 and July 2016. I should emphasise, however, that this is only one part of the process. The situation in Yemen is a dynamic one and there are many channels of communication at all levels which ensure that all the interested parties, and particularly the Foreign Secretary, are fully informed of the latest position.
35. The process for producing the regular IHL updates as undertaken by the Yemen team in MENAD has developed and been refined over the months, but can be summarised as follows:
- a. A draft document is produced by MENAD that draws on the previous IHL update and any relevant information which has been fed into MENAD since the previous update was completed. This draft is then emailed to the stakeholders described below for additional comment, input and clarification;
  - b. AEPT is commissioned to provide an update of all extant export licences to Saudi Arabia from 25 March 2015 (the Foreign Secretary receives these on a case by case basis in any event, but this provides a summary).
  - c. The MOD is commissioned to send an update on newly reported incidents of alleged IHL violations or further evidence on previously reported allegations (since the last update). This update, which is largely in tabular form, sets out the details of the incident, the source and the analysis MOD have performed. Their analysis will take into account any reporting from NGOs and other sources (see below) on alleged incidents.

- d. British Embassy Riyadh is commissioned to update on Saudi activity with regards to military processes, investigations and lessons learnt, Saudi public announcements, NGO engagement, media reporting, plus the wider Saudi political context and policy towards Yemen, and UK activity with regards to UK-KSA interaction and training.
  - e. British Embassy Washington is commissioned to report on policy responses to date.
  - f. This information is collated by MENAD, together with any relevant reporting from NGOs and any information about ministerial or other high level contacts between the United Kingdom and KSA. MENAD will also include an update on activity which will impact military activity, such as the Cessation of Hostilities.
  - g. The draft update is sent to FCO legal advisors, who provide input following AEPT's initial assessment of whether there is a "clear risk" of a "serious violation" of IHL. FCO legal advisors have also had contact with their counterparts;
  - h. The draft update is then sent by MENAD for comments to MOD, AEPT and relevant posts in the region.
  - i. The final draft is then cleared by the head or deputy head of APID, deputy head of MENAD or myself and the final version is sent up to the Foreign Secretary via his private office.
36. The regular IHL updates are exhibited in a closed exhibit and I will refer to some of them in more detail below. However, by way of brief overview, these updates include some or all of the following information:

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- a. A summary of alleged incidents of IHL violations, including any specific incidents of concern;
  - b. An overview of what has changed since the last update. This includes updates on insight into Saudi targeting and Saudi investigations, evidence of the application by KSA of lessons learned and any new allegations of incidents of IHL violations. Progress on de-escalation and the political situation more generally is also considered;
  - c. A summary of UK action to support KSA's IHL compliance to date;
  - d. A report on the US position;
  - e. An overall analysis of Saudi Arabia's attitude towards the principles of IHL
  - f. As annexes:
    - a. the MOD's summary and table of alleged incidents (as explained below);

- b. a list of the 'Extant export licences for Saudi Arabia relevant to IHL assessments' (for the period covered by the update), provided by AEPT;
- c. a list of the 'Pending export license applications for Saudi Arabia relevant to IHL assessments', also provided by AEPT.

37. In addition to the regular IHL updates which I have described above, short updates are also provided when it is necessary to inform the Foreign Secretary more swiftly. This ensures that the Foreign Secretary is sighted on changes to the fluid and evolving situation on the ground in Yemen. Copies of the "ad hoc" updates which have been sent to the Foreign Secretary since December 2015 will be provided in a closed exhibit. Ad hoc updates were, for instance, sent to the Foreign Secretary to inform him of the alleged missile strike on the Iranian Embassy and the alleged use of cluster munitions in Sana'a in January 2016; on the strike against the MSF clinic in Saada in January 2016; the UN Panel of Experts Report; and the progress of the peace talks and the Cessation of Hostilities from April onwards.

