Claim No: CO/3579/2020

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

SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant

and

MWATANA FOR HUMAN RIGHTS

Intervenor

WRITTEN SUBMISSIONS OF THE INTERVENOR
MWATANA FOR HUMAN RIGHTS

References follow the format [~~Mwatana Intervention Bundle (MIB)/tab/page~~ Hearing Bundle Core (HBC)/page or Hearing Bundle Supplemental (HBS)/page].

Essential reading: Witness statement of Radhya al-Mutawakel dated 25 May 2021 [~~MIB/B/26-84~~HBC/847-905], sample reports of airstrikes taking place on 6 August 2020 [~~MIB/C/522-533~~HBS/2084-2095], 14 February 2020 [~~MIB/C/464-494~~HBS/2026-2056], 21 October 2016 [~~MIB/C/262-303~~HBS/1824-1865] and 18 September 2015 [~~MIB/C/182-222~~HBS/1744-1784].

1. The Intervenor, Mwatana for Human Rights, (**"Mwatana"**) makes these written submissions in support of the challenge brought by the Claimant. These proceedings challenge the decision of the Defendant as communicated by a letter dated 7 July 2020 (i) to continue to grant licences for the transfer of military equipment to the Kingdom of Saudi Arabia (**"KSA"**) for possible use in the ongoing conflict in Yemen; and (ii) not to suspend existing military licences for the transfer of military equipment to KSA for possible use in Yemen ("**The Decision**").

2. By Orders made on 20 April 2021, Jay J:

   (i) granted Mwatana permission to intervene in these proceedings by way of evidence and written submissions; and

(ii) directed that any person served with the claim form may file and serve submissions and/or evidence within 35 days of service of the Order.

3. These submissions refer to an evidence bundle consisting of a witness statement by Radhya al-Mutawakel "**RA1**" [HBC/847-905~~MIB/B/26-84~~], along with an exhibit at Tab C containing:

(i) long- and short-form summaries of airstrikes which have taken place in 2020 [~~MIB/C/464-547~~HBS/2026-2019];
(ii) a letter and enclosures sent to the Defendant by Mwatana on 11 August 2019 ("**The August 2019 Letter**") along with subsequent correspondence [~~MIB/C/129-443~~HBS/1691-2005]; and
(iii) a selection of additional reports by the Joint Incident Assessment Team ("**JIAT**") and other incidents which are relevant to issues raised by the August 2019 Letter [~~MIB/C/444-547~~HBS/2006-2109].

4. The court is urged to read Mwatana's witness statement carefully in order to appreciate both the integrity of the organisation as a whole and also the robust nature of the evidence it has adduced in these proceedings.

5. The background to these proceedings has already been set out in court rulings in respect of a previous challenge brought by the Claimant in respect of the Defendant's granting of export licences for arms sales to KSA (the "**First Proceedings**") and does not need to be repeated here.

THE DECISION AND GROUNDS OF CHALLENGE

6. The Decision largely focuses on the incident assessments made necessary by the Court of Appeal's Judgment in the First Proceedings, though the Defendant has been clear that this added process, which it calls **the IHL Analysis**, is supplementary to the pre-existing process as examined in the First Proceedings. The final Criterion 2(c) analysis continues to be taken in the round with a range of other factors, as set out in the Summary Grounds of Defence [SGD/21(c)(ii)-(vi) at HBC/72-73]. The Defendant set out its decision-

making process in detail at paragraphs 18 to 22 of the Decision Letter [~~CB/5/55~~HBS/2340-2341].

7. It is apparent that the IHL Analysis comprises, in broad terms, four stages:

   (i) The MOD's Tracker maintains a subset of incidents of concern that have passed a 'credibility' threshold. The Defendant explains that 'credible' means the Defendant assesses that the alleged events are likely to *have happened* and to be attributable to the KSA, without saying anything about IHL compliance;
   (ii) An assessment is made in respect of each 'credible KSA' incident to determine whether it is 'possible' that it constitutes a breach of IHL;
   (iii) Treating all 'possible' violations as if they were confirmed violations, a pattern analysis is conducted on those incidents. Mwatana understands that the MOD additionally conducts a pattern analysis on all 'credible' violations;
   (iv) Consideration by the Defendant, in light of that analysis, of whether violations are indicative of (a) any patterns of non-compliance with IHL; (b) a lack of commitment on the part of KSA to comply with IHL; or (c) a lack of capacity or systemic weakness which might give rise to a clear risk of IHL breaches.

8. The final analysis entails combining the conclusions of the IHL Assessment with the range of other information outlined at [SGD21(c)(ii)-(vi) at HBC/72-73] to arrive at a view as to whether KSA has a genuine intent and the capacity to comply with IHL and the specific commitments it has made. The Defendant's ultimate test under Criterion 2(c), into which all other information feeds, is whether KSA's express commitments to comply with IHL, along with engagement as to incidents of concern, are a true reflection of the risk of the commission of serious violations of IHL by KSA.

