Claim No. CO/3579/2020

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

B E T W E E N:

THE QUEEN on the application of
CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant

AMENDED STATEMENT OF FACTS AND GROUNDS

References to the core (CB) and supplemental (SB) application bundles follow the format [bundle/tab/page]

Essential reading: *R (Campaign Against Arms Trade) v Secretary of State for International Trade* 1 WLR 5765, letter of 7 July 2020 **[CB/5/55]**, witness statement of Ann Feltham, dated 26 October 2020 **[CB/23/282]**.

Estimated reading time: 2 hours

A. INTRODUCTION

1. Campaign Against Arms Trade ("**CAAT**") challenges the on-going position of the Secretary of State for International Trade that she will (a) continue to grant licences for the transfer of military equipment to the Kingdom of Saudi Arabia ("KSA") for possible use in Yemen; and (b) that she will not suspend existing licences for the transfer of military equipment to KSA for possible use in Yemen.

2. There is an ongoing war in Yemen. The war has been notorious for serious breaches of International Humanitarian Law ("IHL") by all the parties. In particular, there is powerful evidence in the public domain of serious breaches of IHL by KSA. The UK exports much of the materiel (including bombs, aircraft and related equipment) used by KSA in Yemen.

3. On 20 June 2019, the Court of Appeal quashed the Secretary of State's decisions not to suspend extant licences to KSA and to continue to grant new licences (*R (Campaign Against Arms Trade) v. Secretary of State for International Trade* [2019] 1 WLR 5765 ("**CAAT CA Judgment**")). The Secretary of State had argued that it was not necessary to even attempt to reach a view as to whether serious breaches of IHL had been committed by KSA in Yemen. The Court of Appeal held that this approach was irrational. The issue was remitted to the Secretary of State for reconsideration in accordance with the law.

   Over a year later, on 7 July 2020, the Secretary of State wrote to CAAT to set out her new decision. The Secretary of State's new decision proceeded on the express basis that KSA had committed serious breaches of IHL in the war in Yemen. She also concluded that there was no pattern to those violations. The Secretary of State decided to resume granting licences for the sale or transfer of arms to KSA for use in Yemen. The Secretary of State has declined to state the number of cases where she accepts that a serious breach may have occurred or any detail as to why she says there is no pattern in the violations.

4. The Secretary of State has refused to provide any more detailed explanation of her decision on grounds that doing so could prejudice national security and may jeopardise the government's bilateral relationship with the Kingdom of Saudi Arabia.

5. These grounds are therefore based on the Secretary of State's OPEN explanation of her decision.

6. As in CAAT CA, there is likely to be CLOSED evidence which support the Claimant's case, not least because the Secretary of State has declined to give a public explanation of the full reasons for her decision. In order to ensure that the relevant material and arguments are before the Court, the Court is invited to make a declaration under s. 6 of the Justice and Security Act 2013 of its own motion.

B. SUMMARY OF CAAT'S POSITION

7. The Secretary of State's approach announced on 7 July 2020 is unlawful. The Secretary of State has:

   7.1. failed to identify all of the cases where there has been a serious breach of IHL;
   7.2. wrongly concluded that there is no pattern to the breaches;
   7.3. failed to properly take into account the failure of KSA to investigate, prevent or punish serious breaches of IHL itself; and
   7.4. misdirected herself as to the nature of a serious breach of IHL.

C. FACTUAL BACKGROUND

8. The background to the conflict in Yemen, and the involvement of the KSA-led Coalition in that conflict is set out in detail in the judgment of the Divisional Court in *R (Campaign Against Arms Trade) v. Secretary of State for International Trade* [2017] HRLR 8 [39 – 45, 61 – 79, and 87 – 175] ("**CAAT DC Judgment**"). That background is therefore summarised more briefly here.

9. There has been a conflict in Yemen since at least 2015 between competing groups claiming to constitute the legitimate Yemeni government. The KSA-led Coalition ("**the Saudi Coalition**")[1] has intervened in support of armed forces loyal to the government of Abd Rabbuh Mansur Hadi, who are engaged in hostilities with Houthi forces and militias loyal to the former president Ali Abdullah Saleh.[2] In March 2015 the Saudi Coalition commenced a military campaign. This military campaign has involved substantial numbers of air strikes against a wide variety of targets. KSA is the lead state in the Coalition and carries out the substantial majority of airstrikes attributable to the coalition.

10. The Saudi-led Coalition's military campaign has been on-going since 2015, involving both air and ground operations in support of the Yemeni government. As explained below,

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[1] States participating in the Coalition include Egypt, Morocco (until February 2019), 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.

[2] The alliance between Houthis and Saleh collapsed in November 2017. Saleh was killed when Houthi forces took over Sana'a.

throughout the conflict, KSA has been found by competent UN bodies, and respected NGOs (often following painstaking expert investigations) to have committed multiple violations of international humanitarian law ("**IHL**"), including in several incidents involving over 100 civilian casualties.[3]

11. The United Kingdom has granted licences (and refused to suspend existing licences) for the supply of a wide 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. It is common ground between the parties that this equipment is used by KSA in its military operations in Yemen.

(i) Findings of Violations by Competent UN Bodies

12. The impact of the conflict, and of KSA airstrikes in particular, on Yemen's civilian population has been immense. Critical civilian infrastructure, including hospitals, medical clinics, schools and sewerage treatment facilities have been destroyed by documented Coalition air strikes.[4] This has contributed to a widespread cholera epidemic. Much of the country faces famine, a situation made worse by the COVID19 pandemic. The situation in Yemen is described by the UN as the world's gravest humanitarian crisis.[5]

13. The responsibility for violations of IHL in the prosecution of the Coalition 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. These include, *inter alia*, the UN Security Council Panel of Experts on Yemen, the UN Panel of Eminent Experts on Yemen, the UN High Commissioner for Human Rights as well as reputable NGOs (whose findings and investigative methodology are regularly

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[3] For example, on 15 March 2016, KSA air strikes on Khamees market in the Mastaba district of the Hajjah Governorate killed more than 100 civilians, including 25 children (See UNHCHR Group of Eminent Experts 2018 Report § 31. **[SB/26/325]**

[4] See e.g. 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 **[SB/16/192]**

[5] See e.g. UN News "Yemen: millions of children facing deadly hunger, amidst aid shortages and COVID-19", 26 June 2020 **[SB/46/987-989]**; UNICEF "Yemen: 5 Years on: Children, Conflict and COVID19" **[SB/47/990-1006]**. In September 2020, the UN reported that 14.3 million people in Yemen (around half the population) are now in "acute need". *See* Yemen: Situation Report, September 2020, UN Office for Coordination of Humanitarian Affairs **[SB/48/1007-1015]**.

accepted by the UK Government as reliable in other contexts). Each of these investigations has concluded that KSA has committed repeated violations of IHL, many of them serious.

14. Identified violations include, *inter alia*, targeting which is indiscriminate in nature; repeated failures to respect the principle of distinction between civilians and combatants in military attacks; repeated failures to take "all feasible precautions" in attack to avoid death or injury to civilians; and attacks which result in disproportionate death or injury to civilians, absent any identifiable military target.

15. On a number of occasions, KSA airstrikes (with precision-guided munitions) have resulted in mass civilian fatalities of over 100 persons, on civilian sites including a market, a funeral and recently, a prison.