### C. The input from MOD

38. As indicated above, the regular IHL update is informed by updates provided by MOD to MENAD.

39. The updates from the MOD include:

- a. A summary of the alleged IHL incidents that the MOD has been tracking (usually just those which have been added to the MOD's analysis since the previous update);
- b. MOD's analysis of newly reported alleged IHL incidents or new evidence about previously reported allegations. The analysis is in a tabular format, with a series of columns. The columns comprise:
  - i.) The date of the alleged incident;
  - ii.) The nature of the alleged incident;
  - iii.) The source of the information regarding the alleged incident;
  - iv.) Key details of the alleged incident, for instance any available details of civilian casualties or equipment used;

- v.) The MOD's assessment of whether or not the alleged incident was likely to have been caused by a Coalition strike (entitled simply "UK Assessment"); and
  - vi.) The MOD's assessment of whether a legitimate military target has been identified (entitled "Evidence of Target")
40. MOD's analysis is informed by a variety of different sources, as described in the witness statement of Peter Watkins.
41. In addition to the information described above, which is provided to MENAD by the MOD for the purposes of producing the regular IHL analysis, communication between MENAD and the MOD takes place on a daily basis.

**D. Understanding of KSA military processes and engagement with KSA (including post-incident dialogue)**

42. MENAD also leads within the FCO on engagement with KSA. This engagement is explained in more detail below.
43. To do so effectively, MENAD needs to understand the KSA military process and procedures and the wider military context including Saudi objectives and attitude. This information comes both from MOD (as set out below) and the FCO (e.g. through the British Embassy in Riyadh, HM Ambassador and senior Embassy staff or the Defence Attaché) via e-mail updates and through meetings. This information helps MENAD to understand what KSA is doing in terms of the process and procedures it has in place, what lessons have been learned and what has changed.
44. The information is used by MENAD in a multitude of ways. These include:
- a. Feeding into the regular and ad hoc IHL updates to the Foreign Secretary;
  - b. The identification of key issues to be raised with senior KSA officials;
  - c. Providing a basis for post-incident dialogue / IHL investigations with the KSA authorities;

- d. Engaging directly with KSA on IHL issues (as set out in further detail below), including via lobbying by FCO Ministers and senior officials from the KSA government.
45. This work feeds into the analysis referred to above when the information is conveyed to AEPT who then use it to inform their Criteria assessment.
46. There are various ways in which MENAD (in parallel with the MOD) engages with KSA, depending on the issue.
47. Engagement happens for different reasons, at different levels, by a range of people, as summarised in the following table:

Type	Level	Who
Political	Ministerial	Prime Minister, Foreign Secretary, FCO Ministers, Defence Secretary
Operational	Senior Official	UK Special Envoy to Yemen, Ambassador, Senior Embassy staff, MOD Senior Officials
Tactical	Technical staff	UK Liaison officers <sup>3</sup>

48. Examples of bilateral engagement (both public and private) include meetings, telephone calls, correspondence, notes verbale and dialogue in the margins of another event.

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<sup>3</sup> We have a very small number of staff working in Saudi headquarters in a liaison capacity only. These liaison officers are not embedded personnel taking part in the Saudi Arabian-led operations and are not involved in carrying out strikes, directing or conducting operations in Yemen or selecting targets and are not involved in the Saudi targeting decision-making process. All personnel remain under UK command and control.



49. This engagement allows us to discuss with or lobby KSA on priority issues such as processes, investigations and lessons learned, which has all contributed to our understanding of what KSA is doing or intending to do (referred to as our "trend analysis") and what it has already achieved.
50. Statements and commitments made by senior officials of KSA during the course of ongoing engagement and dialogue are just one factor considered in a wider context, as part of an overall assessment. However, by way of example, I would highlight that on 31 May 2016, the Saudis shared a statement, included at Exhibit NC4, with the Defence Attaché at the British Embassy in Riyadh. This was then released as a press statement to the Saudi press agency on 26 May 2016.
51. This statement confirms that the Coalition have strict constraints and restrictions designed to be in the form of rules of engagement according to the rules and regulations of IHL. It is then divided into two sections. First, it sets out the mechanisms and procedures for targeting. Second, it addresses after targeting assessment, setting out a series of commitments on the follow-up of allegations. It promises declarations of all investigation results. The Saudis have produced this for the UK to demonstrate their ongoing compliance with IHL.