9. The Claimant's Amended Statement of Facts and Grounds advances four grounds of challenge, to the effect that the Defendant:

   (a) had no proper basis for concluding that violations were limited to those identified by the Defendant [ASFG/51-55 at HBC/48];
   (b) had no proper basis for concluding that no 'pattern' of violations existed [ASFG/56-61 at HBC/49-55];

(c) had no sustainable basis for the conclusion that Criterion 2 (c) is not met on the Defendant's own factual position, which showed an "established" record of past "isolated" violations [ASFG/62-63 at HBC/55-56]; and

(d) misdirected herself as to (i) "serious violations" of IHL and (ii) the need to consider whether there is impunity in KSA for such serious violations [ASFG/64-78 at HBC/56-61].

10. In the Summary Grounds of Defence, the Defendant submits that:

(a) in relation to ground of challenge (a), the Defendant has considered each credible allegation in light of the information, intelligence and expertise available to her and, in so doing, is not required to accept the findings of open source reporting;

(b) in relation to ground of challenge (b), the Defendant has analysed all the information available to her and the conclusion reached that there is no pattern of violations is not irrational;

(c) in relation to ground of challenge (c), the Defendant was entitled to conclude that Criterion 2(c) was not met despite finding that past isolated violations of IHL were established, on the basis of consideration of the wide range of information available to her of KSA's attitude towards and capacity to comply with principles of IHL; and

(d) in relation to ground of challenge (d), it is not proper for the Claimant to reopen in the proceedings the issue of the meaning of "serious violations"; and the Defendant's exercise is a predictive one, not an exercise in adjudication of state responsibility for breaches of IHL.

SUBMISSIONS

11. The evidence Mwatana introduces is of general significance to matters which inform the whole of this challenge. To assist the Court, these submissions will first address those matters, before being broken down according to their relevance to the Claimant's individual grounds. Mwatana refers to the Saudi/UAE-led Coalition ("the Coalition") in its reporting of airstrikes, because it is not possible for Mwatana to confirm which

Coalition member carried out each attack, and because the JIAT analyses the activities of the Coalition as a whole.[1]

12. Mwatana presents to the Court reliable testimonial and photographic evidence of:

(i) a significant number of airstrikes in which grave harm was caused to civilians and civilian property. In many cases, no military target was identified by Mwatana at all. Such information has been categorised so as to demonstrate the evident patterns of frequently attacked objects ("**Pattern 1": the Object Pattern**).

(ii) a significant number of incidents for which there is direct evidence indicating that the Coalition does not in fact follow its own stated procedures which were set out in the First Proceedings, indicating a failure to take precautions ("**Pattern 2": the Behaviour Pattern**);

(iii) a significant number of incidents that call into question the credibility and reliability of investigations by JIAT, including instances where JIAT has arrived at factual conclusions that cannot be reconciled with Mwatana's on-site inspection, interviews, photographic evidence and consultation with weapons experts; and instances where JIAT has claimed that a military target was identified and, consequently, the airstrike was lawful, but has in fact failed to conduct a proper analysis addressing all other core aspects of IHL compliance such as the requirement to minimise civilian harm and the principle of proportionality ("**Pattern 3": the Response Pattern**).

Pattern 1: the Object Pattern

13. The August 2019 Letter that Mwatana sent to the Defendant [~~MIB/C/86-128~~HBS/1648-1690] described patterns of concern which in Mwatana's view demonstrated that the threshold in Criterion 2(c) had been crossed. Its enclosures outlined clear evidence of the following patterns:

(i) attacks on civilian residential homes, often in densely populated urban areas [RA1/§28 at HBC/861-866];

[1] Although it is said that the majority of airstrikes are carried out by KSA given the number of aircraft they deploy compared to the other Coalition members, see https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful#_ftn126.

(ii) the targeting of infrastructure and economic targets such as water and power facilities, bridges, factories, warehouses, markets and farms [RA1/§30-47at HBC/866-871]; and

(iii) attacks which kill and injure civilians, including attacks on weddings, funerals and vehicles [RA1/§48 at HBC/871-872].

14. The updated evidence in respect of airstrikes taking place in 2020 [RA1/§20 at HBC/855-858, ~~MIB/C/464-547~~HBS/2026-2109] demonstrates that regular attacks causing civilian harm have continued and that the same patterns of attack outlined in August 2019 Letter have continued to be evident.