16. Since the hearing before the Divisional Court in February 2017, numerous further violations of IHL have been found to have occurred by the Security Council's Panel of Experts on Yemen, other authoritative UN bodies and respected NGOs – following detailed investigation by these organizations. Hundreds of civilians are reported to have been killed in these incidents. Violations found include indiscriminate targeting, failure to respect the principles of distinction and proportionality; repeated failures take "all feasible precautions" in verifying targets and avoiding civilian casualties (even on KSA's own account of events); enforced disappearance, torture and the unlawful operation of secret prisons.[6]

17. Reports setting out these findings are exhibited to the witness statement of Ann Feltham. By way of illustration, examples of identified violations of IHL since the Divisional Court hearing include: the detention, torture and (on-going) enforced disappearance of protestors in al-Mahrah and elsewhere[7], an attack on Dhamar prison, 31 August 2019, killing 100; an attack on a hospital on 23 March 2019, killing 7, including 4 children (which, even on KSA factual account of events appears to constitute a violation of IHL);[8] an airstrike on a

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6 See UN Group of Eminent Experts 2018 Report § 72 **[SB/26/330]**; UN Group of Eminent Experts 2019 Report **[SB/35/597]**.

7 *Saudi Forces Torture, Disappear Yemenis*, Human Rights Watch, 25 March 2020 **[SB/44/975-979]**.

8 In a press statement JIAT stated "[t]he mission commander hastened the work procedures to ensure that the military advantage is not lost, which resulted in inaccuracies in the assessment of the possibility of entering the non-military environment within the side effects of targeting.". *See* UN Panel of Experts Report 2020, Annex 27, Appendix 2, para. 5 **[SB/43/959]**. Article 57 API imposes an obligation on military commanders to "**do everything feasible** to verify" that the objectives to be attacked are not civilians and to take "**all feasible precautions**" to minimize civilian casualties **[SB/2/7]**. Thus, under

UNICEF water bore hole on 9 August 2018, (a site which was on a no-strike list and which deprived 10, 500 people of safe drinking water according to UNICEF);[9] an attack on a wedding on 22 April 2018, killing 21,[10] and an attack on a market, killing 43, mostly children (admitted by KSA as involving a failure to follow procedures to minimize civilian casualties).[11] Numerous further attacks, causing large number of civilians casualties, have occurred in 2020, albeit not yet subject to investigative findings.[12] In many of these incidents KSA admitted that its officials did not follow procedures to minimize civilian casualties or verify targets – something which emerges as a frequent pattern in KSA violations. Commenting overall on this activity, the Security Council Panel of Experts identified the following pattern "[t]aken as a whole, the cumulative effects on civilians and civilian objects demonstrated that, even where precautionary measures were taken [by KSA], they were largely inadequate and ineffective".[13]

(a) Security Council Panel of Experts on Yemen

18. The UN Security Council Panel of Experts on Yemen has published five detailed annual investigative reports, finding repeated serious breaches of IHL by KSA in Yemen. These reports cover the period 2015 – 2020. The findings of actual violations of IHL by the Panel, following forensic investigation, in dozens of incidents (resulting in hundreds of civilian deaths), could not reasonably be characterised as "isolated":

    18.1. The Panel of Experts was established (with UK backing) by UN SC Resolution 2140 (2014), to assist the Security Council Sanctions Committee (Yemen), by providing it with analysis and information relevant to the exercise of its sanctions

IHL a military commander must take "all feasible precautions" to avoid civilian casualties even if this might result in a loss of military advantage.

9 UN Panel of Experts Report 2019, Appendix 33, page 183 **[SB/30/474]**. Under IHL it is prohibited in all circumstances to attack an object which is indispensable to the survival of the civilian population (see Article 14, APII).

10 Again, KSA accepted that rules of engagement to minimize civilians casualties were not followed in this incident. This is a violation of IHL (even if not formally acknowledged as such by KSA). See UN Panel of Experts Report, 2019, page 180 **[SB/30/471]**.

11 UN Panel of Experts 2019 Appendix 33, page 186 **[SB/30/477]**. Based on KSA's own explanation, this constitutes a violation of the obligation under IHL to take "all feasible precautions" to minimize civilian casualties.

12 For example, the UN Office for the Coordination of Humanitarian Affairs Reported that around 30 civilians, including many children, were killed in airstrikes in the Maslub area. See AP News "UN Official says airstrikes kill over 30 civilians in Yemen", February 2020.

13 UN Panel of Experts 2019 § 137 **[SB/30/458]**.

functions.[14] These functions include, *inter alia*, the imposition of sanctions on persons or entities which engage in "planning, directing or committing acts that violate applicable international human rights law, international humanitarian law or acts that constitute human rights abuses in Yemen".[15] As a result, the Panel of Experts is resourced and mandated to investigate breaches of IHL by all sides to the conflict in Yemen. The Panel is comprised of four senior experts (in IHL, military operations and other relevant fields) and is assisted by a support staff.

18.2. The detailed methodology adopted by the Panel is set out in Appendix B, Annex 1, 2020 Panel Report. The Panel adopts a "stringent methodology to ensure that its investigations meet the highest possible evidentiary standards".[16] A right of reply is afforded to states, persons or entitles likely to be made subject to findings by the Panel. The panel may also request information from KSA or other states as regards specific incidents, who are required to cooperate with the Panel of Experts.[17] Despite a series of requests for information regarding potential breaches of IHL, KSA has not responded to many of the Panel's requests for information. As a result, it has been found by the Panel to be in material non-compliance with Security Council Resolution 2266 (2016).[18] The Panel's conclusions are based on verifiable information, including: eye-witness testimony; satellite and other independent / verifiable imagery of explosive events. Each event is verified from at least two unrelated sources. The panel also has access to expert military analysis of impact sites (enabling analysis, for example, of damage, impact, ordnance deployed; the provenance of ordnance and its capabilities). Full details of the Panel's investigation are published in confidential annexes to its main report, with its key findings published.

19. Since 2016, the Panel has investigated KSA's compliance with IHL in Yemen, both at a general level, and in very detailed specific investigations into around 34 particular incidents. These incidents caused around 700 fatalities and included airstrikes on hospitals

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14 Paragraph 21 UN Security Council Resolution 2140 (2014) **[SB/5/25]**.

15 Paragraph 17 (c), UN SC Resolution 2140 (2014) **[SB/5/24]**. In its 2020 Report, the Panel notes that since 2016, it has sent some 11 letters, concerning more than 40 airstrikes. No reply has been received to these requests for information (Paragraph 93, Panel of Experts 2020 Report) **[SB/43/943-944]**.

16 Paragraph 1, Appendix B, Annex 1, 2020 Report **[SB/43/953]**.

17 Paragraph 8, Resolution 2266 (2016).

18 E.g. Paragraph 126, 2017 Panel Report **[SB/16/190]**.

and medical facilities (the coordinates of which were often in the possession of the Coalition); markets; a prison, residential areas; vital civilian infrastructure (such as a water supply system); and funeral / wedding services. In a number of individual attacks well over 100 civilians were killed.

20. The Panel concluded in 32 of the 35 specific incidents investigated, that it was "highly likely" or "almost certain" that the rules of IHL had been breached by KSA (specifically, the rules of distinction, proportionality and the duty to take "all feasible precautions" to protect civilians prior to launching an attack).[19] The Panel found that a number of incidents may also constitute war crimes under the Geneva Conventions.[20] In its 2016 Report the Panel found 119 incidents in which the Coalition had violated IHL, with hundreds of civilian deaths. As well as violations perpetrated by airstrikes, the Panel of Experts have also found other violations perpetrated by Coalition ground forces in Yemen.