#### E. KSA Investigations

52. In its engagement with the KSA government and military, HMG has repeatedly pressed for investigations of incidents of particular concern to be conducted and the results to be made public. We are aware that KSA is conducting investigations of a number of incidents.
53. We understand that KSA investigations into incidents of concern include the following:
  - a. The MSF hospital incident in Haidan of 25 October 2015. In a press statement on 31 January 2016, Brigadier Assiri announced the outcome of that investigation (Exhibit NC4). On behalf of KSA, he publicly acknowledged that the MSF facility was incorrectly struck by a Saudi airstrike and that this was due a procedural error in

sharing the no-strike list between Riyadh and the relevant Air Operations Centre. Brigadier Assiri highlighted the lessons which had been learned from this incident, including developing procedures for ensuring that information about medical facilities etc reaches the Front Line Observers.

- b. The 3 December 2015 attack on a mobile clinic in Taiz belonging to MSF. KSA issued a public statement on 4 December committing to investigate the incident; (Exhibit NC4).
  - c. The 15 March 2016 attack on the marketplace in Mastaba, Hajjah province (as committed by Brigadier Assiri on 16 March 2016).
54. On 1 February 2016, the Saudi Permanent Mission to the UN issued a statement noting the establishment of an independent high level team of civilian and military experts to assess reported incidents of civilian casualties, investigation procedures and mechanisms of precision targeting (Exhibit NC4).
55. On 4 August 2016, KSA held a press conference where they announced the conclusions of 7 additional investigations including into the incidents of concern mentioned in 53b and 53c above. We are currently reviewing this information.

## V. APPLICATION OF CRITERION 2C

56. It may assist the Court, if I provide some examples of how Criterion 2C has been applied in practice. This can best be demonstrated by reference to some of the assessments which were carried out in the regular IHL updates.

### A. The October 2015 IHL Update

57. The Update summarised the alleged incidents of IHL violations and included, in Annex B, a summary of the MOD's analysis of the most recent allegations in spreadsheet form. A description of the IHL tracker is provided in the Witness Statement of Peter Watkins.
58. The Update, at paragraph 7, expressed concern at the "*worrying levels of civilian casualties in some reports*" and noted that "*high levels of civilian casualties can raise*

*concerns particularly around the proportionality criteria".* The Update notes that intent is a key element in assessing IHL compliance. 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."* The Update further noted that *"We have taken into account recent NGO reports in our assessment and we are ensuring that we are meeting our responsibility to avoid any risk of "wilful blindness".*

59. In the light of all 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 2C.* (emphasis in original).

#### **B. The November 2015 IHL Update**

60. The November 2015 Update again expresses concern about the picture of civilian casualties and the damage to civilian infrastructure and, in particular, raises concern about the attack on a Mediciens San Frontieres hospital in Haidan, northern Yemen on 25 October 2015.
61. The Update records that 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.
62. The attack on the MSF hospital in Haidan was of particular concern to us. As I explain above, on 31 January 2016, Brigadier Assiri announced the result of that investigation, publicly acknowledging that the hospital had been incorrectly struck due to a procedural error. Thus, as the March Update indicates, although this incident was of very real concern, in view of the response of the KSA, in carrying out an effective investigation, admitting responsibility for the attack and putting in place procedures to prevent a recurrence, our assessment remained that there was not a clear risk that Saudi forces would commit serious IHL violations.