15. Addressing the contribution of NGO evidence to the Criterion 2(c) assessment, the Court of Appeal in the First Proceedings stated [134]:

> *"In the very crudest terms, the NGO and UN Panel evidence often establishes what happened, but the further information available to the Secretary of State could assist as to why events of concern had happened. Both may of course be highly relevant to whether a violation of IHL had taken place and to the risk of future violations."*

16. In setting out the incidents referred to at §13 above, Mwatana has sought to present the Court with a representative and up-to-date picture of *what* is happening in Yemen. In Mwatana's view, the repeated striking of such civilian targets is by itself a strong indicator that the Coalition does not comply with the principles of distinction, precautions and proportionality. However, mindful that civilian harm is only part of the picture, Mwatana explored the second and third patterns, which go further towards addressing the question of *why* events of concern continue to take place.

Pattern 2: the Behaviour Pattern

17. The Coalition's targeting procedure is a matter of record [RA1/§50 at HBC/875-876]. However, in a large number of cases, the Coalition's airstrikes appear to have taken place in clear contravention of that targeting procedure, with the following examples being illustrative:

(i) repeated striking of objects that would be expected to appear on the no-strike list, including the UNESCO-protected Al Feleihi Neighbourhood in Sana'a's Old City [~~MIB/C/182-222~~HBS/1744-1784], numerous hospitals and health facilities, including the Cholera clinic at Abs [~~MIB/C/361-381~~HBS/1923-1943], a water facility and bridge[2] which were both confirmed to have been on the NSL [~~MIB/C/422,434~~HBS/1984, 1996];

(ii) the targeting of open areas containing either large numbers of civilians [~~MIB/C/411~~HBS/1973] or clearly civilian items such as children's swings and merry-go-rounds [~~MIB/C/413-414~~HBS/1975-1976], market stalls [~~MIB/C/411~~HBS/1973] and medical facilities with roof-markings [~~MIB/C/361-381~~HBS/1923-1943];

(iii) second-wave attacks where one airstrike rapidly follows from another, which appear to disregard the likely presence of first responders [RA1/§57 at HBC/880];

(iv) the striking of homes in densely populated areas with wide-area bombs [RA1/§58 at HBC/880];

(v) the 14 May 2018 incident reported by The Intercept[3] in which a leaked US military document revealed that a Saudi airstrike was directed at a tent which turned out to contain a civilian family, seemingly without any precautions to verify the target, and certainly without sufficient precautions given the absence of urgency [~~MIB/C/346-360~~HBS/1908].

18. In the August 2019 Letter, the Defendant's attention was also drawn to public statements made by former insiders concerning the inappropriate over-use of so-called "dynamic strikes', in which the decision to strike is made between the pilot and a source inside Yemen, without routing the decision through the control rooms. Such attacks, based on the description given in those reports, did not accord with the Coalition's procedure and reportedly accounted for a high proportion of attacks.

19. These allegations are consistent with the rare cases in which JIAT has found fault with Coalition attacks after significant public outcry. Those incidents, according to JIAT, have involved the failure to follow procedure, often including either a failure to verify

[2] Mwatana did not investigate this incident but makes reference to it due to its illustration of the pattern.
[3] Mwatana did not investigate this incident but makes reference to it due to its illustration of the pattern.

appropriately that a target was a military objective before carrying out a strike,[4] or the pilot carrying out a strike on a target before assessing the likely civilian harm that would result.

20. This pattern of non-compliance is particularly relevant to the question of whether there is a clear risk of the commission of serious violations of IHL in the future. Procedural requirements to verify targets are a reflection of the requirement under IHL to "*do everything feasible to verify that targets are military objectives.*"[5] Procedural requirements to assess civilian harm are a reflection of the requirement under IHL to "*do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*."[6] The precautionary obligations are not secondary to the principles of distinction and proportionality, but rather are necessary parts of the practical application of these principles.[7] In failing to do everything feasible to verify targets and assess likely civilian harm, the Coalition is violating the cardinal principles of distinction and proportionality.

Pattern 3: the Response Pattern

21. The third pattern Mwatana identifies which is highly relevant to the Defendant's Criterion 2(c) assessment is one that calls into question the credibility and reliability of investigations by JIAT.

22. Despite the Coalition being the only party to the conflict with capacity to conduct airstrikes, JIAT has concluded in a number of cases that the Coalition was not responsible

[4] For example, where the pilot has been urged by a source on the ground to attack a location based on intelligence which later turns out to have been inaccurate [MIB/C/446].
[5] See, e.g. ICRC Customary International Humanitarian Law Database, Rule 16. See generally, ICRC Customary International Humanitarian Law Database, Rules 15-21. See also, Article 13(1) Additional Protocol II to the Geneva Conventions. See also, Article 57(2)(a) Additional Protocol I to the Geneva Conventions.
[6] See, e.g. ICRC Customary International Humanitarian Law Database, Rule 18. See generally, ICRC Customary International Humanitarian Law Database, Rules 15-21. See also, Article 13(1) Additional Protocol II to the Geneva Conventions.
[7] *Prosecutor v. Stanislav Galic*, IT-98-29-T,Judgment (TC) 5 December 2003, para. 58.

