

IN THE HIGH COURT OF JUSTICE  
KING’S BENCH DIVISION  
ADMINISTRATIVE COURT

**B E T W E E N:**

**THE KING on the application of  
CAMPAIGN AGAINST ARMS TRADE (“CAAT”)**

**Claimant**

**-and-**

**SECRETARY OF STATE FOR INTERNATIONAL TRADE**

**Defendant**

**MWATANA FOR HUMAN RIGHTS**

**First Intervener**

**-and-**

**OXFAM**

**Second Intervener**

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**CAAT’s SKELETON ARGUMENT**

*For substantive hearing 31 January, time estimate 3 days*

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**References:** Core Bundle [CB/tab/page], Supplemental Bundle [SB/tab/page]

**Suggested reading:** CAAT CA Judgment, skeleton arguments, Witness statements (Feltham, Lapsley (OPEN and CLOSED), Al-Qaq (OPEN and CLOSED), Balmforth, Perlo-Freeman, al-Mutawakel, Siddiquey

**Estimated reading time:** 4 hours

**Length of skeleton:** Permission is sought for 3 extra pages and a 2 page annex under CPR PD54A para. 14.3. The case is factually detailed and it is likely to be useful to set out the course of the earlier litigation. Annex 1 (2 pages) summarises relevant JIAT reports. It is likely to save time during oral argument and assist the Court in understanding the voluminous evidence.

## A. INTRODUCTION

1. Campaign Against Arms Trade (“CAAT”) challenges the lawfulness of the continuing decision 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 (SFG § 1).
2. There has been a large-scale war in Yemen since 2014. In March 2015 the Kingdom of Saudi Arabia (“KSA”) and a number of other countries from the region intervened in that conflict via a Saudi-led Coalition (“SLC”). The war has been notorious both for its grave humanitarian consequences and because of the evidence of serious violations of international humanitarian law (“IHL”) perpetrated by all sides in the conflict. The conduct of all sides has been independently investigated by competent UN investigative bodies, including a Panel of Experts established by the Security Council, as well as by reputable NGOs. Without exception, these investigations have concluded that the KSA has perpetrated repeated serious violations of IHL throughout the course of the conflict, both through airstrikes and in ground operations.
3. The UK exports much of the military materiel (including bombs, aircraft and related equipment) used by KSA in Yemen. As set out below, such exports are prohibited where there exists a “clear risk” that such equipment “may” be used in violation of IHL. On 20 June 2019, the Court of Appeal quashed the Secretary of State’s previous 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”). Following the judgment, the Secretary of State modified her decision-making process and retook the decision on whether to grant licences. On 7 July 2020, the Secretary of State wrote to CAAT to outline her new decision [SB/76/2337]. She now accepts as established that KSA had violated IHL in the conflict in Yemen in a “small number” of incidents. But she found that there was no “clear risk” that such violations of IHL “may” recur since she considered these breaches to be isolated and without an underlying pattern.
4. CAAT challenges the lawfulness of the Secretary of State’s conclusion. Mr Justice Jay granted CAAT permission on 28 April 2021.<sup>1</sup> The Secretary of State has declined to provide a full explanation for her decision in OPEN for reasons of national security. By an order of 11 November

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<sup>1</sup> Mwatana for Human Rights (“Mwatana”) were granted permission to intervene on 20 April 2021. Oxfam were permitted to intervene in the proceedings by filing a witness statement prepared by Mr Muhsin Siddiquey, Oxfam’s country director for Yemen, whose statement deals specifically with the pattern of attacks in Yemen against humanitarian relief personnel, including by the SLC.

2022, the Defendant was permitted to rely on CLOSED material in these proceedings. Some of this material has now been opened up, but it is inevitable that much of the detailed argument in support of the Claimant’s case will be advanced by the Special Advocates in CLOSED. This skeleton deals with the OPEN evidence.

## **B. FACTUAL BACKGROUND**

5. The history of the conflict in Yemen is set out in detail by the Divisional Court in *R (Campaign Against Arms Trade) v. Secretary of State for International Trade* [2017] HRLR 8 [39] – [45], [61] – [85], and [87] – [175] (“**CAAT DC Judgment**”). In summary, there is a history of political instability and war in Yemen, involving both conflict between different factions within Yemen and, often, intervention by regional powers. In 2014, conflict erupted between armed forces loyal to the government of Abd Rabbuh Mansur Hadi, and Houthi forces loyal to the former president Ali Abdullah Saleh.<sup>2</sup>
6. In 2015, the Saudi-led coalition<sup>3</sup> intervened in the conflict in support of the (then) Hadi-led government, with both air and ground operations. KSA is the leading member of the coalition and carries out the bulk of the airstrikes.<sup>4</sup> It is common ground between the parties that UK supplied materiel is being used by KSA in Yemen. In the course of the conflict, there have been periods during which the intensity of hostilities has been higher, or lower, and a number of short ceasefires (relative to length of conflict) have occurred. A ceasefire was in place between April and October 2022, but this unfortunately collapsed following which there has been a resumption of hostilities.<sup>5</sup>
7. UN agencies and reputable NGO’s have carried out meticulous investigations and concluded that KSA has repeatedly perpetrated violations of IHL, many of them serious. A number of incidents have involved mass civilian casualties, where 100 or more civilians have been killed in a single incident, with many more injured. These incidents have included attacks on markets, detention facilities, and a funeral.<sup>6</sup> In some of these mass casualty incidents (as well as in a number of others)

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<sup>2</sup> The alliance between Houthis and Saleh collapsed in November 2017. Saleh was killed when Houthi forces took over Sana’a.

<sup>3</sup> At the outset, the Coalition involved Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Qatar and Bahrain. Djibouti, Eritrea, and Somalia made their airspace, territorial waters, and military bases available to the coalition. On 5 November 2019, the UAE withdrew most of its forces from Yemen (see IHL Update 1 February – 31 October 2019 [CB/23/377-415, particularly 387]).

<sup>4</sup> This is reflected in the Defendant’s evidence. See e.g. IHL Update 1 February – 31 October 2019 § 29 [CB/23/388] and IHL update 1 November 2019 – 31 January 2020 § 63 [CB/23/550].

<sup>5</sup> See WS Dr Perlo-Freeman §§ 2-3 [CB/26/838-839].

<sup>6</sup> Examples include: SLC airstrike on Dhammar detention facility killing 134 civilian detainees held by Houthis and 40 injured. The Group of Eminent Experts notes that it was well-known that this location was a detention facility, as it had been visited by the ICRC and referred to in UN reports (see Security Council Panel of Experts Report 2020 §§ 67-70); KSA airstrike on Great Hall, Sanaa 8 October 2016, during a funeral which the UN found caused 132 civilian fatalities and 695 injuries. The SLC’s Joint

the SLC's Joint Incident Investigation Team ("JIAT") has conceded that KSA breached rules of engagement and/or IHL. In addition, in the course of the conflict there have been a number of strikes on medical clinics or humanitarian facilities the coordinates of which were on a no-strike list in the possession of KSA.