### C. The January 2016 IHL Update

63. In January 2016, MENAD received an advance copy of the UN Panel of Experts Report. I am aware that the Claimants place a good deal of reliance on this Report and it is important that it is viewed in its proper context.
64. The Panel of Experts' mandate, under SC Res 2140 (2014) was to monitor the implementation of sanctions measures. The Panel of Experts Report, which runs to some 226 pages in total, therefore covers a number of issues relating to sanctions, as well as commenting more generally on the situation in Yemen. Section V of the Report covers "*Acts that violate international humanitarian law and human rights law and cross-cutting issues*". Paragraph 121 describes the methodology of this section, noting that the Panel conducted interviews with refugees, humanitarian organisations, journalists and local activists, and that it obtained satellite imagery (paragraph 138 makes clear that this is commercial satellite imagery) to assist in substantiating certain "widespread" or "systematic" attacks. At paragraph 123, the Panel concludes that "*all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution...*" Paragraphs 127 to 129 and 136 to 139 raise, in general terms, allegations of IHL breaches by the Coalition. At paragraph 137 it is noted that "*The Panel documented 119 Coalition sorties related to violations of IHL.*" Annex 47 of the Report comprises a table of "*Documented IHL Violations*". These are outlined in very general terms - for instance "*Attacks on farms and agricultural areas - 3*"; "*Attacks on mosques - 3*". Further details of certain allegations are contained in Annexes 52 - 56 and 61-63.
65. The UN Panel of Experts Report does not, therefore, contain a detailed and exhaustive analysis of the 119 allegations of IHL violations by the Coalition. However, the allegations which were raised in the UN Report were clearly of concern and were taken seriously by those responsible for conducting the IHL assessment under Criterion 2C. In particular, MENAD (which received an advance copy of the Report) immediately forwarded it to the MOD who carried out a preliminary assessment of the 119 allegations.
66. Although these additional allegations were concerning they did not trigger a change in the overall analysis of Saudi compliance with IHL. In particular, further work was

required by MOD to identify whether the alleged attacks had been carried out by the RSAF, rather than one of its coalition partners. MENAD also requested additional information from the UN Panel of Experts with regards to seven of these incidents. No further detail has been forthcoming to date. In terms of the "clear risk" threshold for Criterion 2C, it is also important to remember that most of the allegations were historic and therefore the increase in the number of incidents being tracked by the MOD did not in itself reflect a deterioration in Coalition behaviour or processes.

67. Another issue highlighted in the January IHL Update related to the use of cluster munitions by the Coalition. In particular, it had been alleged that the Coalition might have used cluster munitions over a residential area in Western Sana'a on 6 January 2016. This allegation caused great concern and immediate steps were taken to establish what had happened.

**D. The March IHL Update**

68. The UK MOD had offered training.
69. An update was also provided on the KSA's announcement of 31 January 2015 that they intended to form an independent high level team to assess and verify incidents of concern. The Saudi Government had confirmed the creation of the Investigations Committee in a letter to the UN Security Council of 1 February 2016.
70. The March Update also notes that there had been continued high level engagements with the Saudis.

**E. The May IHL Update**

71. The May Update recorded a significant reduction in air strikes since the Cessation of Hostilities started on 10 April.
72. High level contact between the UK and KSA had continued.

F. The June IHL Update

73. The June IHL Update noted that it was broadly accepted that the Cessation of Hostilities continued to hold.
74. The June Update again noted that there had been no further announcements of results of investigations into incidents of concern. However the Investigations Committee had now commenced its work. The Committee had received advice and training from the UK.
75. The June update also referred to a report from Amnesty International which alleged that UK made BL-755 cluster munitions had been used by the Coalition.

G. The July IHL Update

76. The July update was produced to inform the new Foreign Secretary of the latest position. Accordingly, it replicates in part the June Update. In addition, MENAD produced two background documents explaining the arms export approval process and providing a glossary of key terms.
77. In relation to the Cessation of Hostilities, it is noted that the Cessation of Hostilities was being significantly challenged.
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78. The July Update refers to further analysis relating to the allegation by Amnesty International regarding the use of cluster munitions.

VI. THE DECISION OF THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

A. The decision communicated on 9 December 2015

79. On 9 December 2015, the Head of the Export Control Organisation at the Department for Business Innovation and Skills (as it then was) wrote to Leigh Day confirming *inter alia* that it was not considered that a blanket ban on the export of arms to Saudi Arabia

was appropriate (Exhibit NC5). This was in response to question 11 of the Pre-Action letter from Leigh Day of 9 November 2015.

80. As set out in that letter of 9 December, all export licence applications are assessed on a case by case basis against the Criteria, and this provides a robust system for the screening of applications for licences for items in respect of which there is a clear risk they might be used in a serious violation of international humanitarian law.
81. There was no additional decision taken on 9 December, this letter simply conveyed the position as it stood at that point – as I have described above the clear risk analysis has been conducted on an ongoing basis, responding to new information as it comes to FCO's attention, since the start of this conflict in March 2015. Officials were already closely watching developments in Yemen because of the possibility of Saudi Arabia using UK licensed items there.
82. The conclusions of FCO at that point were based on the full range of considerations outlined above at paragraphs 32-55. The conclusion that extant licences did not meet the mandatory refusal threshold was based on the reasoning set out in the IHL updates for October and November 2015.