- in direct and irreconcilable contradiction with credible testimonial and often photographic evidence to the contrary [RA1/§68 at HBC/886-890].[8]

23. JIAT has, in relation to a significant number of strikes, claimed to identify a military target on the basis of questionable analysis, such as the attack on three civilian vehicles in Al-Jawf Governorate on 6 August 2020 which JIAT claimed was directed at Houthi fighters but where Mwatana's investigation found no military targets, only eight civilians (all of whom were children) who were killed and 15 civilians who were wounded (including eight children and four women) [~~MIB/C/522-533~~HBS/2084-2095]. JIAT has often claimed in other cases that no civilians were present when and where airstrikes were carried out, whereas Mwatana's investigations provide detail to the contrary [RA1/§68 at HBC/886-890].

24. While there can be room for reasonable error and misunderstanding in such a complex aerial campaign as the present one, in particular at JIAT's distance from the field of battle, such complexities could not explain the repeated fundamental incompatibility of JIAT's claims with Mwatana's evidence.

25. In addition to these factual contradictions, JIAT's legal analyses raise serious concerns. JIAT often concludes that a Coalition attack did not violate IHL on the sole basis that there was, according to the Coalition's claims, a legitimate military target. JIAT routinely ignores the significant civilian harm that results from such attacks, apparently failing to acknowledge the requirements under IHL to avoid and minimise civilian harm and to cancel disproportionate attacks when striking military objectives [RA1/§69 at HBC/890-891]. The fact that JIAT has not acknowledged civilian harm in these cases is a strong indication that it was not considered in advance by the Coalition – which would be a clear breach of the IHL precaution and proportionality obligations. This failure to take account of proportionality may well be one of the reasons that the Coalition has continued to conduct attacks which harm large numbers of civilians.

26. Where JIAT has referenced the precautionary obligations, its discussions lack basic coherence and credibility. For example, JIAT has asserted that certain precautions were taken to avoid and to minimize harm to civilians when the actions of the Coalition clearly

[8] An overview of the findings by Human Rights Watch and the United Nations Group of Eminent Experts concerning JIAT is given in The August 2019 Letter at §102 [~~MIB/C/122~~HBS/1684].

demonstrate otherwise.[9] JIAT also states with approval that a "*precision guided bomb*" was used in situations where that fact does nothing to mitigate civilian harm, for example because the bomb in question has been directed at a crowded market. Additionally, its statements are often internally inconsistent, with JIAT simultaneously claiming no civilians were present but then recommending compensation for losses; or stating that all feasible precautions were taken but that procedure had not been followed, leading to civilian harm.[10] Finally, in a number of attacks, JIAT specifies that the target was an object which can plausibly be presumed not to be time-sensitive, such as a fuel station or a bridge that had, according to JIAT, become a military target.[11] In such a case, precautionary obligations would require the attacker to wait until there were no civilians close by, but this is often not properly addressed by JIAT.

27. In some reports, JIAT's own findings seem to acknowledge inadvertently that the Coalition is failing to abide by precautionary obligations. For example, in the case of the 2019 attack on the detention centre in Dhammar that caused the death or injury of around 170 detainees [~~MIB/C/546-547~~HBS/2108-2109], JIAT claimed that "*the Coalition Forces were not aware of the use of a building in the compound as a detention site*." The ICRC said it had visited the site before the attack, and the United Nations Panel of Experts had mentioned the detention centre in its 2018 report [HBS/452-454, 476~~SB/43/944-946, 968~~]. JIAT does not analyse this as a potential failure to comply with precautionary

[9] Such as: a) the launching of four bombs at a civilian home and at groups of civilians in al-Jawf as they tried to rescue the injured and/or flee on 14 February 2020 [~~MIB/C/464-494~~HBS/2026-2056]; JIAT claimed on 25 November 2020 that Coalition forces took "*possible precautions to avoid accidental loss or damage to civilian objects or minimize them, during the management of the military operation, by planning to use precision-guided bombs and emphasizing the absence of civilians before and during the execution of targeting operations*" b) the use of a wide-impact area munition in the middle of a crowded market area at Muthalith Ahim, [~~MIB/C/413, 458-459~~HBS/1975, 2020-2021]; JIAT claimed on 9 July 2020 that the Coalition took "*all feasible precautions by studying and defining the target's environment, using a guided bomb that was commensurate with the target, and minimizing collateral damage* ". In reality, according to Human Rights Watch, the wide-impact area munition landed on the road between two busy restaurants which were well within the blast radius of the bomb, killing at least 65 people and wounding at least 105.

