Neutral Citation Number: [2019] EWCA Civ 1020

Case No: T3/2017/2079

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2017] EWHC 1754 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2019

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE IRWIN
and
LORD JUSTICE SINGH

- -

Between:

THE QUEEN (on the application of CAMPAIGN AGAINST ARMS TRADE)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR INTERNATIONAL TRADE	**Respondent**
-and-	
AMNESTY INTERNATIONAL **HUMAN RIGHTS WATCH** **RIGHTS WATCH UK**	**First Interveners**
-and-	
OXFAM INTERNATIONAL	**Second Intervener**

- -
- -

Martin Chamberlain QC and Conor McCarthy (instructed by **Leigh Day**) for the **Appellant**
Sir James Eadie QC, Jonathan Glasson QC and Jessica Wells (instructed by **the Government Legal Department**) for the **Respondent**
Jemima Stratford QC, Nikolaus Grubeck and Anthony Jones (instructed by **Deighton Pierce Glynn**) for the **First Interveners (written submissions only)**
Gerry Facenna QC and Julianne Kerr Morrison (instructed by **Gowling WLG (UK) LLP**) for the **Second Interveners (written submissions only)**
Angus McCullough QC and Rachel Toney (instructed by **the Special Advocates' Support Office**) appeared as **Special Advocates**

Hearing dates: 9, 10 and 11 April 2019

- -

JUDGMENT

Sir Terence Etherton MR, Lord Justice Irwin and Lord Justice Singh:

1. This appeal concerns the lawfulness of the grant by the UK Government of export licences for the sale or transfer of arms or military equipment to the Kingdom of Saudi Arabia, for possible use in the conflict in Yemen.

2. It is an appeal from the order dated 10 July 2017 of Burnett LJ and Haddon-Cave J, sitting in the Divisional Court of the Queen's Bench Division, dismissing the claim of the appellant, Campaign Against Arms Trade ("CAAT"), for judicial review of the failure of the respondent, the Secretary of State for International Trade, to suspend extant licences and of the Secretary of State's decision to continue to grant such licences.

3. The appeal has proceeded with both open and closed material and was heard by us in both open and closed sittings. This is the open judgment of the court.

Background – the conflict in Yemen

4. The following is a very brief summary of the factual background relating to the conflict in Yemen, sufficient to understand the context for this appeal. It is largely taken from the more full and detailed account in the judgment of the Divisional Court, for which we are grateful.

5. Saudi Arabia and Yemen are contiguous and share a 1,800 km border. Since early 2015 Yemen's capital city, Sana'a, and parts of central and southern Yemen have been in the control of Houthi rebels backed by former Republican Guard Forces loyal to former President Saleh. The Houthi are a Shia-Zaydi movement from the north of Yemen.

6. On 24 March 2015 the President of Yemen, President Hadi, wrote to the UN requesting support "by all necessary means and measures, including military intervention, to protect Yemen and its people from continuing aggression by the Houthis". A further letter was sent on 26 March 2015 from the Gulf Cooperation Council countries endorsing President Hadi's request.

7. On 25 March 2015 a coalition of nine states led by Saudi Arabia (Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Qatar and Bahrain) responded to a request for assistance by President Hadi and commenced military operations against the Houthis in Yemen ("the Coalition").

8. On 14 April 2015 the UN passed Security Council Resolution 2216 (2015) affirming the legitimacy of President Hadi and condemning the unilateral actions taken by the Houthis.

9. Hostilities took place during 2015 and 2016, despite numerous ceasefire attempts, and were continuing at the date of the judicial review hearing. Coalition military operations took the form primarily of airstrikes led by Saudi Arabia against the Houthis, together with some ground operations. The Saudis reported numerous cross-border incursions and missile attacks by the Houthis, including the use of SCUD missiles. There were reports of attacks by Houthi forces on Coalition shipping in the Red Sea. As at the date of the judicial review

hearing, Houthi forces continued to occupy Sana'a, and ground fighting remained significant in the Northern Provinces and around Taizz. The Saudis had by then reported 745 Saudi soldiers and border guards killed along the Southern front, and over 10,000 injured since March 2015.

10. Terrorist organisations, such as Al-Qaeda in the Arabian Peninsula and Daesh (also known as "ISIS"), have taken advantage of the on-going instability and ungoverned space in Yemen. This has complicated the picture and led to increased anti-terror operations in the region led by US forces.