#### **B. The subsequent decisions**

83. Following the 9 December letter, the FCO looked carefully at the claimant's arguments and reviewed how and on what basis our arms export licence application decisions for Saudi Arabia were taken.
84. The submission from AEPT to the Foreign Secretary of 26 January 2016 (Exhibit NC6) considered the Criteria, the information from MOD and others, including MENAD's most recent IHL update.<sup>4</sup> It set out the reasoning leading to the formal recommendation for the Foreign Secretary to:

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<sup>4</sup> The motivation for the 26 January submission from AEPT to the Foreign Secretary was the Leigh Day legal challenge. As noted above, the inclusion of MENAD's IHL update in the 26 January submission was a one-off; these always had been and continue to be self-standing updates from MENAD to the FS, provided both on a regular and an ad-hoc basis, depending upon developments.

- a. advise BIS not to suspend extant licences and not to suspend the processing of new licence applications for the export of arms to Saudi Arabia; and
  - b. agree that licences for arms exports to Saudi Arabia should continue to be assessed on a case-by-case basis, against the Consolidated Criteria.
85. We continue to assess that KSA are broadly complying and are seeking to comply with IHL, and are seeing evidence of this:
- a. Saudi investigations and lesson learning. We have seen an increase in Saudi public communications addressing alleged IHL violations, which have indicated positive steps in relation to IHL compliance. Notably:
    - i. The intention to form an independent high-level team of skilled specialists to assess and verify incidents of concern as announced at the 31 January press conference. The Saudi Government confirmed the creation of this committee in a letter to the UNSC on 1 February. (Exhibit NC4)
    - ii. In an article written by the Saudi Ambassador to London in the Daily Telegraph on 29 February commitments were made (i) to continue to carry out an IHL compliant campaign, and (ii) to form an independent team to conduct IHL investigations. (Exhibit NC4)
    - iii. In a presentation to the Royal United Service Institution on 29 February, Saudi MOD Spokesman, General Assiri described Coalition efforts to avoid civilian casualties.
    - iv. More recently, to demonstrate their ongoing compliance with IHL, the Saudis have produced a statement, included at Exhibit NC4.
    - v. As mentioned in section 55, KSA announced the conclusions of 7 investigations on 4 August 2016.
  - b. De-escalation. Since the Cessation of Hostilities agreement came into effect on 10 April, we have seen significant de-escalation in the air campaign and, importantly, Saudi restraint in response to action by Houthi/Saleh forces.



### C. Suspension mechanism

86. The suspension mechanism provides for the immediate suspension of pending and/or extant licence applications where conflict or crisis conditions change the risk suddenly, or make conducting a proper Criteria risk assessment difficult.
87. Whilst cognisant of the fact that there were some gaps in our knowledge when conducting these risk assessments, it is important to note that:
- a. An allegation simply needs to be made for it to be included on the MOD tracker. The 'threshold' for inclusion on the MOD tracker for analysis is therefore very low;
  - b. The allegations are often very vague, with extremely limited information, hindering further analysis. For example, the allegation may be that an airstrike was made 'during the past two months' or 'somewhere in the Hajjah governorate';
  - c. There are always some gaps in AEPT's knowledge when they are conducting these assessments, in relation to exports to any country;
  - d. AEPT received and continues to receive, regular flows of information from within government, through the Embassy in Riyadh, and from Saudi contacts via MENAD as well as open sources included NGOs, international organisations and media that have placed this conflict under particular scrutiny;
  - e. The assessment under Criterion 2C also takes into account our knowledge of KSA processes and procedures, our engagement with KSA and the commitments received from KSA as part of our considerations of Saudi overall attitude and compliance with IHL.
88. With respect to the position adopted on 9 December 2015, and thereafter, it was not considered that the risk had changed suddenly, and that whilst there were clearly conflict conditions it was and is the view of AEPT, on the basis of the information provided to them, that they remained able to conduct the necessary risk assessments against the Criteria. AEPT considered as of the 9 December 2015, and thereafter, that it was in possession of sufficient information, despite not being in possession of complete information, to conduct the necessary Criteria assessment.
89. This is reflected in the IHL updates leading to the position adopted on 9 December 2015, and thereafter.