[10] For example, in the case of the attack on August 6, 2020, JIAT asserted that the Coalition launched an attack in an area while there were no civilians in the vicinity, but then went on to find not only that civilians were in the area, at the time, and were harmed, but that that the targeting officer "*failed…. to ensure that the target was still valid*". Mwatana found that in fact all the vehicles the Coalition hit in that strike were civilian.

[11] The issue of the widespread bombing of dual-use infrastructure is of major significance given the humanitarian catastrophe in Yemen. Where an object of importance to the civilian population has become a military target as a result of its use by the armed forces, proportionality assessments are required to assess not only the immediate effects of an attack but also the so-called "reverberating" effects. Such a discussion is beyond the scope of this intervention.

obligations, but instead asserts, as it almost always does, that the Coalition complied with IHL.

28. These problematic findings of JIAT present further serious issues which fall to be taken into account in any rational assessment of KSA's intentions and capacity to comply with IHL. If JIAT's investigations, which appear to fail to grasp the need for an analysis of several fundamental aspects of IHL, are presented with KSA's approval, and indeed represent its attempt to demonstrate compliance with IHL, there is, in Mwatana's submission, serious ground for doubting KSA's intentions and capacity to comply with IHL requirements. That is plainly relevant to the Defendant's Criterion 2(c) analysis. It appears that JIAT only shallowly grapples with the concept of distinction between civilian and military targets, touching occasionally on some of the precautionary obligations. The fact that JIAT routinely ignores fundamental IHL principles, including proportionality, is of serious concern, given the central importance of this concept for civilians in a war such as Yemen's. The following analysis by Dinstein is particularly appropriate in this context:[12]

> *"Although proportionality is a supplementary restriction, its pragmatic import is incomparable. This can only be fully appreciated when it is borne in mind that almost every object (which is not a military objective by nature) may be transformed into a military objective through use, purpose or location… The requirement of identification of an object as a military objective is, consequently, outstripped (and, in some sense, eclipsed) by the need to comply with the principle of proportionality. Proportionality is the central pillar of robust civilian protection from the effects of attacks in wartime."*

29. Patterns 2 and 3 plainly undermine the reliability of commitments being made by KSA in respect of its intentions and capacity to comply with IHL. As repeatedly articulated by the Defendant, most recently in paragraph 21 of her Summary Grounds of Defence, the following strands of information and analysis inform her Criterion 2(c) assessment (emphasis added):

[12] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Ed, p. 153 / §411

i. MOD analysis of allegations of violations of IHL that are reported in the press or social media or which are brought to its attention by, for instance, NGOs or foreign governments;

ii. An understanding of KSA military processes and systems, obtained in particular through the Defence Attachés at the British Embassy in Riyadh and UK Liaison Officers located in the Saudi Arabian Air Operations Centre in Riyadh and further informed by the logistical support and training provided to KSA by the UK and others;

iii. Engagement with KSA, including dialogue at the highest political, diplomatic and military levels;

iv. Post-incident dialogue, including with respect to investigations;

v. Public and private commitments made by Saudi Arabian officials regarding compliance with IHL;

vi. Broader analysis of developments in Yemen relevant to IHL compliance.

30. The Defendant submits that it is these strands of information and commitments that allow her to depart from the conclusions of United Nations experts and NGOs.

31. In the First Proceedings, the Defendant acknowledged that a foreign state's responses to engagement on issues of IHL compliance are an "*absolutely critical*" part of an iterative process in which such engagement is to be reflected in improvements to the Coalition's procedures and practices. The Court plainly stated in that context that where the Defendant takes into consideration statements and assurances made by a foreign state to whom arms are being supplied, it is important that "*what the state does must be set beside what it says*". A situation in which the Defendant acknowledged in the First Proceedings that it could be compelled to suspend licences was one in which KSA's reaction to engagement was not satisfactory.[13] The evidence that Mwatana submits in these proceedings clearly demonstrates that an assessment of what KSA actually does casts doubt on the alignment of its behaviour with its assurances, raising significant questions of concern as to the credibility of those assurances, which does not appear to have been fully or properly taken into account by the Defendant.

[13] Transcript of the First Proceedings hearing dated 10 April 2019, p.23-24 available at https://caat.org.uk/wp-content/uploads/2020/09/2019-04-10.transcript.pdf

32. These concerns are plainly of the highest relevance to the Defendant's Criterion 2(c) assessment process. First, as to strand (ii), the evidence presented by Mwatana in respect of Pattern 2 as addressed above, which indicates that officers of the Royal Saudi Air Force may not be following their own procedures, diminishes the value of the UK's understanding of those procedures. It also significantly undermines the degree to which KSA commitments to comply with IHL (strand (v)) can be reasonably relied upon, in particular due to the apparent scale of the problem. The fundamental deficiencies in the investigations of JIAT have a direct bearing on the value of strands (iii) and (iv), particularly in light of the importance placed upon such engagement as per [31] above.