**(i) Investigations of breaches of IHL identified by competent UN agencies and NGOs**

8. As set out in the SFG §§ 12 – 23, a range of specialised UN bodies have investigated allegations that the SLC has violated IHL in specific incidents in Yemen. These investigations provide a compelling body of material indicating that: (a) KSA has repeatedly violated IHL in the conflict in Yemen in incidents which cannot properly be characterised as isolated; (b) this is *a fortiori* the case if the question is approached on the basis that "possible" violations of IHL are treated as "established" violations of IHL; (c) a range of common features, or patterns, are apparent in such violations; and (d) even if no common features are apparent the materially significant number of actual, or possible, violations throughout the duration of the conflict is such that there is a "clear risk" that such violations "may" reoccur (even were there no pattern to such incidents).
9. The Panel of Experts ("**Security Council Panel of Experts**") was established (with UK backing) by UN SC Resolution 2140 (2014), which empowers it to investigate violations of IHL by all sides to the conflict, for purposes of advising the Security Council Sanctions Committee on Yemen.<sup>7</sup> The UN Group of Eminent Experts ("**Group of Experts**") was established by the Office of the High Commissioner for Human Rights following a resolution passed by the Human Rights Council, with a specific mandate to investigate violations of IHL and IHRL.<sup>8</sup> The work of each body is assisted by senior officials with expertise in IHL and military operations.
10. These bodies each adopt a rigorous methodology which is set out in investigation reports (see SGF § 18):<sup>9</sup>
  - 10.1. Findings by the Security Council Panel of Experts may result in the imposition of sanctions by the Security Council. As a result, the Panel adopts a "stringent methodology to ensure that its investigations meet the highest possible evidentiary

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Incident Assessment Team concluded that this strike did not follow rules of engagement and that the coalition "did not take into account the nature of the targeted area" when planning the attack. See UN Security Council Panel of Experts Report 2017 §§ 123-125 and Annex 49 [SB/6/60-61, 75-76]. KSA air strikes on Khamees market in the Mastaba district of the Hajjah Governorate 15 March 2016, killing more than 100 civilians, including 22 children (See UN Security Council Panel of Experts Report 2017, Annex 49, Appendix A [SB/6/77-83].

<sup>7</sup> Paragraph 18 (c), UN SC Resolution 2140 (2014). [SB/4/32]

<sup>8</sup> A/HRC/RES/36/31 [SB/7/108-112]. The mandate of the Group of Experts has recently expired.

<sup>9</sup> As regards the Security Council Panel of Experts, the detailed methodology adopted is set out in Appendix B, Annex 1, 2020 Panel Report [SB/17/461-463].

standards”.<sup>10</sup> 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 annexes to its main report. A right to reply is afforded to parties adversely affected by the findings, including states. KSA and JIAT have provided evidence to the panel, against which it has reviewed its original findings (see Appendix 4, Annex 29 Security Council Panel of Experts 2021 Report).<sup>11</sup>

10.2. The UN Group of Experts adopts a similar methodology.<sup>12</sup> It interviews eyewitnesses and conducts analysis of sites using satellite imagery. It also takes account of information or evidence submitted by KSA, the Government of Yemen or the SLC and has regard to the findings of JIAT in respect of specific incidents. KSA and the SLC is afforded a right to reply and to submit evidence.

11. Reputable NGOs including Human Rights Watch (“**HRW**”) Amnesty International and Mwatana have conducted detailed ground investigations into alleged violations in Yemen. The Court of Appeal has confirmed the importance of these investigations and their findings. In CAAT CA Judgment [134] the Court observed that “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 did have the capacity to introduce representatives on the ground and to interview eyewitnesses, which the Secretary of State could not do”. Understandably, this is not the kind of analysis or investigation HM Government can undertake.

12. The UK will also, of course, have access to information which the UN or NGOs do not have. However, there are also important limitations in HMG’s insight into KSA operations:

12.1. As recorded in the IHL Update (February 2020 to April 2020) the UK “does not have access to routine coalition operations”. As a result, “the UK does not have a complete understanding of how the Coalition actually applies IHL principles in practice or implements lessons learned from past errors, especially in terms of whether IHL

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<sup>10</sup> Paragraph 1, Appendix B, Annex 1, Security Council Panel of Experts 2020 Report.

<sup>11</sup> [SB/24/607].

<sup>12</sup> As regards the Panel of Eminent Experts, its methodology is summarised in its 2019 Report §4-10 [SB/13/247-249].

principles are applied consistently by all operational units”.<sup>13</sup> Similarly, the IHL Update (November 2019 – January 2020 IHL) § 89 records that “HMG cannot directly assess incorporation of IHL principles in the SLC’s operating procedures and improvements will only become apparent in the longer term”.<sup>14</sup>

12.2. Similarly, the Decision Paper<sup>15</sup> before the Secretary of State in July 2020 notes that UK liaison officers are “not involved in the targeting chain and so had limited ability to see at first-hand what lessons had been learned and improved procedures had been disseminated and ingrained through the chain of command”.<sup>16</sup>

13. The UK therefore has limited ability to assess whether KSA has, in practice, implemented amended and improved operational practices following admitted breaches or past violations.

#### **(ii) Findings of violations of IHL**

14. The UN agencies and NGOs have – following their investigations - found that the SLC has repeatedly violated IHL in Yemen. Incidents found to constitute violations (often serious) of IHL have continued since the Divisional Court considered this matter in February 2017 (see numerous examples of such violations in SFG § 17). Violations found include indiscriminate targeting; failure to respect the principles of distinction and proportionality; repeated failures to 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.<sup>17</sup>

14.1. Since its creation in 2016, the Security Council Panel of Experts has found (often multiple) violations of IHL in 33 of the approximately 34 investigations completed (with further investigations underway). The Panel found that a number of incidents may also constitute war crimes under the Geneva Conventions (in other words violations which may entail individual responsibility under international criminal law and not merely state liability for violation of IHL).<sup>18</sup> These investigations are painstaking and, in order that it can conduct these thoroughly, it investigates only a sample of the allegations of violations which come to its attention. In its 2016 Report the Panel found 119 incidents in which

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<sup>13</sup> IHL Update (February 2020 to April 2020) § 78 [CB/23/662].

<sup>14</sup> IHL Update (November 2019 – January 2020 IHL) § 89 [CB/23/563]. Paragraph 6 of this update also acknowledges that the UK “cannot know for certain the full extent to which SLC operational personnel apply IHL principles”.

<sup>15</sup> ‘Exhibit 1A’ Al-Qaq [CB/23/270-317]

<sup>16</sup> Decision Paper p. 28. See also p. 30. [CB/23/298 and 300].

<sup>17</sup> See UN Group of Experts 2018 Report § 72 [SB/11/191]; and 2019 Report § 66.

<sup>18</sup> See Panel of Experts Report 2017 § 143 [SB/6/68].

the Coalition had violated IHL, with hundreds of civilian deaths. As well as violations perpetrated by airstrikes, the Security Council Panel of Experts have also found other violations perpetrated by Coalition ground forces in Yemen, including in the context of detention<sup>19</sup> and in attacks carried out by helicopter, including an incident in which 41 refugees were killed in an attack by a helicopter of a type only in the possession of the SLC.<sup>20</sup> Violations are not limited to those by air operations. In its Final Report in 2020, the Security Council 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 ...”.<sup>21</sup>

14.2. The Group of Experts has also found violations committed by the SLC. By way of example only, the experts have identified 11 violations involving 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, 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.

**(iii) Breaches of IHL apparent from JIAT’s own factual findings**

15. The SLC investigates alleged breaches of IHL via its Joint Incidents Investigations Team. JIAT’s work has been subject to significant criticism from both the UN Group of Experts and Human Rights Watch. Criticisms made by these bodies include: (a) that it fails to apply IHL properly or consistently, often overlooking or failing to apply key rules; (b) fails to find violation of IHL even where identified facts indicate a breach;<sup>22</sup> (c) lacks transparency as to its composition, expertise and as to the methodology adopted in its investigations.<sup>23</sup> Moreover, in some instances, assessment by Human Rights Watch and the UN Group of Experts shows that its factual findings are often

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<sup>19</sup> Security Council Panel of Experts Report 2020 § 100 [SB/17/456] and Annex 28. This annex is confidential but will be in the possession of the United Kingdom as a permanent member of the UN Security Council.