21. In its 2018 report, the Panel of Experts observed that, analysed cumulatively, the violations indicate that "even where precautionary measures were taken, they were largely inadequate and ineffective".[21] A similar finding was again repeated in its 2019 report.[22] In its 2017 Report the Panel concluded that there are a number of "patterns" underpinning KSA's violations of IHL. The Panel found that "violations 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".[23]

(b) Other UN Agencies findings on Yemen

22. Other UN agencies have also investigated KSA's activities in Yemen – and its respect for IHL and IHRL more generally. Numerous violations of IHL have been identified, many serious. These include the UN Secretary General; the UN High Commissioner for Human Rights; the UN Group of Eminent Experts on Yemen (appointed by the High Commissioner); UN Special Rapporteurs; and specialist agencies such as UNESCO.

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[19] *See* Panel of Experts Report 2017 § 127 **[SB/16/190-191]**; Panel of Experts Report 2018 § 161 **[SB/20/255-256]**; Panel of Experts Report 2019 § 136 **[SB/30/457]**; Panel of Experts Report 2020 § 97 **[SB/43/945]**.

[20] See Panel of Experts Report 2017 § 143 **[SB/16/197]**.

[21] Paragraph 161 (d), Panel Report 2018 **[SB/20/256]**.

[22] Paragraph 136 (c), Panel Report 2019 **[SB/30/457]**.

[23] Paragraph 131 Panel Report 2017 **[SB/16/192]**.

23. In September 2017, the UN High Commissioner for Human Rights established a group of Eminent Experts ("**the Group of Experts**"), with a broad mandate, to investigate alleged violations of IHRL or IHL by parties to the conflict in Yemen, to establish the facts and make findings. The findings of violations by these officials and agencies are numerous. An overview is provided in the Witness Statement of Ann Feltham. The Group of Experts identify patterns in the serious violations it examined.[24] It found that there were, at least, 32 attacks on hospitals, medical or educational facilities and "credible information" that the no-strike list in the possession of the Coalition was not being adequately respected. The experts also identified 11 attacks on marketplaces, including one on 15 March 2016, on Khamees market, which killed more than 100 civilians, including 25 children. A further airstrike on Mahsees Market on 26 December 2017 killed 46 civilians. A series of five attacks on weddings and funerals were also identified. This included the so-called "Great Hall" attack on 8 October 2016, killing 137 civilians and another attack on 22 April 2018, killing in Al-Raqah village, killing 23 civilians. The Group also identified a series of 11 attacks on civilian boats off the shores of Hudaydah from November 2015 until May 2018, killing around 72 civilians, including 32 refugees fleeing Somalia.

(c) Findings by NGOs on KSA violations in Yemen Conflict

24. Respected NGOs, including Human Rights Watch, Amnesty International and others have conducted their own detailed investigations into violations of IHL by the Saudi-led Coalition, in dozens of incidents. As the Court of Appeal emphasised in CAAT CA Judgment [134] "the major NGOs… and the UN Panel of Experts had a major contribution to make in recording and analysing events on the ground in the Yemen conflict". As the court noted [134], the NGOs are able to interview eye-witnesses and their investigators are often able to attend the scene of an alleged attack. Understandably, this is not the kind of analysis the government can undertake. Moreover, their reports are detailed and compiled by IHL experts.

25. The findings of these investigations are summarised in the witness statement of Ann Feltham. But, in summary, NGOs including HRW and Amnesty International have (like

[24] Report of the Group of Eminent Experts on Yemen (2018) §§ 29 – 37 **[SB/26/325-326]**.

UN investigators) concluded that the Saudi-Coalition has perpetrated violations of IHL, in many dozens of incidents, in breaches including: indiscriminate targeting; failing to take all feasible precautions in attack; destroying items indispensable to the survival of the civilian population; failure to respect of the immunity of medical personnel and hospital from attack; and attacks disproportionately killing civilians. Each of these constitute serious violations of IHL.

(d) Other grave violations of international law by KSA

26. KSA has been found by competent UN agencies, national authorities and respected NGOs to be responsible for a wide range of other grave breaches of international law (in reports the UK government accepts as authoritative in other contexts). These findings are also important in assessing the risk of arms transfers as they demonstrate KSA's attitude to compliance with fundamental human rights which must be assessed in the Criterion 2 (c) assessment.

27. KSA has been found to systematically violate the prohibition on torture; engage in unlawful killings and enforced disappearance; as well as the arbitrary arrest and detention of dissidents. Impunity is afforded to state officials accused of torture and other similar grave violations of international law. The UN Committee Against Torture reported that "torture and other ill-treatment are routinely practiced in prisons and detention centres" in KSA.[25] The UN Special Rapporteur on Counter Terrorism made the same finding following a 2018 country visit.[26] The Special Rapporteur also concluded that "[t]hose who peacefully exercise their right to freedom of expression are systematically persecuted in Saudi Arabia". [27] These findings are confirmed in successive annual reports by the US State Department's on KSA, which finds torture, enforced disappearance and unlawful detention common place within KSA.

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[25] Concluding Observations on Saudi Arabia, 8 June 2016, CAT § 7 **[SB/10/72]**.

[26] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Saudi Arabia (2018) § 69 **[SB/29/443]**.

[27] *Ibid*. § 69.

28. Separately, following detailed investigation, the UN found that KSA bears responsibility for the abduction and murder of the journalist Jamal Khashoggi in its consulate in Istanbul. The Special Rapporteur on extra-judicial killing found:

28.1. KSA was responsible for the extra-judicial killing of Mr. Khashoggi, in violation of IHRL, the UN Charter, the Vienna Convention on Consular Relations and the Convention Against Torture.[28] In particular, Mr Kashoggi was "the victim of a deliberate, premeditated execution, an extrajudicial killing for which the state of Saudi Arabia is responsible".[29]

28.2. The Special Rapporteur found that the killing was likely perpetrated with the active involvement of numerous senior state officials[30] and that it is "inconceivable" that an operation of this scale could have been perpetrated without the Crown Prince being aware that a "mission of a criminal nature, directed at Mr. Khashoggi, was being launched".[31] Furthermore, the killing took place against the background of an "organized and coordinated" crack-down involving "repeated unlawful acts of torture and physical harm". The "Crown Prince condoned this behavior and allowed the repetition and escalation of these crimes. He took no action to prevent or punish those responsible".[32] There is credible evidence that the crime scene was forensically cleaned by KSA officials which indicates that "the Saudi investigation was not conducted in good faith, and that it may amount to obstructing justice".[33] KSA permitted evidence to be destroyed, which "could not have taken place without the Crown Prince's awareness".[34] A number of unidentified individuals have faced prosecution (in secretly conducted proceedings) in KSA in connection with the killing. However, the Special Rapporteur has expressed "grave concerns" that these proceedings fall below basic fair trial standards and may result in a miscarriage of justice.[35] The significant (and unexplained) discrepancy between

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28 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi §§ 1-3 **[SB/34/501]**.