## VII. CONTINUING REVIEW

### A. Overview of continuing engagement

90. The FCO:

- a. continues to engage with and lobby the Saudis on IHL compliance through Ministerial, diplomatic and military channels;
- b. continues to act on new information. For example, all additional allegations of particular IHL violations are passed to the MOD to be investigated;
- c. continues to monitor the MOD's offer and provision of training and best practice to the Saudi military. All are coordinated by the Riyadh Defence Section and UK liaison officers to the RSAF and Coalition;
- d. continues to review the overall attitude of KSA towards IHL; and
- e. from the available information, we continue to assess that there is not a clear risk that KSA might use items supplied by the UK in a serious violation of IHL. We consider that the Saudi-led Coalition is seeking to comply with IHL, and broadly has IHL-compliant processes in place. We will continue to undertake this assessment on a case by case basis for individual export licences.

### B. Internal meetings

91. The FCO chairs fortnightly meetings on military, humanitarian and political developments in Yemen. Since 1 January 2016, these have taken place on: 5 January, 19 January, 2 February, 1 March, 15 March, 5 April, 26 April, 10 May, 24 May, 7 June and 21 June. These meetings are chaired by a representative of MENAD and are attended by a representative of AEPT and officials from DIT, MOD and DFID officials. British Embassy Riyadh and the Yemen Office Saudi attend via video conference.

92. MENAD also hold regular informal internal meetings which cover a wide range of issues, including (where relevant) IHL issues.

### C. Dialogue with NGOs

93. The FCO also have a continuous dialogue with NGOs on the issue, so that we a) have access to their information and b) are able to advise on UK policy positions. We have held these regularly at Senior Official and Ministerial level.
94. In addition to the FCO responding to letters from NGOs (MENAD would coordinate a draft response for FCO Ministers to send), FCO Ministers and officials have both reactively and proactively engaged with NGOs. A table listing the meetings is provided in Exhibit NC7.

## VIII. COMMITTEES ON ARMS EXPORTS CONTROLS

### A. Overview of CAEC's role

95. The Committees on Arms Exports Controls ('CAEC') consist of four select committees meeting and working together:
- a. Business Innovation and Skills Committee
  - b. Defence Committee
  - c. Foreign Affairs Committee
  - d. International Development Committee
96. The CAEC<sup>5</sup> have worked together since 1999 to examine the Government's expenditure, administration and policy on strategic exports, that is the licensing of arms exports and other controlled goods.
97. The four Committees work together because each has an interest in arms exports and any Member of the four committees can attend meetings of the CAEC.
98. There CAEC has 16 members (MPs) and is chaired Chris White MP.

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<sup>5</sup> <http://www.parliament.uk/business/committees/committees-a-z/other-committees/committee-on-arms-export-controls/>

99. The CAEC has previously carried out its role by undertaking a single inquiry each year, typically examining exports over the preceding year and developments in export policy. However, the new Chair of the CAEC has indicated a new approach; namely, that it is likely to focus on 2 or 3 specific thematic or country-specific issues each year, such as Saudi Arabia, the Arms Trade Treaty, ethical arms trade or space policy.

**B. The present CAEC inquiry**

100. On 10 March 2016, the CAEC launched an inquiry into the use of UK-manufactured arms in the conflict in Yemen. In particular it intends to examine: *“if weapons manufactured in the UK have been used by the Royal Saudi Armed Forces in Yemen, if any arms export licence criteria have been infringed and discuss what action should be taken in such cases.”*

101. The CAEC invited written submissions on the following issues:

- a. What are the UK’s strategic interests in the region and wider afield? To what extent and how are those strategic interests being advanced?
- b. What significance does the region play in terms of the UK defence and security industry?
- c. Are UK-manufactured arms being used by the Royal Saudi Armed Forces in the conflict in Yemen?
- d. Have there been any infringements of the UK Government’s criteria for the granting of arms export licences with regard to the use of UK-manufactured arms in Yemen? If so, what should be done as a consequence?
- e. Should DfID’s formal involvement in granting arms export licences be extended to consider the impact on the sustainable development of both the recipient country and countries where British arms may ultimately be used?