<sup>20</sup> Security Council Panel of Experts 2018 § 19 p. 243.

<sup>21</sup> Security Council 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).

<sup>22</sup> This criticism is specifically made by the UN Group of Experts, Conference Paper, 2021 § 16-17 [SB/27/689].

<sup>23</sup> See Human Rights Watch Report “Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen”, [SB/53/1410-1453].

demonstrably contradicted by objective, independent evidence, including the information from the staff of reputable aid organisations such as MSF.<sup>24</sup>

16. Nevertheless, a significant number of JIAT reports disclose facts which constitute a violation of IHL, on the admitted facts. These incidents are set out in Annex 1. All of these incidents would constitute serious violations and a number are of the utmost gravity, involving scores of civilian fatalities.

(iv) **Secretary of State’s decision-making process and the new decision**

17. Previously, the Secretary of State did not consider whether the KSA might have violated IHL in any specific incident. In June 2019, the Court of Appeal held that this approach was unlawful. The Secretary of State revised her decision-making process to address the court’s judgment. On 7 July 2020 the Secretary of State wrote to CAAT saying that, following this new analysis, she remained of the view that there was no “clear risk” that UK weapons “may” be used in a serious violation of IHL in Yemen.<sup>25</sup>

18. The revised methodology of the Secretary of State is set out in the Decision Paper produced by the Export Control Joint Unit (“**ECJU**”), with input from the MOD and Foreign Office.<sup>26</sup> This paper was provided to the Foreign Secretary in a ministerial submission sent in January 2020.<sup>27</sup> The Decision Paper explains that the Criterion 2 (c) assessment is informed, in particular, by: (a) analysis of whether KSA has breached IHL in specific incidents (“**IHL Analysis**”) (see below); (b) “an analysis of thematic trends drawn from IHL updates, including analysis of the training provided to KSA and broader issues, both positive and negative”; (c) “the UK’s knowledge of the development of KSA systems, including reflection they have on credible reported allegations”; (d) “an overall ‘stand back’ analysis (Decision Paper § 10).

19. As regards the IHL Analysis:

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<sup>24</sup> By way of illustrative example only, JIAT denied that the coalition bombed a civilian home in Mahda on 4 August 2017. Yet, munition wreckage at the scene, blast damage at the scene; the accounts of ICRC officials; video footage and photographic evidence demonstrated that the residence had been destroyed by a airstrike (with only the SLC being able to mount such operations in Yemen). See HRW “Hiding Behind the Coalition”, p. 1425 [**SB/53/1425**]. See also findings of Group of Experts, Conference Paper on Accountability 2021 § 17 [**SB/27/689**].

<sup>25</sup> [**SB/76/2337**] § 2-3.

<sup>26</sup> See WS Al-Qaq §§ 2 and 29-39.

<sup>27</sup> January 2020 Ministerial Submission [**SB/22/199-201**].



- 19.1. The purpose of the IHL Analysis is to assess whether individual incidents may amount to a violation of IHL (WS Lapsley § 25).
- 19.2. The IHL Analysis is limited to incidents involving “fixed wing aircraft” – it does not, for example, involve assessment of violations perpetrated by helicopters, ground forces or in detention facilities in Yemen (see Letter of 7 July 2020 § 9).<sup>28</sup> In addition, it appears that the IHL Analysis of airstrikes is conducted exclusively by reference to four IHL principles: “proportionality; feasible precautions; distinction and necessity” (Decision Paper § 24 (g)). The justification for these limitations is not explained in the Decision Paper.
- 19.3. A Tracker system records matters that are relevant to the IHL Analysis. The system records whether an allegation is considered “credible” in the sense that it is assessed by the MOD as likely to have occurred (WS Lapsley § 27 (1)). The Tracker also categorises incidents as “Credible Other” (i.e. assessed as attributable to another coalition member) and “Credible Not Known” (where the perpetrator is unknown), (Decision Paper § 24 (j)). In addition, the Tracker records credible incidents where the MOD “does not have sufficient information to carry out a further assessment”. Such incidents constitute around 1/7 of the overall number of “credible” allegations (Decision Paper § 24 (k) and Lapsley § 27 (3)).
- 19.4. The MOD Incident Assessment Panel assesses “whether it is possible that the incident constituted a breach of IHL, or whether it is unlikely it constituted a breach” as well as the rationale for this assessment (WS Lapsley §§ 24 (h) and 27 (2)). In this context, it is explained that possible breaches “may be anywhere on the spectrum from ‘just possible’ to probable” (WS Lapsley § 27 (4)).
- 19.5. “Possible” violations are then treated as “established” violations for purposes of assessing whether there is a “clear risk” that weapons “might” be used in violation of IHL for purposes of Criterion 2 (c) (*see* WS Lapsley § 27 (4); Decision Paper § 23).
20. IHL Updates are prepared by the FCDO for the Foreign Secretary. The purpose of the updates is to provide the Foreign Secretary with information on KSA’s compliance with IHL so as to inform her recommendation to the Trade Secretary on whether Criterion 2 (c) has been met (WS Al-Qaq § 24).
21. The Decision Paper p. 11 includes an overall summary of conclusions drawn from the MOD’s IHL Analysis. Paragraph 31 states that of the Credible incidents attributed to KSA “a small number are assessed as being ‘possible’ breaches of IHL”, while “over 4 times that number are assessed as

being unlikely to be breaches of IHL”. In other words, around 20% of Credible incidents attributed to KSA are assessed as “possible” breaches of IHL in incidents involving fixed-wing aircraft.

22. Significantly, the MOD says that it is unable to assess whether IHL may have been violated in a very high number of credible incidents involving KSA – around 50% (Decision Paper p. 11). The Decision Paper recognizes that it is possible that IHL may have been violated in such incidents. It notes that the IHL Analysis simply reaches no conclusion one way or the other in these credible incidents because of the “very limited information” available (Decision Paper § 34). Added to this there is a material number of unattributed Credible Not Known incidents, a small number of which are assessed to involve violations. This is the context for the Secretary of State’s view that KSA has only violated IHL in a “small number” of incidents. CAAT is concerned that it is said to be impossible to form a view even as to whether an incident constitutes a “possible” violation in such a high number of incidents, given the detailed investigations which have been conducted by UN bodies and NGOs, not to mention the findings of JIAT. As all of the relevant assessments are CLOSED, this issue will need to be considered by the Court in CLOSED with the assistance of the Special Advocates.
23. The overall conclusion in the IHL Analysis is set out in the Decision Paper §§77-81. This notes that “half of the ‘possible’ breaches occurred more recently, but these are said to be “disparate” incidents. It notes that “some of these incidents raised serious concerns”, although each was said to have occurred in a different context. Overall, it is assessed that the breaches do not indicate a “pattern” of violations but is consistent with “a limited number of errors, well within the margin that would be expected in a conflict of this nature”. The Secretary of State’s letter of 7 July 2020 explains that she regards the “possible” violations as being “isolated” incidents.
24. The Decision Paper also sets out a thematic analysis which considers a number of specific issues including: HMG insight into KSA targeting practices and procedures; training on IHL; the killing of journalist Jamal Khashoggi; the export restrictions / bans imposed by other governments including the US and Germany; KSA assurances and political engagement. Section V of the Decision Paper sets out ECJU’s analysis. As well as addressing the MOD’s IHL Analysis, it also addresses evidence going to KSA’s attitude to compliance with IHL<sup>29</sup> and its capability to comply with IHL.<sup>30</sup> Based on the absence of a “pattern” to possible violations and the broader evidence going to KSA attitudes and capabilities it concludes that the criterion 2 (c) test is not met (Decision Paper §§ 170 – 171).

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<sup>29</sup> Decision Paper §§ 158 – 163.