33. Following the retaking of the Decision, in August 2020, Mwatana asked the Defendant to clarify whether she continued to attribute weight to Saudi assurances and the work of JIAT in light of the information put to her in the August 2019 Letter in this regard [~~MIB/C/438~~HBS/2000]. The Defendant's response in its 11 December 2020 letter was, in its totality*, "The IHL Analysis is just one part of the Criterion 2C Analysis. In reaching the Decision, the Secretary of State has taken into account the full range of information and analysis available to the Government"* [~~MIB/C/441~~HBS/2003]. It is absolutely clear that Saudi assurances of "*genuine intent*" and "*capacity*" to comply with IHL continue to be a key counterweight in the Defendant's assessment process to allegations of civilian harm and, as per the new methodology, "*established*" IHL violations.

34. The foregoing points are relevant to the lawfulness of the Decision in that they undermine the reasonableness of the Defendant's reliance both on KSA's assurances as to its future conduct, and on KSA's accounts of the compliance of its past conduct with IHL. The Court of Appeal explained at [144] why it was important for the Defendant actually to conduct IHL assessments of individual incidents:

> *"[…] perhaps the most important reason for making such assessments is that, without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high level assurances by the Saudi authorities? If the result of historic assessments was that violations were continuing despite all efforts, then that would unavoidably become a major consideration in looking at the "real risk" in the future. It would be likely to help determine whether Saudi Arabia had a*

genuine intent and, importantly, the capacity to live up to the commitments made."

SUBMISSIONS AS TO GROUND (a): NO PROPER BASIS FOR CONCLUSION THAT VIOLATIONS LIMITED TO THOSE IDENTIFIED BY THE SECRETARY OF STATE

35. Between Mwatana's published incidents and incidents summarised for these proceedings, the Defendant now has before her 140 incidents that have been documented by Mwatana's independent researchers [~~MIB/553-562~~HBS/2115-2124]. Given its high-calibre field investigations and the fact that the Defendant has already acknowledged that it takes Mwatana's reporting into account, Mwatana presumes that such reports are treated as 'credible'. Given the level of civilian harm in each case, Mwatana considers that the incidents it has documented should be included in the category of incidents constituting a 'possible' IHL violation.

36. However, given that only a "*small*" number of credible incidents have been assessed by the Defendant as being 'possible' violations for the purposes of the IHL Assessment, Mwatana assumes that at least some of the incidents it has documented must have been deemed 'unlikely' to have violated IHL or that the Defendant decided that more information was needed to categorise the incident either way. As to whether this can reasonably have come about under the Defendant's methodology, it is instructive to consider the reality of the process in some detail.

37. Reports on airstrikes by Yemeni and international NGOs by definition all make allegations of civilian harm. Where the Defendant accepts that some civilian harm took place and that the harm is attributable to the Coalition, there can only be two explanations which would result in a finding that no violation took place. They are either:

    (i) The civilian harm was the incidental result of an attack which the RSAF expected was proportionate to the anticipated concrete and direct military advantage; **or**
    (ii) The harm, either in its scale or at all, was a mistake – but one which took place despite Coalition taking all feasible precautions to avoid and in any event to minimise that harm.

38. In defence of these proceedings, the Defendant has reiterated that, not being a party to hostilities, she does not have access to the key operational information which would enable her to take a fully informed view of whether specific incidents have violated IHL.[14] It follows that in each case where the MOD assesses that a credible incident is unlikely to be a breach of IHL or for which there is not enough information, an inference is effectively being made in favour of the Coalition that either (i) or (ii) above is likely to be satisfied.[15] This is, in Mwatana's submission, a key area in which the credibility and reliability of KSA as a source of assurances about IHL compliance is relevant. It has always been the Defendant's case that this fundamental void is compensated for by the strands of information listed at [SFG/21/(ii)-(v)] at HBC/72-73 and [29] above. In Mwatana's view, in light of what it has shown about the reliability of those strands of information, there can be no justification for giving KSA the 'benefit of the doubt' any longer – in particular where credible NGOs and UN bodies have determined that IHL was violated. This serves to reinforce Mwatana's view that all of its reported incidents, and many other credible NGO reports involving civilian harm, must (at least without compelling incident-specific explanations) be categorised as 'possible' violations.

Problems with specific categories of incidents under Ground (a)

39. As to the inclusion of specific categories of incidents in the list of 'possible' violations, the patterns outlined above present some very serious and unanswered questions. For example, Mwatana is not clear how the Defendant can assess whether an attack violated IHL if the Coalition **does not accept responsibility** at all. Although asked directly by Mwatana in its letter of 20 August 2020 [~~MIB/C/438~~HBS/2000], the Defendant has not explained this.[16] Indeed, it is difficult to see how the Defendant can rationally assess such incidents (of which there are many) in favour of the Coalition when it denies responsibility entirely, unless she is to accept that the Coalition was not responsible. As

[14] Such as "*(i) the intended target; (ii) the intelligence which led to that targeting; (iii) the surveillance and reconnaissance carried out; (iv) the weapon used; and (v) other steps taken to minimise potential civilian casualties or damage*" [~~MIB/C/441~~HBS/2003].