29 Paragraph 235, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi **[SB/34/544]**.

30 Paragraph 201, Ibid **[SB/34/537]**.

31 Paragraph 258 (d), *ibid*. **[SB/34/549-550]**

32 Paragraph 257, *ibid*. **[SB/34/549]**

33 Paragraphs 8 and 288 et seq., *ibid*. **[SB/34/502-557]**

34 Paragraph 259, *ibid*. **[SB/34/550]**

35 Paragraph 259, *ibid*.

those identified as having involvement in the killing, and those put on trial, is also a matter of concern. It is perhaps doubtful that all those truly responsible have been or will be brought to justice.[36]

(e) Impunity of State Officials in KSA

29. Grave violations of international law often go uninvestigated and unpunished in KSA. In its recent country reports on KSA, the US State Department has repeatedly found that KSA lacks an independent legal system. The Public Prosecutor's Office, judges, the Public are required "to coordinate their decisions with executive authorities, with the king and crown prince as arbiters".[37]Adverse findings on impunity have also been made by other organisations. Following a country investigation, the UN Special Rapporteur on Counter Terrorism found "[t]hose who peacefully exercise their right to freedom of expression are systematically persecuted in Saudi Arabia" and that "a culture of impunity prevails for public officials who are guilty acts of torture and other ill-treatment".[38] Similarly, the Committee Against Torture found a "lack of independence and impartiality of the judiciary", and that complaints of torture by state officials "are rarely investigated, which allegedly create a climate of impunity".[39] The Saudi authorities are reported to have passed a number of files to prosecutorial authorities in respect of several incidents in Yemen. However, no prosecutions have been initiated as a result according to the US State Department's 2019 report, and other sources.[40]

(f) Secretary of State's Decision-Making Process and Decision

30. Following the judgment of the Court of Appeal, the Secretary of State adjusted her decision-making process as explained below. However, many aspects of the decision-making process appear to remain the same. This process is set out in detail in the CAAT DC Judgment [103-174]. The Secretary of State takes six "strands" of information. This includes a database of incidents prepared by the MOD, referred to as "the Tracker" system.

[36] Table D, Page 37 and paragraphs 236 and 252 *ibid* **[SB/35/534, 544, 548]**. KSA has said the operation was planned by Mr. Ahmed Asiri (former chief spokesman for the Coalition in the Yemen conflict, who issued the "May Declaration", in which KSA declared the entire city of Sa'dah and the region of Maran as "military targets").

[37] See US State Department Country Report: Saudi Arabia (2019) **[SB/40/754]**.

[38] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Saudi Arabia (2018) § 69 **[SB/29/443]**.

[39] Concluding Observations on Saudi Arabia, 8 June 2016, CAT §§ 22 and 28 (c) **[SB/10/75-76]**

[40] US State Department Country Report: Saudi Arabia (2019) **[SB/40/742]**.

Allegations of breaches of IHL come to the MOD from a variety of sources, including media, NGO reporting and UN bodies. The issues addressed by the MOD in its "analysis" are: (a) whether it is possible to confirm that a specific incident has occurred; (b) whether the incident was likely to have been caused by a Coalition strike; (c) whether it is possible to identify the Coalition nation involved; (d) whether a legitimate military object is identified; and (e) whether the strike was carried out using an item that was licensed under a UK export licence.

31. In addition, the Secretary of State has access (albeit limited) to KSA military processes and procedures, as a result of the diplomatic and military relationship between KSA and the United Kingdom. There are, however, important limits to this knowledge (CAAT DC Judgment [121-125]). The government does not, for example, have access to the operational intelligence KSA relies on in conducting an airstrike (CAAT DC Judgment [201 (iii)]). Other strands of information which inform the Secretary of State's decision include the UK's diplomatic engagement with KSA (CAAT DC Judgment [128-131]; the public reports of the Coalition's Joint Incident Assessment Team ("**JIAT**") (CAAT DC Judgment [128-131]; public statements of KSA officials (CAAT DC Judgment [134-135]; and updates on the situation in Yemen prepared by the FCO (CAAT DC Judgment [150 – 151]).

32. Previously, this process did not involve HM Government preparing any analysis as to whether KSA might have violated IHL in any specific incident. This was the approach that was found to have been unlawful in CAAT CA. The Secretary of State has written explaining her revised approach to decision-making in this area by letters of 7 July 2020, 28 July 2020 and 27 August 2020. Under the revised method adopted following the judgment of the Court of Appeal:

    32.1. The MOD engages in "analysis of all of the incidents of concern recorded on the Tracker which the MOD assesses are credible – that is, the information and intelligence available indicates that the alleged events are likely to have happened and to have involved fixed wing aircraft" (Letter of 7 July 2020 § 9). This is referred to as the "IHL Analysis".

    32.2. As regards all "credible" incidents (as defined), the IHL analysis reaches a conclusion on "whether it is possible that the incident constituted a breach of IHL;

or whether it is unlikely that it represents a breach". Incidents which are identified as "possible" breaches of IHL "are regarded – for the purpose of the Criterion 2C Analysis – as if they are breaches of IHL".

32.3. It is said that in an unquantified "number of incidents" it is not possible to form a view as to whether a violation was a "possible" violation, owning to the lack of information available (Letter of 7 July 2020 § 18). Possible violations of IHL as regards "credible" incidents are factored into the Secretary of State's decision as to whether Criterion 2 (c) of the Consolidated Criteria are met, as if they are "established" violations.

33. The Secretary of State's decision was communicated to CAAT by letter of 7 July 2020. In this letter she explained her revised decision-making process (as above). She declines to provide other than a generalised description of that process, or her decision, on grounds that doing so could prejudice national security or the UK's international relations. However, her core reasoning is set out in her letter §§ 20 – 22:

33.1. It is said that a number of incidents have been identified as "possible" breaches of IHL by KSA. The Secretary of State explains that the MOD has analysed whether these "possible" violations of IHL are indicative of (i) any patterns of non-compliance; (ii) a lack of commitment on the part of Saudi Arabia to comply with IHL; and/or (iii) a lack of capacity or systemic weaknesses which might give rise to a clear risk of IHL breaches.

33.2. The Secretary of State concludes that this analysis by the MOD has not revealed any patterns, trends or weaknesses. The Secretary of State concluded, in particular, that the incidents which have been assessed to be possible violations of IHL occurred at different times, in different circumstances and for different reasons. The Secretary of State assesses that these are "isolated" incidents.

34. As a result, the Secretary of State decided that she would grant new licences for the sale or export or arms or military equipment to KSA for possible use in Yemen and that she would not suspend existing licences for the transfer of such equipment to KSA.

D. LEGAL FRAMEWORK

35. The legal framework governing the export of military equipment to KSA is set out in detail in the CAAT CA Judgment [12 - 25]. The main points can be summarised as follows.

(a) Legislative framework

36. The Export Control Act 2002 ("**the 2002 Act**") provides the legal framework for the regulation and control of the export of certain goods, including military equipment and technology, from the United Kingdom. Controls may be imposed by the Secretary of State "for the purpose of giving effect to any EU provision or other international obligation of the United Kingdom": s. 5(2). **[CB/17/106-110]**

37. Section 9 of the 2002 Act empowers the Secretary of State to give guidance about any matter relating to the exercise of her licensing powers; and requires her to set out the general principles to be followed. By s. 9(5) of the 2002 Act, decision makers must have regard to this guidance "when exercising a licensing power or other function" under the 2002 Act.

38. The Export Control Order 2008 (the **2008 Order**) provides for controls in respect of the export of military goods or technology from the United Kingdom. Article 32 of the 2008 Order empowers the Secretary of State to "amend, suspend or revoke a licence [previously] granted by the Secretary of State". **[CB/19/116]**

(b) Policy Framework

39. According to the Government's policy on export control licensing, as set out in Parliament on 7 February 2012 by the Secretary of State for Business, Innovation and Skills, the suspension mechanism in Article 32 of the 2008 Order will be "triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult". This policy must be read in conjunction with the Consolidated Criteria, which require a risk assessment to be conducted on the basis of "reliable evidence". **[CB/20/117-118]**

40. The Common Position applies to EU Member States exporting arms and military equipment to non-EU States. The Common Position is legally binding as between Member

States and continues to apply in the United Kingdom during the transitional period following the UK's departure from the EU. Article 1 imposes an obligation to assess applications for arms export licenses case by case, in conformity with the criteria set out. Under Article 13 of the EU Common Position, the User's Guide to the European Code of Conduct on Exports of Military Equipment ("**the User's Guide"**) "shall serve" as guidance for the implementation of the Common Position.[41] **[CB/18/111-115]**

41. The United Kingdom implements the requirements of the Common Position through the Consolidated Criteria **[CB/119-126]**. The Consolidated Criteria serve as guidance under s. 9 of the Export Control Act 2002. Criterion One provides:

> The Government will not grant a licence if to do so would be inconsistent with, *inter alia*: […]
>
> (b) the UK's obligations under the United Nations arms trade treaty; […]
>
> (f) European Union common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.