<sup>30</sup> Decision Paper §§ 164 – 169.

25. ECJU provided the Foreign Secretary with a further submission in April 2020, analysing further IHL Updates. On 12 May 2020 the Foreign Secretary made a recommendation to Trade Secretary that the Criterion 2 (c) test was not met.<sup>31</sup> The Trade Secretary considered the matter and, based on the Foreign Secretary’s advice, decided that the Criterion 2 (c) threshold was not met on 7 July 2020.
26. That remains HMG’s position. In her statement, Stephanie Al-Qaq addresses a number of serious incidents which have occurred since July 2020 (WS Al-Qaq §§ 40 – 46D). This includes a number of airstrikes where JIAT findings may indicate a breach of IHL (i.e. 14 February 2020, Al Jawf, 6 August 2020, killing 32 including 19 children and Khab Directorate, killing 8 children). These incidents have not changed HMG’s conclusion on Criterion 2 (c).

### C. LEGAL FRAMEWORK

27. The applicable legal and policy framework is set out in the SFG §§ 36-50 and summarised below.

#### (i) Policy on Arms Export Licencing

28. HMG’s policy on arms export licencing was, until recently, set out in the Consolidated EU and National Arms Export Licencing Criteria, announced by the then Secretary of State for Business, Innovation and Skills in Parliament on 25 March 2014. This policy and, in particular, Criterion 2 (c) of that policy, was based on EU Common Position 2008/944/CFSP (“**the Common Position**”). 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.<sup>32</sup> The User Guide provides guidance on the application of Criterion 2 (c) and has been followed by HMG in applying the Consolidated Criteria.
29. On 8 December 2021, the Secretary of State for Trade announced a revised policy in Parliament – the Strategic Exports Licencing Criteria. For present purposes, Criterion 2 now provides, in relevant part:

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

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<sup>31</sup> [CB/22/213-214].

<sup>32</sup> A revised version of the User Guide was adopted by Council Decision of 16 September 2019.

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 or the Council of Europe;

Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, the Government will:

c) Not grant a licence if it determines there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law.

30. The User's Guide explains Criterion 2 (c) 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."<sup>33</sup>

31. 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 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 and 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.

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<sup>33</sup> 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.

32. In other words, the assessment must take three key matters into account (a) past and present record of compliance (b) the intentions of the state to which arms are to be exported and (c) the capacity of that state to comply with IHL.

**(ii) Key Rules of IHL**

33. 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.

- i) the obligation to take all feasible precautions in attack and to do everything feasible to verify that targets are not civilian;
- ii) the protection for medical clinics and medical transport;
- iii) the prohibition on attacking objects indispensable to the survival of the civilian population;
- iv) the prohibition on indiscriminate attacks;
- v) the prohibition on attacks which cause disproportionate death or injury to civilians;
- vi) the prohibition on attacks directed against civilian objects and/or civilian targets; and
- vii) the obligation to investigate and prosecute breaches of IHL.

34. The Consolidated Criteria (and the Common Position which it seeks to implement) requires assessment of the risk of “serious violations” of IHL. 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]).<sup>34</sup> 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 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).

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<sup>34</sup> 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.

## D. GROUNDS

### (i) **Ground 1: No proper basis for conclusions that violations limited to those identified by the Secretary of State**

35. As the Decision Paper makes clear, the Secretary of State now accepts that KSA has perpetrated violations of IHL in a “small number” of incidents.<sup>35</sup> This appears to constitute around 20% of credible allegations attributed to KSA, albeit that in around half of the credible incidents attributed to KSA the Secretary of State says there is insufficient information to form a view as to whether the incident is even a possible violation of IHL.

36. Based on the overwhelming body of OPEN evidence available, including JIAT’s own findings, the Secretary of State has erred in her conclusion that KSA has merely violated IHL in a “small number” of incidents.

37. However, much of the relevant evidence has not been disclosed and will be considered by the Court in CLOSED proceedings. In particular, in the OPEN proceeding the Secretary of State has not (a) identified how many incidents she accepts as possible violations other than saying it is “a small number” and (b) identified which incidents constitute possible violations or (c) explained her rationale (even where there is substantial, independent objective evidence). These issues will need to be addressed by reference to the CLOSED material.

38. Nevertheless, even on the OPEN material, the Secretary of State appears to have underestimated the number of violations which have occurred:

38.1. First, as set out in detail above, the Security Council Panel of Experts, the UN Group of Experts and NGOs have conducted detailed investigations and concluded that the SLC has violated IHL in a large number of incidents, throughout the conflict, including in a number of recent incidents. Many of these incidents have resulted in catastrophic civilian casualties, or damage to essential infrastructure such as hospitals, cholera treatment clinics or water treatment works. The Security Council Panel of Experts has found violations in at least 35 instances (with a further report due in January 2023). Reputable NGOs such as HRW and Amnesty International have conducted on-the-ground investigations, finding likely violations in many more incidents.

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<sup>35</sup> Decision Paper pp. 10 – 11 [CB/23/280-281]

- 38.2. Second - as set out in detail above - JIAT's own factual admissions / findings show: (a) IHL has been violated in a significant number of instances; (b) these incidents have continued throughout the conflict and many of these incidents are recent (c) many of these violations are of the utmost gravity, causing scores of civilian deaths, including attacks purportedly on military objectives but in locations such as a busy markets which would inevitably result in high civilian casualties. Recent examples include the attacks on a residential area in Al Jawf, on 14 February 2020, which killed 32 including 19 children or the strike on Kitaf hospital, 26 March 2019, killing 7 including 4 children. It is true that JIAT rarely expressly admits that an incident violated IHL. But this should not prevent the Secretary of State drawing proper conclusions from admitted facts, where these identify a possible breach.
- 38.3. Third, the Secretary of State's approach is to treat "possible" violations as "established" violations, with "possible" breaches said to range from "just possible" to "probable" (WS Lapsley § 27 (4)). The Claimant agrees that this is the right approach, not least given that the Consolidated Criteria 2 requires the Secretary of State to "[e]xercise special caution and vigilance in granting licences [...] to countries where serious violations of human rights have been established by the competent bodies of the UN". This being the case, the findings of the UN agencies and NGOs (and JIAT's own findings) establish a compelling body of evidence showing violations in a significant number of possible incidents, which have continued throughout the conflict.
- 38.4. Fourth, the Secretary of State has adopted a limited approach to assessing violations of IHL. First, she merely assesses violations perpetrated by "fixed wing aircraft", rather than even attempting to form a view as to whether KSA may have violated IHL in other activities including: (a) the activities of KSA forces in ground operations (b) attacks involving helicopters of which there are a number<sup>36</sup> or (c) in detention facilities / secret prisons or through enforced disappearance. Such an approach is arbitrary and contrary to that required by CAAT CA Judgment [138]. In addition, the Decision Paper § 24 (g) explains that the IHL analysis only assesses credible incidents by reference to 4 principles (proportionality; feasible precautions; distinction and necessity). If this is correct, in some instances, the analysis may miss other forms of IHL violation such as the obligation to safeguard an enemy *hors de combat* (Article

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<sup>36</sup> This includes one incident in which 41 migrants on a boat were machine-gunned by a helicopter gunship. Security Council Panel of Experts 2018 § 19 p. 243.

41, AP I)<sup>37</sup> or the obligation to safeguard and facilitate the relief consignments and personnel (Article 70, AP I) – again a major IHL issue in the conflict given the famine and cholera epidemic affecting much of the country.<sup>38</sup> The point is also of significance as regards the question of pattern (see below).

39. Accurately identifying the breaches of IHL is important to the lawfulness of the decision to continue to export:

39.1. First, whether the requirements of the Consolidated Criteria are met is said in the Decision Paper § 171 to be “finely balanced”. A failure to properly characterise one, or a small number, of incidents as violations, would constitute an important and material error in the context of a finely balanced decision.