102. The Government provided written evidence to the CAEC on 11 April 2016. The written memorandum addressed the main themes in the Terms of Reference above, namely:

- a. UK relations with the Gulf States and Saudi Arabia

- b. Current UK policy in the Gulf Region
- c. Pursuing UK strategic interests
- d. Defence Engagement and Counter-Terrorism
- e. The role of UK defence and security industry
- f. Origins of the 2015 Yemen Conflict and UK Response
- g. The legal basis for the Saudi-led coalition operations
- h. Reports of UK arms used in Yemen by Saudi Arabia/Saudi-led coalition
- i. Export Licensing and International Humanitarian Law (IHL)
- j. Political and Humanitarian response
- k. DFID role in export licensing beyond Criterion 8

103. Four Ministers (Tobias Ellwood, FCO Minister for the Middle East; Anna Soubry, BIS Minister for Small Business, Industry and Enterprise; Phillip Dunne, MOD Minister of State for Defence Procurement, and Desmond Swayne, DfID Minister of State) gave oral evidence to and responded to questions from the CAEC on 27 April 2016.

104. The conclusions of the inquiry are expected after the summer 2016 recess.

### C. All-Party Parliamentary Group on Yemen

105. Separately from CAEC, Ministers have also been involved in appearing before the All-Parliamentary Group on Yemen. FCO Minister Mr Ellwood has twice attended a roundtable discussion on Yemen hosted by Parliament's All-Party Parliamentary Group on Yemen. These meetings occurred on:

- a. 21 July 2015. It was hosted by APPG chair Keith Vaz, MP. As well as Parliamentarians, the APPG invited representatives from NGOs and humanitarian agencies to attend. Mr Ellwood had been requested to outline the Government's policy on Yemen, and participate in the subsequent discussion.
- b. 4 November 2015. This parliamentary discussion on Yemen was hosted by Mr Ellwood and attendees included Lady Hodgson and other parliamentary members, including from the APPG. The meeting's agenda included the following agenda items: UK policy approach and rationale, followed by discussion; and UK humanitarian assessment & access issues followed by discussion.

#### D. The International Development Committee Report

106. On 5 May 2016, the House of Commons International Development Committee published a report on the "Crisis in Yemen". The Committee had heard evidence from , inter alia, Mr Ellwood MP and the Deputy Head of APID and had also received correspondence from the Foreign Secretary (annexed to the Report) in which the Foreign Secretary: explained the basis for the Government's position that the mandatory refusal threshold in Criterion 2C has not been met; emphasised the Government's deep concern regarding the situation in Yemen; noted that its view was that the Saudis should be given an opportunity to investigate allegations of IHL violations.

107. The Report's conclusions noted that *"We have heard credible evidence of violations of IHL in Yemen"* and expressed the view that *"It is deeply disappointing that the UK Government does not accept that breaches of IHL have taken place in Yemen."* The Report further expressed concern as to whether Saudi Arabia was best placed to investigate the allegations of IHL abuses. It noted that the Government was not opposing calls for an independent investigation and urged the Government to press the Saudis to complete their review in a short time frame.

(<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmintdev/532/53202.htm>)

108. The Secretary of State for International Development provided a formal response to the Report.

([http://www.publications.parliament.uk/pa/cm201617/cmselect/cmintdev/557/55704.htm#\\_idTextAnchor005](http://www.publications.parliament.uk/pa/cm201617/cmselect/cmintdev/557/55704.htm#_idTextAnchor005))

#### IX. CORRECTIONS TO MINISTERIAL STATEMENTS

109. In June 2016, it was brought to our attention that there were inconsistencies in two parliamentary responses. In the light of this, officials conducted a thorough review of all our parliamentary responses and debates on this subject since March 2015. This process highlighted that there were inconsistencies in the drafting of answers to 4

written questions out of over 90 and two responses given in debates relating to allegations of breaches of IHL.<sup>6</sup>

110. Accordingly, on 21 July 2016, Mr Ellwood, issued a Written Ministerial Statement (Exhibit NC8) which clarified those inconsistencies in order to ensure that the answers given in all our written questions and debates accurately reflect the Government's policy.
111. I would emphasise that the Written Ministerial Statement of 21 July was issued at the earliest opportunity and that it does not represent or contain any change in policy.