42. Criterion Two provides:

> Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, 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.

43. The Consolidated Criteria also provide:

> 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".

[41] A revised version of the User Guide was adopted by Council Decision of 16 September 2019.

44. Of the words "clear risk" and "might", the User's Guide says this at §2.7:

> The combination of 'clear risk' and 'might' in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression."[42]

At §2.13, the User's Guide continues:

> A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international law humanitarian law should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments <u>and</u> the recipient's capacity to ensure that the equipment or technology is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.
>
> Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.

45. The User's Guide then identifies a series of questions which a decision-maker should investigate in assessing whether there exists a clear risk, including whether:

    45.1. "there [is] national legislation in place prohibiting and punishing violations of international humanitarian law?";

    45.2. "the recipient country ratified the Rome Statute of the International Criminal Court?";

    45.3. "there is an independent judiciary capable of prosecuting serious violations of international humanitarian law?"

[CB/22/127-281]

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[42] This was in the context of internal repression (Criterion Two (a)), but the same words ("clear risk" and "might") are also used in Criterion Two (c), to which this part of the guidance is also plainly applicable.

(c) International humanitarian law

46. The relevant requirements of IHL (derived in particular from the four Geneva Conventions of 1949, Additional Protocols I and II and customary international law) include the following obligations (see CAAT CA Judgment [23-25]):

    (a) the obligation to take all feasible precautions in attack and to do everything feasible to verify that targets are not civilian;

    (b) the protection for medical clinics and medical transport;

    (c) the prohibition on attacking objects indispensable to the survival of the civilian population;

    (d) the prohibition on indiscriminate attacks;

    (e) the prohibition on attacks which cause disproportionate death or injury to civilians;

    (f) the prohibition on attacks directed against civilian objects and/or civilian targets;

    (g) the obligation to investigate and prosecute;

    (h) the obligation to make reparation.

47. The Consolidated Criteria (and the Common Position which it seeks to implement) requires assessment of the risk of "serious violations" of IHL. This is the central legal concept in the risk assessment.

48. The concept of "serious violations" is a term of art in IHL with a specific meaning. It refers to a "breach of a rule [of IHL] protecting important values" involving "grave consequences for the victim" (see *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]).[43] In particular, the concept of serious violation is different from, and broader than, the concept of a "war crime". Furthermore, a serious violation of IHL may, in principle, be committed absent any

[43] *See also* Articles 89 and 90 of Additional Protocol I to the Geneva Conventions and International Committee of the Red Cross (**ICRC**) authoritative commentary on Article 89 of AP I **[SB/2/8-10; SB/3/11-13]**.

intent, recklessness or, indeed, any mental element on the part of the state which perpetrates the serious violation (for example, by a failure to take all feasible precautions in attack).

49. In addition, a single instance in which IHL has been violated may, on its own, and absent any pattern of violations, constitute a "serious violation" of IHL. The meaning of the concept of a "serious violation" of IHL, and whether it was applied correctly by the Secretary of State in previous decision-making in this area, is an issue between the parties presently before the Supreme Court. The Claimant understands from correspondence that the Secretary of State's position is that she accepts that this paragraph correctly describes the concept of serious violation and has directed herself in the decision under challenge accordingly. Should this not be the case, the Claimant invites the Secretary of State to urgently clarify her position in accordance with the duty of candour.

(d) The Arms Trade Treaty

50. The government has made clear that it will interpret and apply the Consolidated Criteria in a manner consistent with its obligations under the Arms Trade Treaty ("**ATT**")[44] and, in particular, will refuse a licence where it is inconsistent with its obligations under the ATT.[45] Prior to granting an export licence, State Parties to the ATT must "assess the potential" that the arms or military equipment "would contribute to or undermine peace and security" or could be used to "commit or facilitate" serious violations of IHL or IHRL (Article 7 (1) (a) and (b), ATT). The ATT imposes an obligation to consider safeguards. According to Article 7 (2), an exporting state must also "consider whether there are measures that could be undertaken to mitigate [the] risk..." that the military equipment could be used "to commit or facilitate violations of IHL or IHRL. According to Article 7 (3) "[i]f, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1 [e.g. that the arms "could be used" to "commit or

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44 The Arms Trade Treaty entered into force in respect of the UK on 24 December 2014. **[SB/6/28-39]**

45 Parliamentary Written Ministerial Statement by Minister for Business, Innovation and Skills, 25 March 2014, Col. 9WS **[CB/21/119-126]**

facilitate violations of IHL or IHRL"], the exporting State Party shall not authorize the export".

E. GROUNDS

(a) No proper basis for conclusions that violations limited to those identified by the Secretary of State

51. The Secretary of State now accepts that KSA has committed possible serious violations of IHL in a number of incidents (which she treats as "established" violations for purposes of her analysis) (letter of 7 July 2020 § 20).

52. First, it is unclear which incidents have been accepted by the Secretary of State to involve "possible" serious violations of IHL. Despite requests, the Secretary of State has refused to identify or particularise the incidents involved. The Secretary of State refuses even to state the number of incidents accepted to be "possible" serious violations of IHL, beyond a general statement that the number of cases is "small".

53. It therefore follows that the Secretary of State has determined that in the large number of cases identified as breaches of IHL by international bodies, in most such cases there is not even a "possible" breach. It is difficult to understand on what basis such a conclusion has been reached as no attempt has even been made to provide general or redacted reasons for the decisions taken.

54. The OPEN evidence of reports by reputable international bodies establishes a compelling *prima facie* case of repeated serious violations of IHL. Nothing the Secretary of State has put forward justified a conclusion that there have, in fact, been merely a "small number" of possible violations.

55. The Claimant considers that the rejection of these reports are not reasonable or justified. It will be necessary (as it was in the earlier litigation) for Special Advocates to be appointed to review the material which the Secretary of State declines to provide to the Claimant.

(b) No proper basis for conclusions that no "pattern" of violations existed

56. Despite her acceptance that a number of breaches of IHL are to be treated as having been committed by KSA, the Secretary of State concludes that there is no "clear risk" that UK weapons "might" be used in similar such violations in the future. She reaches this conclusion on the basis of findings that:

    56.1. none of these violations demonstrate "patterns, trends or [capacity or systemic] weaknesses" on the part of KSA which "might give rise to a clear risk of IHL breaches" (letter of 7 July 2020 § 21); and (relatedly);

    56.2. that the "established" violations are found to be "isolated" incidents, since "the incidents which have been assessed to be possible violations of IHL occurred at different times, in different circumstances and for different reasons" (letter of 7 July 2020 § 21).

57. The Secretary of State's approach appears to be based on guidance as to the meaning of the "clear risk" test, set out in the User Guide § 2.13:

> Isolated incidents of international humanitarian law violations are not <u>necessarily</u> indicative of the recipient country's attitude towards international humanitarian law and <u>may not</u> by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern (emphasis added).

58. As the Court of Appeal's judgment made clear, the question of whether there exists a pattern of violations is one which "requires to be faced" (CAAT CA Judgment [138]) (even if, in itself, the fact that breaches are "isolated" is not determinative).[46]

[46] Of course, even if there is no "pattern" of violations, and past incidents are merely "isolated", it does not follow that there is necessarily no "clear risk" that military equipment "might" be used in commission of serious violations of IHL. Such a risk may arise because of the risk of further isolated incidents.