39.2. Second, as explained in Ground 3, the fact that a “small number” of violations are being perpetrated by a recipient state in a conflict will render the transfer of arms firmly contrary to Criterion 2 (c). This is *a fortiori* the case where (as here) many of these purportedly “small number” of violations involve catastrophic levels of civilian casualties. The policy requires that licences will not be granted where there is a “clear risk” that it “might be used to commit or facilitate a serious violation of international humanitarian law”. There is no minimum acceptable level of serious violations.

39.3. Third, half of the “possible” violations have occurred “recently” and these incidents have raised “serious concerns” (Decision Paper p. 25). The recent continuation of these violations would inevitably be highly relevant.

40. For these reasons, an error on the part of the Secretary of State in identifying “possible” violations of IHL, will have a material impact on the overall conclusion that Criterion 2 (c) is not met.

41. The standard of review is one of anxious scrutiny. As the Divisional Court held in CAAT DC Judgment [27] “the nature of the decision in this context, involving as it does risk to life,

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<sup>37</sup> Article 41 prohibits attacks on enemy personnel where they are rendered wounded or incapacitated. For example, in the attack on Abs Hospital, on 26 August 2019, appears to have targeted a wounded fighter in a car in the hospital, following an airstrike.

<sup>38</sup> The Security Council Panel of Experts has repeatedly raised concerns about humanitarian assistance being prevented by SLC airstrikes, including on the port of Hodeidah. See e.g. Panel of Experts 2019 § 164 and Panel of Experts 2018 § 188 – 190 describing the SLC blockade of the port as “essentially using the threat of starvation as a bargaining tool and an instrument of war.”. There is certainly sufficient (and uncontroverted) factual evidence based on which HMG could assess whether this constituted a breach of applicable principles of IHL. But this analysis is not included in the IHL Analysis because of its limited scope.



necessitates a rigorous and intensive standard of review”. Moreover, the question of whether the Secretary of State has lawfully analysed whether a violation constitutes, or may constitute, a violation of IHL is a question which the Court is well-equipped to assess. Moreover, the Court has access to consider OPEN and CLOSED material, including all of the material available to the Secretary of State in reaching her decision.

42. Finally, the Secretary of State appears to have misdirected herself that the special caution obligation does not apply in respect of KSA’s actions in Yemen (and only applies to an assessment of “serious violations of human rights” under Criterion 2 (a)).<sup>39</sup> This interpretation is wrong. The “special caution” obligation is derived from the Common Position and is reflected in the User Guide.<sup>40</sup>

**(ii) Ground 2: No proper basis for conclusions that no “pattern” of violations existed**

43. Despite accepting that KSA has violated IHL in a “small number” of incidents in the conflict in Yemen, the Secretary of State finds that there is no “clear risk” that UK licensed weapons “might” be used in further such serious violations. She reaches this view on the basis of findings set out in the Decision Paper and her letter of July 2020 that:

43.1. The “established” violations are “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).

43.2. The “possible breaches of IHL identified do not indicate a pattern of violations which would give rise to serious concerns regarding KSA’s capacity or commitment to comply with IHL (Decision Paper p. 25).

43.3. Instead, the breaches are “consistent with a limited number of errors, well within the margin that would be expected in a conflict of this nature” (Decision Paper p. 25).

44. The Secretary of State’s approach appears to be based on the User Guide § 2.13:

Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and

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<sup>39</sup> Secretary of State’s PAP Response §§ 23-24, 12 October 2020; OPEN Defence § 48.

<sup>40</sup> The User Guide § 2.3 states “Examination of Criterion Two reveals several key concepts **which should be taken into account in any assessment**, and which are highlighted in the following text” (emphasis added). The text on special caution is identified as one of these concepts.

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 (emphasis added).

45. However, the Secretary of State's analysis is, in key respects, flawed, robbing the decision of logic (*R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, at [27] per Sedley J, as he then was):

45.1. First, a key aspect of the Secretary of State's reasoning is that the number of credible allegations is low in the context of the air campaign as a whole. But, as noted above, this does not address the fact that (a) established violations have continued throughout the conflict (which is, in itself, a pattern) (b) Criterion 2 (c) prohibits the transfer of arms where there is a "clear risk" that weapons might be used in a single violation, or small number of violations; and (c) some of the established violations are flagrant in character (such as the attack on civilian funeral gathering of a prominent Yemeni attended by over 1,000 mourners).

45.2. Second, the finding that the number of violations is "well within the margin that would be expected in a conflict of this nature" (Decision Paper § 78) appears to be (a) unsupported by the evidence and/or (b) based on a comparison which is deeply flawed analytically. In particular, the Decision Paper states that the "overall number of credible allegations [*against KSA in Yemen*] is relatively low", by reference to "unverified allegations" in the Libya and Iraq/ Syria conflicts (Decision Paper p 10). This comparison is erroneous. The comparison does not compare like with like (i.e. the (limited / vetted) category of "credible allegations" against the SLC in Yemen versus "unverified allegations"). And the number of allegations in a conflict may well have nothing to do with the conduct of parties to that conflict. Some conflicts attract a great deal of media scrutiny, and scrutiny from a state's own institutions. Yemen is a country with limited infrastructure and institutions; high levels of illiteracy and limited communications in many areas. Large parts of it are remote and inaccessible. If anything, there is a real prospect of underreporting in Yemen.

45.3. Third, the Decision Paper notes that "the number of allegations of violations has generally fallen since the start of the conflict, consistent with an airforce showing rapid and consistent improvement in its capability" (Decision Paper p. 10). There is no basis

in the OPEN material for this view. The OPEN material suggests that half of all established violations are said by the Decision Paper to have occurred “recently”.

45.4. Fourth, the paper concludes that “[t]here does not appear to be **any evidence** of targeting specific types of infrastructure” (emphasis added) (Decision Paper p. 25). This “no evidence” conclusion disregards (a) the evidence of a significant number of attacks on hospitals and medical clinics as well as important civilian infrastructure, consistent (at the very least) with a failure to take proper precautions to protect such sites (b) the findings of the UN Group of Experts, and the Security Council Panel of Experts as well as NGOs which each raised concerns that medical units and certain important civilian infrastructure was not being respected in airstrikes.<sup>41</sup>

46. Furthermore, the Secretary of State’s conclusion that there is no “pattern” of violations is unsustainable on the OPEN evidence – including strikes, in effect, acknowledged by JIAT.

46.1. First, a substantial number of the violations involve failure to take proper steps to check (a) a target is not an impermissible target (such as a hospital or medical clinic) or (b) whether civilians are present. Failing to do so is expressly a clear breach of the fundamental obligation in Article 57 API 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. As noted above, this failing is a common feature in a significant number of incidents, including those in which scores of civilians have been killed.