#### X. THE CESSATION OF HOSTILITIES

112. A nationwide ceasefire was adopted from 15 December 2015 until 2 January 2016, in parallel to political negotiations which took place in Biel from 15 – 20 December 2015.
113. A further local de-escalation of the conflict on the Yemen / KSA border was agreed on 4 March 2016.
114. On 17 March 2016, in a press statement, Brigadier Assiri, the military spokesperson for the Saudi-Led Coalition declared its plans to scale back its military operations in Yemen, although noted that it would continue defensive operations in support of the Government of Yemen. (Exhibit NC4)
115. On 23 March 2016, the UN announced a nationwide ceasefire which commenced on 10 April 2016 and continues to present day. Our assessment is that the ceasefire is broadly holding and the Saudi-led Coalition has demonstrated restraint in response to Houthi provocations, including the launch of missiles across the KSA border.
116. The UN convened talks between the conflict parties in Switzerland in December 2015, with a further round beginning in Kuwait on 21 April. After a pause for Eid-al-Fitr,

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<sup>6</sup> Questions 24769 and 24771 (15 February 2016); Question 24770 (12 February 2016); Question 15523 (4 January 2016); Question 15523 (4 January 2016); Westminster Hall Debate on Human Rights and Arms Sales to Saudi Arabia (8 June 2016); Westminster Hall Debate on War in Yemen: First Anniversary from 22 March.

they recommenced on 16 July, again in Kuwait. Despite significant efforts from the UN Special Envoy, Ismail Ould Cheikh Ahmed, with political support from many G18 ambassadors (including the US, UK, Saudi Arabia and UAE) and financial support for the logistics of the peace process from several donors, including the UK, the parties have thus far been unable to reach an agreement. There has nonetheless been progress in identifying the core political and security issues that will form the basis of a future agreement, and in making agreements on prisoner releases and humanitarian access. The present round of talks is due to conclude on 7 August, after the Houthi/pro-Saleh GPC side refused to sign a first phase draft agreement presented by the UN Special Envoy. While UN-led discussions with both sides continue on the exact nature of the next round of talks, both sides continue to profess their commitment to peace talks, and to respecting the cessation of hostilities and participating in the De-Escalation and Coordination Committee which monitors the cessation of hostilities. The UK has consistently, both bilaterally and through multilateral organisations, called on the conflict parties to make the necessary compromises in order to reach a durable peace deal, and to respect the cessation of hostilities as the first step towards a permanent end to the war.

117. The UN announced on 23 March that a cessation of hostilities would begin to coincide with peace talks in Kuwait. This entered into force on 10 April. After political talks began on 21 April, there was a marked drop in violence levels across Yemen, including a period of ten consecutive days in which no Coalition airstrikes were recorded. Our assessment is that, although levels of violence have ebbed and flowed since then, the overall level of violence was significantly lower than before April, and the cessation of hostilities was broadly holding. Skirmishes mainly took place along the front lines established at the beginning of the cessation of hostilities, with little ground taken and held by either side. In recent weeks, the overall level of kinetic incidents has increased, in large part due to an uptick in Houthi-Saleh forces attacking the Southern border, with Saudi forces taking some losses. Despite considerable Saudi restraint in the face of regular Houthi-Saleh attacks and provocations, at times they have been compelled to respond. The overall level of violence remains lower than before April, and although challenged, the cessation of hostilities remains in place.



118. The conflict parties have committed to the relocation of the De-Escalation and Co-ordination Committee (DCC), the UN-created mechanism to monitor the cessation of hostilities, to Saudi Arabia, to improve co-ordination between military actors, but the Houthi-Saleh side is yet to send its representatives. Ensuring the functioning of the DCC during the upcoming pause in political talks is a high priority for the UN Special Envoy, and he has full support from the international community.

**I believe that the facts stated in this statement are true**

**SIGNED:**

*Neel Gh*

**DATED:**

*5 August 2016*