59. In this context, the Secretary of State's overall conclusion that the identified "established" violations of IHL are merely "isolated" incidents and do not constitute a "pattern" is critical to her overall finding that the Criterion 2 (c) test is not met. However, based on the OPEN evidence, the Secretary of State's conclusion is not rational:

   59.1. First, the OPEN evidence overwhelmingly establishes repeated (serious) violations of IHL. Every independent international body which has investigated specific violations of IHL by KSA in Yemen has concluded that KSA has perpetrated repeated violations of fundamental rules of IHL.[47] The UN Security Council's Panel of Experts has conducted detailed investigations into at least 34 incidents (involving hundreds of fatalities) and involving attacks on hospitals, medical facilities, food markets, funeral/weddings, a prison and vital civilian infrastructure. It has also reached broader conclusions that IHL has been violated in many incidents it has not had capacity fully to investigate. In several of the investigated violations civilian casualties have numbered well over 100 dead. In almost all (32) of these incidents the Security Council's Panel of Experts concluded that that it was "highly likely" or "almost certain" that the rules IHL had been breached by KSA.[48] Similar findings of violations have been made in respect of several dozen other incidents by respected NGOs, such as HRW or Amnesty International, following detailed country investigations.[49] Illustrative examples of incidents which – on any reasonable view – constitute (at least) "possible" violations of IHL in the annex to these grounds. Such reports have been issued year after year, without any significant evidence of a change in approach or improvement in the conduct of KSA, or the avoidance or past conduct, such as the targeting of crowded markets.

[47] Identified violations include the principle of distinction; the prohibition on indiscriminate targeting; the duty to take all feasible precautions in attack; the duty to take all feasible precautions in the verification of targets; the prohibition on attacks on medical personnel or facilities; the prohibition on targeting wounded or sick combatants or persons not directly participating in hostilities; the prohibition on launching attacks causing disproportionate harm to civilians.

[48] *See* Panel of Experts Report 2017 § 127 **[SB/16/190-191]**; Panel of Experts Report 2018 § 161 **[SB/20/255-256]**; Panel of Experts Report 2019 § 136 **[SB/30/457]**; Panel of Experts Report 2020 § 97 **[SB/43/945]**.

[49] *See for example:* **SB/8/44-54; SB/11/83-150; SB/12/151-163; SB/36/678 (fn. 82); SB/38/690-696; SB/41/800-933; SB/42/934-938**

59.2. Secondly, in explaining her decision, the Secretary of State has offered no explanation why these findings of the UN agencies and major NGO's are wrong. No flaw or misdirection in the IHL analysis put forward by these bodies has been suggested. Rightly, there is also no suggestion that the methodology by which the UN agencies or NGOs have reached their conclusions is flawed. As recognised by the Court of Appeal's judgment [134] NGOs and the UN Panel of Experts have a "major contribution" to analysing events in Yemen and are carried out in a methodologically rigorous manner (as explained above). Moreover, as the Court of Appeal observes [134] UN agencies and NGOs have available to them means of investigation not available to the Secretary of State, including the ability to conduct investigations on the ground, to examine the scene of incidents and physical evidence and to speak to witnesses.

59.3. The position before the Divisional Court was that the MOD was unable to identify a military target in the majority of incidents recorded by it (three quarters in some reporting periods) (CAAT CA Judgment [71]). This accords with the findings of the UN Panel of Experts, which also identified the repeated absence of military targets as of concern.[50] This is a matter of some significance, in an analysis which treats "possible" violations of IHL as "established" violations. A "basic rule" of IHL is that to be lawful every attack must be directed at a military target.[51] CAAT accepts that the absence of *evidence* of a military target does not necessarily mean that such an attack constitutes a violation of IHL. But – absent any indication of a military target – without more, the attack must be treated as *prima facie* inconsistent with Article 48 API.

59.4. Thirdly, the OPEN evidence confirms the existence of a pattern of conduct. Patterns include a repeated failure by KSA to take "all feasible precautions" to

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50 For example, in its 2017 Final Report the Panel of Experts found § 127 that in 8 of the 10 specific incidents it investigated "there was no evidence that the airstrike had targeted legitimate military objective" and that the use of precision guided munitions in these airstrikes indicated that the intended target was hit. **[SB/16/190-191]**

51 Article 48 of Additional Protocol I to the Geneva Conventions 1949 states "[i]n order to ensure respect for, and protection of, the civilian population and civilian objects…the parties to a conflict shall direct their operations only against military objectives". **[SB/5/5]**

minimize civilian casualties and to "do everything feasible" to verify that targets are not civilian, before launching attacks. This failing is apparent on KSA's own explanation of many of the incidents.[52] In its 2020 and 2019 reports, the UN Panel of Experts recorded that KSA had repeatedly admitted it had failed to take steps to minimize civilian casualties, prior to attacks (a number of which involved mass civilian fatalities) and to respect its own procedures and rules of engagement. Assessing the position overall the Security Council Panel of Experts has found "[t]aken as a whole, the cumulative effects on civilians and civilian objects demonstrated that, even where precautionary measures were taken [by KSA], they were largely inadequate and ineffective".[53] The Panel has previously found that "violations associated with the conduct of the [Saudi Coalition's] air campaign are sufficiently widespread to reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure".[54]Other repeated violations identified in the reports of UN agencies and NGOs include breach of the prohibition on indiscriminate targeting, breach of the principle of distinction and proportionality. These violations have been found to occur repeatedly. In addition, KSA has repeatedly: attacked targets on a "no strike" list;[55] attacked hospitals, schools and medical facilities; and destroyed infrastructure indispensable to the survival of the civilian population (a violation of IHL).

59.5. Fourthly, the Secretary of State has not subjected alleged violations of IHL <u>other than airstrikes</u> to analysis to determine whether these form part of a "pattern", in assessing KSA's record of compliance with IHL in the Yemen

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[52] For example, as recorded in the UN Panel of Experts report, KSA has admitted failing to follow procedures to minimize civilian casualties, or to verify targets, in incidents including: an attack on a hospital on 23 March 2019, killing 7, including 4 children; an attack on a wedding on 22 April 2018, killing 21; an attack on a market, killing 43, mostly children, on 9 August 2018. This list is non-exhaustive (see Annex 27 UN Panel of Experts Report 2020 **[SB/43/956-972]**). KSA does not appear to have admitted that these events are violations of IHL – but the explanation provided is consistent only with a violation.

[53] UN Panel of Experts 2019 § 137 **[SB/30/458]**.

[54] UN Panel of Experts 2017 § 131 **[SB/16/192]**.

[55] The UN and humanitarian organizations operating in Yemen (such as MSF) provide the Saudi Coalition with precise details of their coordinates and their activities. Despite this, on numerous occasions, the Saudi Coalition has targeted locations on the "no strike" list.

conflict (letter of 27 August 2020 [§ 2]). This approach falls into error for several reasons:

(a) First, it is wrong in principle – and contrary to the approach required by the Court of Appeal which held that the question of whether there existed a pattern of violations by KSA was one which "required to be faced" [138]. Neither the Court of Appeal's finding, nor the approach required by the User Guide, is limited to any specific category of violation – as the Secretary of State now appears to suggest. Indeed, User Guide stipulates that the "clear risk" assessment of clear risk must involve inquiry into "the recipient's past and present record of respect for international humanitarian law".

(b) Second, the Secretary of State's approach also undermines her fundamental conclusion that breaches of IHL by KSA in the Yemen conflict are "isolated". Such a conclusion is not sustainable where the Secretary of State has excluded ongoing serious violations of IHL outside the context of air strikes from her analysis of specific incidents, including enforced disappearance, torture and other alleged grave violations of IHL perpetrated by KSA in Yemen.