46.2. Second, there is a pattern by which KSA officials fail to make lawful judgments as regard the proportionality of an attack (even where a military target may be

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<sup>41</sup> By way of example, the UN Group of Experts 2018 §§ 35 - 36 observed “[35] Despite the special protection afforded to medical facilities and educational, cultural and religious sites under international humanitarian law, many such facilities and sites have been damaged or destroyed by coalition air strikes throughout the conflict. The Group of Experts reviewed information concerning at least 32 such incidents. It received credible information that the no-strike list of protected objects was not being adequately shared within the coalition command chain. [36] Several air strikes have damaged facilities operated by Médecins sans frontières, including a clinic in the Houban district of the Ta’izz Governorate, hit on 2 December 2015; an ambulance in the Sa’dah Governorate, struck on 21 January 2016; and a hospital in the Abs district of the Hajjah Governorate, hit on 15 August 2016. All the locations of the Médecins sans frontières facilities had been shared with the coalition and the ambulance was clearly marked. On 11 June 2018, Médecins sans frontières reported that an air strike had hit a new cholera treatment centre in the Abs district of Hajjah Governorate. It indicated that the coordinates of the facility had been shared with the coalition on 12 separate occasions.

identified). A significant number of the violations appear to have involved violations of IHL with massive civilian casualties. These strikes have involved the use of heavy ordnance in locations (such as busy markets, hospitals or detention facilities) where large numbers of civilians are inevitably present and which will only ever result in mass casualties. Examples include: airstrike on Civilian funeral in Great Hall, 8 October 2016: 132 civilians killed; 15 March 2016, Civilian market, Hajjah, 106 killed; 15 August 2016, Hospital Hajjah, 19 killed; airstrike on bus at busy civilian market, Dayhan, Sa'dah, 9 August 2018, 43 killed; an attack on Dhamar prison, 31 August 2019, killing 100; airstrike in Al Jawf residential area, 14 February 2020: 32 killed, including 19 children.

- 46.3. Third, repeated failure to follow rules of engagement in a significant number of incidents admitted by JIAT. This is of particular concern since the purpose of rules of engagement is to ensure that armed forces respect IHL. As set out above, JIAT often explains non-compliance by the need to act quickly to avoid loss of military advantage – but this is no justification under IHL, which imposes stringent obligations for the protection of civilians and is itself evidence of a pattern of behaviour of the requirements of IHL being ignored where there is a perceived urgency.
- 46.4. Fourth, a further pattern in a significant number of incidents involves a failure to check a location against no-strike lists or to respect such lists.<sup>42</sup> Serious concerns have repeatedly been raised by MSF<sup>43</sup> and Oxfam (as outlined in their witness statement).<sup>44</sup> This was also a common feature, or pattern, identified in violations by UN investigations.<sup>45</sup> The UN Group of Experts explains “[t]he failure to ensure that all relevant commanders have access to the no-strike list raises serious concerns

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<sup>42</sup> The Group of Experts noted “Several air strikes have damaged facilities operated by Médecins sans frontières, including a clinic in the Houban district of the Ta’izz Governorate, hit on 2 December 2015; an ambulance in the Sa’dah Governorate, struck on 21 January 2016; and a hospital in the Abs district of the Hajjah Governorate, hit on 15 August 2016. All the locations of the Médecins sans frontières facilities had been shared with the coalition and the ambulance was clearly marked. On 11 June 2018, Médecins sans frontières reported that an air strike had hit a new cholera treatment centre in the Abs district of Hajjah Governorate. It indicated that the coordinates of the facility had been shared with the coalition on 12 separate occasions”. Group of Experts Report 2018 § 36 [SB/11/186-187].

<sup>43</sup> See Group of Experts 2018 § 36.

<sup>44</sup> WS Siddiquey [CB/29/926-944].

<sup>45</sup> The UN Group of Experts observed “[d]espite the special protection afforded to medical facilities and educational, cultural and religious sites under international humanitarian law, many such facilities and sites have been damaged or destroyed by coalition air strikes throughout the conflict. The Group of Experts reviewed information concerning at least 32 such incidents. It received credible information that the no-strike list of protected objects was not being adequately shared within the coalition command chain”. UN Group of Experts 17 August 2018 § 35 [SB/11/186]

about the ability of the coalition to comply with the special protections accorded to such objects”.<sup>46</sup> For example, MSF’s detailed internal investigation into the attack on its Abs Hospital, leaving 19 dead and 24 injured confirms that the location and protected status of the hospital was regularly communicated to KSA [SB/46/1311].<sup>47</sup> This attack appears to have been on a car carrying wounded fighters to the hospital, inside the hospital compound, in breach of the prohibition on attacking persons *hors de combat* in IHL (Art. 41, API). The IHL Update (November 2019 - January 2020) notes a discrepancy between the number of locations on the NSL in early 2019 and October 2019.

46.5. Fifth, there have been a significant number of attacks on targets which are *ipso facto* immune from attack under IHL including: hospitals, medical clinics,<sup>48</sup> and infrastructure essential to the survival of the civilian population<sup>49</sup> such as water treatment plants. The witness statement of Mr Siddiquey, Oxfam’s Director for Yemen sets out examples in this regard. The UN Group of Experts has also raised this concern.<sup>50</sup>

47. The Secretary of State’s analysis of the issue of pattern does not grapple with these issues, at least in OPEN. On 26 and 27 April 2021, the MOD’s Incident Assessment Panel met to discuss whether a pattern existed. The Panel concluded that its view had not changed and that no pattern could be identified. By email of 4 May 2021,<sup>51</sup> ECJU noted that “a large part of [*the MOD’s*] analysis seems to depend on the relatively small number of possible [*violations*] when set against the intensity of the air campaign”. The email notes that no evidential basis for this comparison had been provided and (rightly) raised concerns that the analysis was “circular”.

48. In response, the MOD explain their view on the absence of a “pattern” by email of 25 May 2021,<sup>52</sup> as follows: (a) there are 4 key pillars of IHL and so a limited number of types of violation are likely

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<sup>46</sup> UN Group of Experts 2018 Report § 38 (d)

<sup>47</sup> The Report states “[t]he location of the Abs hospital had been notified to all parties in the conflict and the GPS coordinates were regularly shared with the SLC through the [KSA] Evacuation and Humanitarian Operations Centre since the start of MSF activities in the facility over a year before the attack on 15 August 2016. The latest communication of the GPS coordinates for all MSF operations was on 10 August, followed by an amended communication the next day (due to the addition of GPS coordinates for a water tank). The Abs hospital complex lies within an enclosed and gated area that has the MSF logo at the entrance and the MSF logo painted on the roof of several buildings”.

<sup>48</sup> Article 12 of API states “Medical units shall be respected and protected at all times and shall not be the object of attack”.

<sup>49</sup> Article 54 (2) of API provides “It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population”.

<sup>50</sup> UN Group of Experts 2018 § 35.

<sup>51</sup> [CB/23/756].

<sup>52</sup> [CB/23/761].

to occur and it is “unsurprising” that most, or all, possible violations involve failure to respect the principles of proportionality or the obligation to take precautions in attack; (b) it is “unsurprising” that breaches involve breaches of the rules of engagement, since if rules of engagement are followed targeting is likely to be lawful; and (c) the challenging nature of the operations.

49. This reasoning is indeed circular and ignores the obvious patterns in the events. It fails to ask *why* the rules of engagement are breached, and why the *same types* of breach continue to recur. For example, why is there a specific and repeated failure to verify / assess the risk of civilian casualties or take into account the nature of the location being attacked (a busy market / a hospital run by MSF on a no-strike list etc).

**(iii) Ground 3: No sustainable basis for conclusion that Criterion 2 (c) is not met despite “established” record of past “isolated” violations**

50. 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.

51. 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 the serious violations are “isolated”. This is clear from the terms of Criterion 2 (c) itself which makes clear that the policy is to “[n]ot grant a licence if it determines there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law”.

52. The evidential position before the Secretary of State was that:

52.1. There is an established record of a “small number” of IHL breaches, attributed to KSA.

52.2. These breaches have continued to occur throughout the conflict and half of the established breaches had occurred “recently” at the time the Decision Paper was prepared. It is inferred that a number of these incidents relate to events, like the Great Hall strike, which caused catastrophic numbers of casualties.

52.3. In addition, (a) there is a “very small number” of violations attributable to the SLC which may, or may not, be the responsibility of KSA and (b) half of the credible incidents attributable to KSA may, or may not, amount to a violation, but there is insufficient information to form a view (a fact which remains very relevant to the assessment of risk).