11. CAAT submits that there is a large body of evidence which demonstrates overwhelmingly that Saudi Arabia has committed repeated and serious breaches of international humanitarian law ("IHL") during the conflict in Yemen. CAAT claims, in particular, that Saudi Arabia has committed indiscriminate or deliberate airstrikes against civilians, including airstrikes which have used "cluster" munitions, and which have targeted schools and medical facilities. CAAT's evidence runs to many hundreds of pages, and includes reports from the UN, the European Parliament, the Council of the EU, the International Committee of the Red Cross, Médecins Sans Frontières, Amnesty International, Human Rights Watch, Parliamentary committees, and the press. Some of that material is set out in paragraphs [64] to [79] of the judgment of the Divisional Court. Additional evidence of the Interveners to similar effect is set out in paragraphs [81] to [85] of the judgment of the Divisional Court. We refer later in this judgment to some of the evidence in more detail.

The legal context

The Export Control Act 2002

12. The export of arms and military equipment from the UK to Yemen is regulated by the Export Control Act 2002 ("the 2002 Act"). Section 1(1) of the 2002 Act provides that the Secretary of State may by order make provision for or in connection with the imposition of export controls in relation to goods of any description. Section 5(2), as amended, provides that controls may be imposed for the purpose of giving effect to any EU provision or other international obligation of the UK. Section 9(2) provides that the Secretary of State may give guidance about any matter relating to the exercise of any licensing power or other functions conferred by a control order, and section 9(3) provides that the Secretary of State must give guidance about the general principles to be followed when exercising any such licensing power.

13. Article 3 in Part 2 of the Export Control Order 2008 S.I. 2008/3231 provides that, subject to (among others) Article 26, no person shall export military goods or transfer military software or technology by electronic means. Article 26(1) provides that nothing in (among others) Part 2 prohibits an activity that is carried out under the authority of a UK licence. Article 32(1) provides that the Secretary of State may by notice amend, suspend or revoke a licence granted by the Secretary of State.

The EU Common Position

14. In December 2008 the Member States of the EU adopted the Council Common Position 2008/944/CGSP of 8 December 2008 "defining common rules governing control of exports of military technology and equipment" ("the EU Common Position"). Article 1.1 provides that each Member State shall assess export licence applications made to it for items on the EU Common Military List on a case-by-case basis against the criteria of Article 2. Article 1.2 provides that those export licence applications include applications for physical exports and applications for licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

15. For the purpose of these proceedings and this appeal, the relevant criterion in Article 2 is that set out in Article 2.2 ("Criterion 2") as follows, so far as relevant:

> "Criterion Two: Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.
>
> > - Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, Member States shall:
> >
> > (a) …;
> >
> > (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 United Nations, the European Union or by the Council of Europe;
> >
> > …
> >
> > - Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:
> >
> > (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law."

16. Article 10 provides that:

> "While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria."

17. Article 13 provides that "the User's Guide to the European Code of Conduct on Exports of Military Equipment" shall serve as guidance for the implementation of the EU Common Position.

The Consolidated Criteria

18. On 24 March 2014 the Secretary of State set out in a written statement to Parliament what were described as "Consolidated EU and National Arms Export Licensing Criteria" ("the Consolidated Criteria"). These were based on the EU Common Position. The written statement said that it was guidance given under the 2002 Act s.9. Criterion 2 of the Consolidated Criteria is the relevant criterion for the purpose of these proceedings and this appeal. It was expressed as follows, so far as relevant:

> "*The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.*
>
> Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will:
>
> a) …;
>
> b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union;
>
> c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law."

19. The Parliamentary written statement referred to, and set out what was said in, Article 10 of the EU Common Position. It also said that, in the application of the Consolidated Criteria, account would be taken of reliable evidence, including, for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations.

The User's Guide

20. As mentioned above, Article 13 of the EU Common Position refers to a "User's Guide" which is to "serve as guidance for the implementation of the Common Position". The relevant and current version of the User's Guide is dated 20 July 2015. Chapter 2, which has the title "Criteria Guidance", sets out "best practices" for the criteria in the Common Position, including Criterion 2. The introduction to Chapter 2 describes its purpose as follows, so far as relevant:

> "The purpose of these best practices is to achieve greater consistency among Member States in the application of the criteria set out in Article 2 of [the EU Common Position] by identifying factors to be considered when assessing export licence applications. They are intended to share best practice in the interpretation of the criteria rather than to constitute a set of instructions; individual judgement is still an essential part of the process, and Member States are fully entitled to apply their own interpretations. The best practices are for the use of export licensing officials and other officials in government departments and agencies whose expertise *inter alia* in regional, legal (e.g. human rights, public international law), technical, development as well as security and military related questions should inform the decision-making process."