(c) In its Final Report in 2020, the UN Panel of Experts found that "[a]rbitrary arrest and detention, enforced disappearances, ill-treatment and the torture of detainees continue to be conducted by the Government of Yemen, Saudi Arabia …".[56] In March 2020, following detailed investigation (including interviews with eye witnesses and government officials),[57] HRW found that Saudi forces were responsible for the torture, detention of 16 detainees at al-Ghaydah airport, the illegal transfer under IHL[58] of at least 11 of those 16 detainees from al-Mahrah to KSA territory. Individuals were held, and

56 UN Panel of Experts Final Report 2020 p. 2, and §§ 100-101, and confidential annex 28 (available to the government as a member of the UN Security Council) **[SB/43/940, 948, 973]**.

57 HRW, Saudi Forces Torture, "Disappear" Yemenis, 25 March 2020 **[SB/44/975-979]**.

58 Article 49, Geneva Convention IV 1949 prohibits the transfer of "protected persons" (e.g. civilians) to the territory of another country, under all circumstances **[SB/1/4]**.

transferred incommunicado, outside process of law, conduct which constitutes enforced disappearance under international law.[59] HRW reported that Saudi forces are operating a secret detention facility al-*Ghaydah* airport, contrary to IHL and IHRL. These examples of serious violations of IHL by KSA must be assessed in answering the question as to whether there is a "pattern" of violations of IHL by KSA, and in assessing its "past and present record of respect" for IHL. A conclusion that there are only a "small number" of "isolated", "possible" violations is not sustainable without carefully assessing whether these are also possible violations of IHL.

59.6. Fifthly, the Secretary of State appears to have misdirected herself as to the requirements of the Consolidated Criteria, in adopting the position that "special caution" is not required in her assessment of KSA's compliance with IHL in the Yemen conflict by operation of the policy. Criterion 2 (reflecting the relevant terms of the EU Common Position it is designed to implement) provides:

> Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, 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.

59.7. The Defendant's position before the Divisional Court was that KSA <u>is</u> a state in respect of which it is bound to apply "special caution".[60] However, the Secretary of State's position is now that the special caution obligation does not apply in respect of KSA's actions in Yemen (and only applies to an assessment

59 International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006. Rule 98, ICRC Rules of Customary International Law **[SB/4/14-18]**.

60 See the Secretary of State's pre-action response to the first claim at **CB/4/53**. The Secretary of State resiled from this position in argument before the Court of Appeal. However, the point was academic, as the Secretary of State had accepted that she was bound to apply "special caution" to her first decision.

of "serious violations of human rights" under Criterion 2 (a).[61] This is wrong. Special caution must be applied to both an assessment of whether weapons may be used in the serious violation of human rights or serious violation of IHL. The distinction the Secretary of State draws is arbitrary. This is illustrated by the fact that many of the incidents alleged against KSA (such as arbitrary and incommunicado detention and the torture of detained persons) are violations of both IHRL and IHL.

60. Taking these factors together, the Secretary of State's conclusion that there exists no "pattern" and that the record is one of merely "isolated" violations, is irrational.

61. The Secretary of State may rely on CLOSED evidence justifying her conclusion that there is no pattern of breaches of IHL. If so, such evidence will need to be examined in CLOSED proceedings. However, the Secretary of State's OPEN explanation of her decision, is not sustainable on the evidence publicly available.

(c) No sustainable basis for conclusion that Criterion 2 (c) is not met despite "established" record of past "isolated" violations

62. Even if the Secretary of State was entitled to conclude that there was no "pattern" of violations, there was a "clear risk" that such "isolated" serious violations "might" occur in future. The effect of Criterion 2 (c) (and the User Guide) is that it is impermissible to export military equipment where there is a clear risk of future serious violations, even if "isolated". The Secretary of State's finding that "established" violations by KSA in Yemen are "isolated" (and not part of a "pattern") does not mean that it is permissible to export military equipment in accordance with Criterion 2 (c). Even if there is no pattern, against an established history of past violations, there must be a "clear risk" that such isolated violations "might" reoccur:

    62.1. The Secretary of State accepts that a "small number" of (unidentified) "isolated" serious violations of IHL have occurred.

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[61] Secretary of State's PAP Response §§ 23-24, 12 October 2020 **[CB/15/99-103]**

62.2. The risk of further violations is to be assessed in the context of the UK exporting weapons which – if misused even on a single instance could result in the unlawful infliction of mass civilian casualties. This risk is far from theoretical. In practice, there have been a significant number of incidents in which the Saudi Coalition has launched attacks (such as on the Great Hall Funeral, the Mastaba Market or Dhamar prison) in which hundreds of civilians have been killed and injured. Therefore, the risk of further very grave "isolated" incidents is very real and must be grappled with in any rational decision where past violations are established.

63. No such justification has been put forward by the Secretary of State. CAAT raised this issue with the Defendant in its letter before claim. In her response, the Secretary of State offered no explanation of the basis on which she has reached the conclusion that there is no "clear risk" of further serious violations of IHL, despite there now being an established history of past violations. She asserts (without any further explanation) that this matter has been considered (see paragraph 20 PAP Response 12 October 2020).

(d) Misdirection as to (i) "serious violations" of IHL; and (ii) the need to consider whether there is impunity in KSA for such serious violations

64. In CAAT CA, the Court of Appeal held that:

64.1. when applying Criterion 2 (c), it was lawful for the Secretary of State to fail to consider whether there was impunity for serious violations of IHL in KSA (as UN agencies and the US State Department have repeatedly found); and

64.2. the Secretary of State had not misdirected herself as to the meaning of the concept of "serious violation" of IHL.

65. The Court of Appeal ruled in favour of the Secretary of State on these issues. It decided that:

65.1. whether there was impunity in KSA for breaches of IHL was not a relevant consideration that the Secretary of State was required to take into account; and

65.2. the Secretary of State had not misdirected herself as to the meaning of a "serious violation" of IHL.

66. The Court of Appeal granted CAAT permission to appeal to the Supreme Court on both points. Upon taking her new decision in July 2020, the Secretary of State wrote to the Supreme Court withdrawing her appeal against the Court of Appeal's judgment (Ground 1) and asking CAAT to withdraw its grounds of challenge (Grounds 2 and 3).[62] The Secretary of State's position was that the grounds were academic following the new decision and that any challenge on these issues is more appropriately pursued in new proceedings in respect of her new decision.[63] The Claimant agrees that it would be more appropriate for these issues to be determined on the basis of up-to-date facts and on the Secretary of State's current decision. If and to the extent that any part of the Court of Appeal's decision binds the Court in this claim, the Court will be invited to grant permission for a leapfrog appeal, in light of the permission to appeal previously granted by the Court of Appeal.

(i) Impunity

67. In its letter before claim, CAAT asked the Secretary of State a series of questions addressing KSA's willingness and ability effectively to prosecute and punish violations of IHL perpetrated by state officials (see letter of 18 September 2020). These questions included whether (and how) the Secretary of State has assessed whether:

67.1. KSA has in place legislation to enable prosecution of persons responsible for violation of IHL; and

67.2. KSA has a judicial system capable of prosecuting and punishing state officials for violations of IHL.

68. The Secretary of State's response was simply that she is not required to consider these matters (Letter of 12 October 2020). For its part, the Court of Appeal held [152 and 154]

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62 Ground 3 before the Supreme Court was CAAT's Ground 4, before the Court of Appeal.