52.4. There is now also evidence that further, effectively admitted, serious violations have occurred since this date – but this has not caused the Secretary of State to revise her view.

53. In short, the factual position on the Secretary of State's own case was (and remains) that KSA has committed serious violations of IHL in (at the very least) a "small number" of incidents and may have committed serious violations in further incidents about which there is insufficient information or where attribution is uncertain.

54. In this context, the critical question the Secretary of State had to ask was whether these "isolated" violations would continue. It was crucial this (distinct) question be subject to anxious consideration irrespective of whether such violations were isolated or part of a pattern. If there was a "clear risk" that isolated violations "might" continue, then the Secretary of State was required to conclude that Criterion 2 (c) was not met.

55. Indeed, at no point does the Secretary of State conclude that these violations (even if small in number and "isolated") will not continue. On the contrary, the Secretary of State in effect appears to accept that "a limited number of errors, well within the margin that would be expected in a conflict of this nature" is consistent with Criterion 2 (c) (Decision Paper p. 25). Such an approach is not consistent with the Criteria and, in adopting this approach, the Secretary of State has fallen into error.

**(iv) Ground 4: (i) the need to consider whether there is impunity in KSA for serious violations of IHL and (ii) misdirection as to "serious violations" of IHL**

56. The Secretary of State's decision-making is flawed in two further respects.

56.1. First, there is significant evidence that officials in KSA often enjoy impunity for violations of IHRL and IHL (including in the specific context of the conflict in Yemen). In a context where there are established breaches of IHL and admitted persistent breaches of rules of engagement, the existence of impunity is obviously relevant to the risk of future breaches. If there is no prospect of penalty, there is little incentive not to commit future breaches. The Secretary of State's position is that she is not required to consider the issue of impunity (OPEN Skeleton § 56). This was an error of law.

56.2. Second, the Secretary of State has misdirected herself as to the meaning of the concept of a "serious violation" of IHL, which is the central concept applied in the prospective risk assessment for purposes of Criterion 2 (c).

57. These issues were addressed in the CAAT CA Judgment. The Court of Appeal ruled in favour of the Secretary of State on these issues. It decided that: (a) 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 (CAAT CA Judgment [146] – [154]; and (b) the Secretary of State had not misdirected herself as to the meaning of a “serious violation” of IHL (CAAT CA Judgment [155] – [166]). However, the Court of Appeal granted permission to appeal to the Supreme Court on both points. The Secretary of State was also granted permission to appeal, but withdrew her appeal and invited CAAT to withdraw its appeal on the basis that the matters are better considered in the context of the new decision.<sup>53</sup>

58. CAAT agrees that these legal issues are better determined in the context of the new decision of 7 July 2020, in particular because the factual position has now changed.

### Impunity

59. In its letter of claim CAAT asked the Secretary of State about KSA’s capacity and ability to prosecute violations of IHL. In particular, CAAT asked: (a) if she has assessed whether KSA has in place legislation to enable prosecution of persons responsible for violation of IHL and if she has assessed whether KSA has a judicial system capable of prosecuting and punishing state officials for violations of IHL (see letter of 18 September 2020).<sup>54</sup>

60. The Secretary of State’s position is that she is not required to consider these matters in assessing compliance with Criterion 2 (c) (Letter of Response of 12 October 2020 § 20 – 22; OPEN Skeleton § 56). Her letter of response therefore provided no information as to any assessment conducted, or conclusions reached, on the issue of the effectiveness of KSA processes for prosecuting or punishing members of its armed forces who violate IHL.

61. The OPEN evidence is as follows:

61.1. Consistent with the Secretary of State’s position, there is no indication in the OPEN evidence that these issues have been considered. In particular, the thematic analysis in the Decision Paper considers: targeting; the murder of Jamal Khashoggi; export restrictions imposed by other states – but not the issue of whether KSA officials who breach IHL may face prosecution for their actions.

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<sup>53</sup> Letter of 28 July 2020 [SB/80/2355-2357].

<sup>54</sup> [SB/83/2366-2378]



61.2. The issue is also not considered in the OPEN account of ECJU's analysis.

62. CAAT considers that this approach is wrong in law. It is not possible to reach sustainable findings on KSA's capacity and willingness to comply with IHL, without considering whether KSA is willing and able to prosecute and punish those who perpetrate grave breaches, or whether a culture of impunity prevails. It cannot safely be concluded that there is no "clear risk" that violations of IHL "might" reoccur where those who perpetrate such violations do not face a genuine risk of investigation, prosecution and sanction for their actions.

62.1. The point can be tested as follows: suppose the Secretary of State were told that the position is that (a) KSA has in place no legislative arrangements by which officials who violate IHL in Yemen can genuinely be prosecuted; and (b) and that those officials who do violate IHL in Yemen, enjoy impunity in practice. In a context where established violations had occurred (some of which appear to be flagrant and to fundamentally disregard rules of engagement) such information would be so obviously relevant that it could not reasonably be left out of account.

63. The factual context 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."<sup>55</sup> There was no reported limitation to this Royal Pardon, and in itself this contravenes IHL, since the Geneva Conventions requires "grave breaches" to be prosecuted.<sup>56</sup> The UN Group of Experts observes that "even if any prosecutions are underway ... [the pardon] "raises further concerns in terms of effectiveness and credibility" of such processes.<sup>57</sup> It has also noted that KSA appears to lack a legal regime which enables prosecution for war crimes.<sup>58</sup> The Panel reports that JIAT has passed a number of files to Coalition states, including KSA for further action. The Panel has asked KSA for information concerning "the nature of the JIAT referrals, and the nature and status of the national proceedings: e.g. the nature of the charges, the rank/office of the persons charged, and the outcome of any proceedings...", and that "the Group had not received any response. Nor do the details or the outcomes of the courts martial appear to have been made public. The proceedings thus remain cloaked in some secrecy".<sup>59</sup>

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<sup>55</sup> See Human Rights Watch, *Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen*, 24 August 2018 [SB/53/1410-1453].

<sup>56</sup> See e.g. Articles 85, 86 and 87 of API.

<sup>57</sup> UN Group of Eminent Experts 2019 Report § 892.

<sup>58</sup> UN Group of Experts 2021, *Accountability Paper*, § 18.

<sup>59</sup> UN Group of Experts 2021, *Accountability Paper* § 19.

64. The importance of the issue of impunity is emphasised by the broader findings of competent UN human rights bodies, NGOs and the US State Department that there is a practice of impunity for state officials in KSA, including for torture, enforced disappearance and similar violations. This includes findings by the US State Department in its 2019 Country Report on KSA, the UN Special Rapporteur on Torture and the UN High Commissioner for Human Rights.<sup>60</sup> 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.
65. The Secretary of State relies, of course, on CAAT CA Judgment. On the question of principle, the Court of Appeal held [152] and [154] 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". But the circumstances have now fundamentally changed. 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 breaches of IHL. Moreover, the Secretary of State's decision depends on a core finding that breaches of IHL (and rules of engagement) are isolated, or sporadic, and that there is, therefore, no clear risk of reoccurrence. In this context, assessing whether breaches have been addressed genuinely, or whether officials in practice enjoy impunity is critical.

Misdirection as to the concept of "serious violation" of IHL

66. The Claimant's position on this issue is set out in detail in the SFG §§ 73 – 78. In short, the Secretary of State misinterprets the concept of "serious violation" of IHL, which is critical to the prospective risk assessment for purposes of Criterion 2 (c).
67. The Secretary of State's position before the Divisional Court was clear:
- 67.1. "[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).

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<sup>60</sup> See for example [SB/38/942-1000]; [SB/5/40-41].