[15] This accords with the Claimant's assertion that attacks for which no military target can be found should be treated as *prima facie* violations, without more – see [SFG/59.3 at HBC/51]. There may be instances in which the allegations of civilian harm are not accepted, but Mwatana maintains that its documentation of civilian harm is reliable.

[16] In the Defendant's letter of 11 December 2020 [~~MIB/C/440~~HBS/2002], she stated that in some cases the attacks were not deemed credible, and in others they recognised "*room for further improvement*" in the JIAT's reporting.

previously noted, claims that the Coalition was not responsible often cannot be reconciled with physical evidence such as bomb remnants.

40. Similarly, in cases where JIAT's **factual findings concerning the existence of military targets** are contradicted by Mwatana's evidence, the Defendant must be required either to reject Mwatana's evidence or, if it does not, be faced with difficult questions as to why JIAT's claims are so incompatible with testimonial and other evidence gathered by Mwatana on the ground. Given that it cannot examine the raw evidence available to JIAT, the Defendant is required to accept an account that is self-evidently highly questionable and incomplete. In Mwatana's respectful submission, it is not reasonable or rational, given the general deficiencies in JIAT's credibility, to do so.

41. The issue arises again in the numerous cases where JIAT finds that an airstrike complied with IHL because JIAT identified a military target, with no reference to **proportionality**. It is difficult to see how the Defendant could find that airstrikes which, as far as JIAT has reported, did not even consider the calculation between anticipated military advantage and expected civilian harm, were 'unlikely' to have breached IHL. The prohibition on disproportionate attacks is engaged at the point of the "*launching*" of the attack.[17] The question of whether the principle has been breached is not determined objectively or retrospectively based on the consequences, but subjectively with reference to what "*may be expected*" by the attacker when the attack is launched. As to what should be expected by the attacker under IHL, this core obligation encompasses taking steps to detect the presence of civilians, to take steps to minimise harm, and in any event to cancel attacks which may be expected to be disproportionate. Thus, it is difficult to see how the strong indications that these assessments are not being systematically carried out would not result in the categorising of many such incidents as 'possible' violations.

42. Similarly, in cases where it is plausible that a target was not time sensitive and where the Coalition attacked the target at a time when civilians were *more* likely to be present, for example during the day, it is difficult to understand how the Defendant could avoid a finding, without more, that the strike at least *possibly* violated the obligation to take all feasible precautions to minimise civilian harm.

[17] See, e.g. ICRC Customary International Humanitarian Law Database, Rule 14. See also, Article 51(2) Additional Protocol I.

43. Mwatana suggests that the undermined credibility of JIAT should be extrapolated to cast doubt on the cases where it is claimed that a munition hit a civilian target due to a technical failure. The Defendant should address whether in each case of "technical failure", which account for a significant proportion of JIAT findings, that finding is deemed credible.

44. Finally, as to the listed attacks for which there is specific evidence indicating that procedures were not followed, it is difficult to see how incidents such as these, without additional and incident-specific operational information to explain the facts as presented (which the Defendant does not have), would not be classed as 'possible' violations at the very least.

45. Mwatana has attempted to engage the Defendant on all of the above issues, but those attempts have been unsuccessful despite the Defendant having had the relevant information since August 2019. Mwatana notes that the Defendant has identified, in a CLOSED Annex to its CLOSED Summary Grounds of Defence, which incidents of those listed in the Witness Statement of Ann Feltham have been deemed 'possible' violations.[18] Mwatana respectfully submits that the same should be done with respect to the incidents Mwatana has highlighted.

SUBMISSIONS AS TO GROUND (b): NO PROPER BASIS FOR CONCLUSION THAT NO "PATTERN" OF VIOLATIONS EXISTED

46. As described above, Mwatana has presented a series of patterns of concern to the Defendant. Despite this, Mwatana is not clear whether, in analysing patterns, the Defendant asked herself the question of whether or not KSA/the Coalition had a policy of targeting specific types of civilian targets, or whether there existed systemic or procedural issues resulting in particular types of civilian targets being attacked.

47. In her explanation of how patterns are identified, the Defendant states that the MOD does not apply a "*prescriptive approach*", and submits, as an example, that it has "*looked for similarities in the factual nature of the incidents, the reasons/explanations for the*

[18] HBC/77

incidents and the timescale in which they have occurred," adding that the analysis "*has not revealed any such patterns, trends or weaknesses*" [SGD/27 at HBC/75-76].