63 Letter of 28 July 2020 **[CB/9/73-75]**

that that these matters "may be highly relevant in some cases" but that such judgments are "essentially ones for the Secretary of State to make provided that she acts rationally", and that the Secretary of State had not acted irrationally by failing to consider these matters on the facts as they were before the Divisional Court. The Court of Appeal nevertheless recognised that its conclusion was one that was arguably wrong and was of real public importance and therefore granted permission to appeal to the Supreme Court.

69. The factual circumstances have now fundamentally altered. Before the Divisional Court and the Court of Appeal, there were no findings by the Secretary of State that KSA had committed past breaches of IHL. That is no longer the case. The Secretary of State's decision now proceeds on the basis that KSA has committed a number of established breaches of IHL.

70. Accordingly, even if these questions could properly be left out of account previously (as to which the Claimants respectfully submit that the Court of Appeal in CAAT CA was incorrect), they can no longer be. On the Secretary of State's own findings, KSA now has an "established" record of violations of IHL, albeit in a "small number" of incidents. Any rational assessment as to the <u>future</u> risk that these violations may <u>reoccur</u> must ask whether:

    70.1. KSA has the "capacity" to prosecute and punish violations such as these so as to negate the risk of reoccurrence;

    70.2. KSA affords state officials impunity in respect of such grave violations of IHL, elevating the risk of reoccurrence; and

    70.3. KSA has <u>ever</u> prosecuted or punished individuals for violation of IHL, materially affecting the risk of reoccurrence.

71. The factual context in which these questions arise is that on July 10, 2018, KSA King Salman issued a royal decree "pardoning all military personnel who have taken part in the Operation Restoring Hope [the Yemen Military Operation] of their respective military and disciplinary penalties." [64] There was no reported limitation to this Royal Pardon, and in itself this seriously contravenes IHL, since the Geneva Conventions require "grave breaches" to be prosecuted. Most recently, the UN Panel of Experts reports that is it

[64] *See* Human Rights Watch, Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen, 24 August 2018 **[SB/27/361-404]**

unaware of any prosecutions having been initiated, by any state, for conduct in Yemen, although KSA has stated that files have been passed to a prosecutor in respect of several incidents.[65] The UN Group of Eminent Experts observes that "even if any prosecutions are underway … [the pardon] "raises further concerns in terms of effectiveness and credibility" of such processes.[66]

72. Without considering and assessing these matters, a rational assessment of the risk of reoccurrence is not possible. On the evidence in the public domain, there are serious, pressing and well-documented concerns about the immunity of state officials for torture, enforced disappearance and a wide range of other serious violations of international law. This includes findings by the US State Department in its 2019 and 2020 Country Report on KSA, the UN Special Rapporteur on Torture and the UN High Commissioner for Human Rights.[67] If these concerns are right, on any rational view, the risk of further violations is likely to be materially elevated. Where possible violations have been established, a rational assessment of risk must include consideration of KSA's capacity to prosecute such violations, and to grapple conscientiously with the substantial body of evidence that grave violations of international law routinely go unprosecuted in KSA, and that state officials enjoy impunity in respect of such conduct.

(ii) Serious violations of IHL

73. In CAAT CA, the Court of Appeal [165] left open the question of legal principle as to (a) whether a single incident could amount to a serious violation of IHL (even absent a pattern of non-deliberate conduct) and (b) whether some mental element was a "necessary" requirement of a serious violation. The court did so on grounds that it would not be appropriate to "give advice for the future". In the context of the Secretary of State's new decision, however, the issue now arises as to whether she has approached the concept of serious violations correctly.

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65 UN Panel of Experts Report 2019 § 140 **[SB/30/459]** and 2020 Report §99 **[SB/50/1033]**.

66 UN Group of Eminent Experts 2019 Report § 892 **[SB/35/646-647]**.

67 *See, for example:* **SB/40/742-799**

CAAT's position

74. A "serious violation" refers to a violation of international humanitarian law which (a) protects an important value and (b) has grave consequences for victims of the violation, as explained in the consistent jurisprudence of international tribunals,[68] and made clear in the ICRC's authoritative commentary to the Additional Protocols to the Geneva Conventions.[69] In addition, (a) a violation of IHL may be a "serious violation", even when committed without intent or recklessness, or indeed any mental element and (b) such a violation could be perpetrated in a single incident (e.g. even if not part of a wider pattern of conduct).

The Secretary of State's approach before the Divisional Court and subsequently

75. The Secretary of State's position before the Divisional Court was clear:

75.1. "[T]he term 'serious violation' has a particular meaning as a matter of IHL and is synonymous with 'war crimes'", and that whilst the precise mental element may vary depending on the crime concerned, some mental element will be necessary" (Secretary of State's Divisional Court Skeleton §§ 38 and 40) (emphasis added).

75.2. At trial, the Secretary of State elaborated on this explaining that "serious violation has developed a meaning in international humanitarian law …it indicates the standard that is in play, and it is a very high one". The Secretary of State further submitted that the concept of a serious violation "imports consideration of all the sorts of features that one finds in a grave violation and/or a war crime. It imports particular focus on the intention and the attitude of the state conducting the conflict". This was described as the Secretary of State's "basic submission" (Transcript of Hearing, Day 2, p. 6, E – G **[SB/17/238]**).

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68 *Prosecutor v. Tadic,* Appeals Chamber, Judgment on Jurisdiction, IT-94-1 [94]; *Prosecutor v. Galic* IT-98-29-T [106-108]; *Prosecutor v. Delalic*, Trial Chamber, IT-96-21T [279].

69 International Committee of the Red Cross (**ICRC**) commentary on Article 89 of AP I §§ 3591 -3592 **[SB/3/11]**.

76. This position is in error, for the reasons set out above. Subsequently, in correspondence in respect of the proceedings before the Supreme Court, CAAT asked the Secretary of State to confirm that she has approached her new decision on the basis that "(a) intent, recklessness or some mental element are not indispensable requirements for a serious violation of IHL and (b) that a single incident may constitute a serious violation" (see CAAT's proposed consent order dated 31 August 2020 **[CB/11/82]**). The Secretary of State refused this request by letter of 12 October 2020 **[CB/16/104-105]**.

77. Such an error is highly material. The consistent finding of a range of authoritative bodies, including the UN Panel of Experts and respected NGOs, is that KSA has repeatedly breached the IHL obligations imposed by Article 57 API to "take all feasible precautions" to minimize civilian casualties and the related obligation to "do everything feasible" to verify that a target is not civilian (which does not require intention, recklessness or any mental element). Moreover, the Secretary of State herself now accepts that KSA has possibly violated IHL in incidents but asserts that these are "isolated" and that there is no "pattern".

78. In this context, it is particularly important that the Secretary of State proceeds on the correct legal basis, namely that a single unintended violation, such as a failure to take all feasible precautions in attack, will constitute a "serious violation", because it has grave consequences and relates to a rule protecting an important value. This is so regardless of (a) whether it forms part of a pattern of non-deliberate violations and (b) whether there is any indication of intent, recklessness of some other mental element in that incident. It is (at best) unclear whether this is the way the Secretary of State has approached the new decision. Given these points, the core aspect of the Secretary of State's prospective assessment under Criterion 2 (c) appears to be infected by error of law.

F. RELIEF

79. CAAT invites the Court to grant permission and, in due course:

    79.1. declaratory relief; and

    79.2. to remit the matter to the Secretary of State for reconsideration.

80. CAAT also applies for a Costs Capping Order, with reciprocal costs capping, pursuant to Section 88 of the Criminal Justice and Courts Act 2015. The application for a Cost Capping Order, and evidence in support, will be filed separately.

Ben Jaffey QC

Conor McCarthy

26 October 2020