- 67.2. At trial, the Secretary of State explained 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).
68. This position was in error. 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,<sup>61</sup> and made clear in the ICRC’s authoritative commentary to the Additional Protocols to the Geneva Conventions.<sup>62</sup> 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).
69. The Secretary of State says that there is no live dispute on this issue (Skeleton §§ 58-60). However:
- 69.1. 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<sup>63</sup>). The Secretary of State refused this request by letter of 12 October 2020.
- 69.2. In her summary grounds the Secretary of State relies on her letter of 27 August 2020 § 17. In this paragraph it is explained that “[t]he IHL Analysis does not consider the seriousness of these possible breaches – or any of the other alleged incidents – by reference to any separate, specific criteria. The Court of Appeal identified, at § 161 of its OPEN judgment, the obligations which IHL imposes on a state in conducting its operations in the course of an armed conflict and those principles are factored into the IHL Analysis”. But this paragraph does not address the issue: it is concerned with the retrospective analysis of IHL violations, rather than the prospective assessment of the risk of a (single) “serious violation” of IHL for purposes of Criterion 2 (c).

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<sup>61</sup> *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].

<sup>62</sup> International Committee of the Red Cross (ICRC) commentary on Article 89 of AP I §§ 3591 -3592.

<sup>63</sup> [SB/82/2364-2365].

70. The Secretary of State has not, therefore, provided reassurance as to the approach she adopts in respect of the key prospective risk assessment conducted for purposes of Criterion 2 (c). Given the way the Secretary of State explained her position before the Divisional Court and given that she has declined to clarify that she now adopts a different approach to the concept of “serious violation” for purposes of the prospective risk assessment, it appears her approach remains infected by a misdirection of law.

71. 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, this issue is important, in particular, given the Secretary of State’s core finding that there is no pattern to the violations and her acceptance that isolated violations have occurred. On these facts it is necessary for the court to resolve whether the approach which the Secretary of State says she adopts (as outlined before the Divisional Court) is correct.

**E. RELIEF**

72. The Court is invited to allow the claim for judicial review, quash the decision of 7 July 2020 and remit the matter to the Secretary of State for reconsideration.

**BEN JAFFEY KC**

**CONOR MCCARTHY**

**13 January 2023**

## ANNEX 1

This annex sets out illustrative examples of incidents in which the facts admitted by JIAT constitute, or likely constitute, serious breaches of IHL.

1. **Airstrike on Great Hall, 8 October 2016:** 132 civilians killed, with 695 injured.<sup>64</sup> The Security Council Panel of Experts concluded that this incident constituted a breach of the principles of distinction, proportionality and the duty to take “all feasible precautions” to minimize civilian casualties. The Panel noted that the facts that: “a funeral was being held at al Saba al-Kubra hall for the father of Major General Jalal Al Rowayshan was readily available in the public domain, and accessible to the Saudi Arabia-led coalition prior to the attack”. The funeral was a civilian funeral, in a public location, for a prominent member of Yemeni society and likely to be crowded.<sup>65</sup> JIAT said that “precautionary measures to ensure that the location is not a civilian one that may not be targeted” “were not carried out”.<sup>66</sup> On these admitted facts, this would constitute a serious violation of IHL. 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 minimise civilian casualties.
  
2. **Airstrike on Wedding, Bani Qais, 22 April 2018:** 21 killed, including 11 children, and approximately 90 wounded, including several children.<sup>67</sup> This incident was investigated by the Security Council Panel of Experts which found that it breached IHL rules of proportionality and taking all feasible precautions to minimize civilian casualties.<sup>68</sup> JIAT found “a number of errors indicating non-compliance with some of the rules of engagement procedures to minimise damage which caused collateral damage to the [wedding] tent”.<sup>69</sup> Thus, even on the facts found by JIAT, at a minimum this is a violation of the IHL obligation to take “all feasible precautions” to minimise civilian casualties.
  
3. **Airstrike on bus at busy civilian market, Dayhan, Sa’dah, 9 August 2018:** Approximately 43 killed and 63 wounded, the majority of whom were children. This incident was investigated by the Security Council Panel of Experts which found that it breached IHL.<sup>70</sup> JIAT explained that the bus was bombed based on earlier orders, when the attack should have been aborted due to the presence of civilians and that its rules of engagement designed to minimize civilian casualties

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<sup>64</sup> Security Council Panel of Experts 2017, p. 216 [SB/7/94].

<sup>65</sup> Security Council Panel of Experts 2017 p. 221 [SB/7/99].

<sup>66</sup> JIAT Statement, 18 October 2016.

<sup>67</sup> Security Council Panel of Experts 2019 p. 47 [SB/130/251].

<sup>68</sup> Security Council Panel of Experts 2019 p. 47 [SB/13/251].

<sup>69</sup> Security Council Panel of Experts 2021 p. 251 [SB/24/609-610].

<sup>70</sup> Panel of Experts 2019 p. 47, 186 [SB/13/251, 272]. Group of Experts 2019 § 896-897. [SB/16/438-439].

were not followed.<sup>71</sup> The Security Council Panel of Experts noted that, despite the opportunity to do so, KSA provided no evidence that the bus represented a military target. But even on these admitted facts, this would violate the obligation to take “all feasible precautions” to minimize civilian casualties and may well breach other obligations such as proportionality and the principle of distinction.

4. **Airstrike on Hospital, Kitaf, Saada, 26 March 2019:** 7 killed, including 4 children, and 6 injured. The Security Council Panel of Experts investigated this incident and found violations of IHL.<sup>72</sup> JIAT found that the “military commander hastened the work procedure to ensure that military advantage is not lost, which resulted in inaccuracies in the assessment of the possibility of [civilians] entering the targeting area”.<sup>73</sup>
5. **Airstrike in Al Jawf, 14 February 2020:** 32 killed (mostly female), including 19 children, 21 injured (mostly women and children). Investigated by the Security Council Panel of Experts. JIAT found a breach of the rules of engagement, as a result of a failure to assess the possibility of civilians entering the area affected by the airstrikes.<sup>74</sup> Thus, even on the facts found by JIAT, such a failing would likely constitute a breach of the obligation to take “all feasible precautions” to minimize civilian casualties.
6. **Airstrike on Khab and Al-Shaff Directorate, 6 August 2020:** 8 children killed and 15 people injured, including 8 children.<sup>75</sup> Investigation of this incident is on-going by the Security Council Panel of Experts. JIAT’s report concludes that targeting did not take place immediately after the military target was observed and confirmed due to the departure of the flight for refuelling. When the flight returned, no attempt was made to re-evaluate the target “to ensure that the target was still valid”, “due to the importance of speedy decision-making”. *Prima facie* the failure to take steps is not merely a breach of rules of engagement but a breach of the duty to take “all feasible precautions” to minimize civilian casualties. It may also constitute a breach of the principles of proportionality and distinction, since a military commander must “ensure” that targeting is proportionate and respects the principle of distinction.

This list is not intended to be exhaustive and is based on limited material available in OPEN. Other examples of incidents which constitute possible violations on JIAT’s account of events include: Haydan hospital, Sa’dah, 26 October 2015; Abs Hospital, Abs, 5 August 2016; Sa’dan Well, Sana’a, 10 September 2016; and Mar’ib, 16 September 2017.

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<sup>71</sup> Security Council Panel of Experts 2021 p. 252 [SB/24/610].

<sup>72</sup> Security Council Panel of Experts 2020 p. 37 [SB/17/452].

<sup>73</sup> Security Council Panel of Experts 2021 p. 255. [SB/24/613]

<sup>74</sup> Security Council Panel of Experts 2021 p. 242 [SB/24/600]

<sup>75</sup> Security Council Panel of Experts 2021 p. 241 [SB/24/599]