48. Mwatana considers that the patterns grouped by object type plainly have similarities in their "*factual nature*". The attacks grouped by an apparent failure to follow procedure (and, resultingly, failure to take precautions to avoid and minimise civilian harm and to cancel disproportionate attacks), very clearly have "*reasons/explanations*" in common.

49. After the Defendant's retaken Decision of 7 July 2020 was made public via a statement to Parliament, Mwatana wrote to the Defendant on 20 August 2020, asking: [~~MIB/C/437~~HBS/1999]

> "*In relation to the assessment of patterns and trends:*
>
> 1. *What was the Defendant's approach to whether or not incidents occurred "at different times"?*
> 2. *What was the Defendant's approach to whether or not incidents occurred "in different circumstances"?*
> 3. *What was the Defendant's approach to whether or not incidents occurred "for different reasons"?*
> 4. *According to what specific characteristics and reasons did the Defendant search for patterns and trends across the list of possible violations?*"

50. The Defendant responded that the MOD and the FCDO have "*adopted a broad approach*", before setting out the same wording referred to at [47] above.

51. Mwatana asked if the Defendant had taken into account Mwatana's incident-specific evidence indicating that the Coalition "*fails to follow its own procedures designed to ensure compliance with IHL (para 5)*" The Defendant wrote:

> *"As explained in the Written Ministerial Statement, every allegation which it is assessed is likely to have occurred and to have been caused by fixed wing aircraft has been subject to detailed analysis by reference to the relevant*

*principles of IHL (**"the IHL Analysis"**). In carrying out the IHL Analysis, the MOD has had particular regard to the guidance contained in the User's Guide and to the guidance given by the Divisional Court (at paragraphs 22 to 24 of its OPEN Judgment) and endorsed by the Court of Appeal (at paragraphs 23 to 25 of its OPEN Judgment). In accordance with these principles, the MOD has considered, on the basis of all the information and intelligence available to it, whether the KSA has complied with the obligation to take all feasible precautions in attack."*

52. Paragraphs 23-25 of the Court of Appeal OPEN judgment are simply a re-statement of the core requirements of IHL, and thus the question remains unanswered.

53. In Mwatana's respectful submission, the matters addressed above undermine greatly the rationality of the Defendant's conclusion that no pattern of violations occurred.

SUBMISSIONS AS TO GROUND (c): NO SUSTAINABLE BASIS FOR THE CONCLUSION THAT CRITERION 2(c) IS NOT MET ON THE DEFENDANT'S OWN FACTUAL POSITION, WHICH SHOWED AN "ESTABLISHED" RECORD OF PAST "ISOLATED" VIOLATIONS

54. The Defendant has confirmed that despite having accepted that a number of violations of IHL have taken place, her assessment is that the clear risk threshold under Criterion 2(c) has not been met. She reiterates that she has taken account of "*a wide range of information relating to KSA's attitude towards and capacity to comply with principles of IHL*." [SGD/42 at HBC/80]. Mwatana presumes that the information referred to is that itemised at SGD/21(c)(ii)-(vi) [HBC/72-73]. Where established past violations might give rise to an inclination on the part of the Defendant to suspend arms sales, the patterns of behaviour set out in Mwatana's evidence significantly detract from the extent to which it is rational for the Defendant to rely on the information itemised at SGD/21(c)(ii)-(vi) [HBC/72-73] to counterweigh that inclination.

OTHER VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW ATTRIBUTABLE TO KSA

55. Also relevant, as a cross-cutting issue, is evidence of KSA's wider lack of regard for IHL and human rights standards beyond its conduct of airstrikes, including:

(i) KSA's involvement in significant detention-related abuse, including torture of Yemeni fishermen in Saudi Arabia [RA/§74-82 at HBC/894-898];

(ii) KSA's significant role in humanitarian obstruction in Yemen, including impeding life-saving goods from entering the country [RA/§83-86 at HBC/898-900]; and

(iii) KSA-backed forces indiscriminately shelling civilians [RA/§87-88 at HBC/900-901].

56. Despite the available documentation of these violations, JIAT has almost exclusively examined Coalition airstrikes [RA/§72 at HBC/893-894]. The overview given at [RA/§89-95 at HBC/902-904], which comprises both Mwatana's own investigations and those of other reliable organisations including the United Nations, demonstrates that KSA, through JIAT or otherwise, has failed credibly to investigate suspected IHL violations and failed to implement accountability measures.

57. Mwatana's evidence in this regard is relevant to ground (d) of the Claimant's challenge as it relates to impunity but also to Mwatana's Pattern 3 relating to the credibility and reliability of JIAT and KSA assurances, such that it is also relevant to the Claimant's grounds (a) to (c).

~~**JONATHAN CROW QC**~~

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Brick Court Chambers

BINDMANS LLP

~~01 June 2020~~

13 January 2022