21. Paragraphs 2.1 to 2.15 of Chapter 2 of the User's Guide address Criterion 2. Reference was made to the following provisions in the course of oral argument on the appeal:

> "2.1. [The EU Common Position] applies to all exports of military technology or equipment by Member States … Thus *a priori* Criterion Two applies to exports to all recipient countries without any distinction. However, because Criterion Two establishes a link with the respect for human rights as well as respect for international humanitarian law in the country of final destination, special attention should be given to exports of military technology or equipment to countries where there are indications of human rights violations or violations of international humanitarian law."
>
> "2.2. *Information sources*: A common EU base of information sources available to all member States consists of EU HOMs reports, EU human rights country strategies and in certain cases EU Council statements/conclusions on the respective recipient countries. These documents normally already take into account information available from other international bodies and information sources. However, because of the essential case-by-case analysis and the specificity of each licence application, addition information might be obtained as appropriate from:
>
> - Member States' diplomatic missions and other governmental institutions,
> - Documentation from the United Nations, the ICRC and other international and regional bodies,
> - Reports from international NGOs,
> - Reports from local human rights NGOs and other reliable local sources,
> - Information from civil society."

"2.10. *The relevant principles established by instruments of international humanitarian law.*
International humanitarian law … comprises rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in hostilities (e.g. civilians and wounded, sick and captured combatants), and to regulate the conduct of hostilities (i.e. the means and methods of warfare). It applies to situations of armed conflict and does not regulate when a State may lawfully use force. International humanitarian law imposes obligations on all parties to an armed conflict, including organised armed groups.

The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rule of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection.

The most important instruments of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols of 1977. They are complemented by treaties on particular matters including prohibitions of certain weapons and the protection of certain categories of people and objects, such as children and cultural property …"

"2.11. *Serious violations of international humanitarian law* include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non-international armed conflict, which it defines as war crimes (Article 8 sub-sections b, c and e…)"

"2.13 *Clear risk.* A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of a serious violation 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 <u>and</u> the recipient's capacity to ensure that the equipment or technology transferred 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.

Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party states not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations, and to take appropriate steps to cause such violations to cease. They have a particular responsibility to intervene with states or armed groups over which they might have some influence. Arms producing and exporting states can be considered particularly influential in "ensuring respect" for international humanitarian law due to their ability to provide or withhold the means by which certain serious violations are carried out. They should therefore exercise particular caution to ensure that their export is not used to commit serious violations of international humanitarian law …

Relevant questions to be considered include:

- Is there national legislation in place prohibiting and punishing violations of international humanitarian law?

…

- Have the same measures been taken to ensure respect for international humanitarian law by other arms bearers which operate in situations covered by international humanitarian law?
- Have mechanisms been put in place to ensure accountability for violations of international humanitarian law committed by the armed forces and other arms bearers, including disciplinary and penal sanctions?
- Is there an independent and functioning judiciary capable of prosecuting serious violations of international humanitarian law?"

22. Annex III to section 2 of Chapter 2 of the User's Guide identifies "competent bodies of the UN, the Council of Europe or the EU to establish serious violations of human rights".

Principles of international humanitarian law

23. The relevant principles of IHL are codified in the Four Geneva Conventions of 1949 and the Additional Protocols I and II of 1977 and in customary

international law. They include the following: (1) the obligation to take all feasible precautions in attack; (2) effective advance warning of attacks which may affect the civilian population; (3) the protection of objects indispensable to civilian populations; (4) the prohibition on indiscriminate attacks; (5) prohibition on disproportionate attacks; (6) the prohibition on attacks directed against civilian objects and/or civilian targets; (7) the obligation to investigate and prosecute; (8) the obligation to make reparation.

24. The "principle of distinction" prohibits an attack on civilians, as follows:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives": Additional Protocol I to the Geneva Convention, Chapter II "Civilians and Civilian Population", Article 48; and see also Article 8(2)(b)(i) of the Rome Statute of the International Criminal Court.

25. The "principle of proportionality" prohibits an attack launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the concrete and direct overall military advantage anticipated: see Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court. The "principle of proportionality" does, however, permit belligerents to carry out proportionate attacks against military objectives, even when it is anticipated that civilian deaths or injuries will inevitably occur as a result.

The proceedings

26. By letter dated 9 December 2015 from the Department for Business, Innovation and Skills ("BIS"), which at that time was the department responsible for export control, to CAAT's solicitors, BIS answered a number of questions raised in prior correspondence about licences for exports to Saudi Arabia. In that letter, BIS stated, among other things, that new licences had been granted for the transfer of arms, military equipment or components for such equipment to Saudi Arabia since 30 June 2015, and that the department did not consider a blanket ban on arms exports to Saudi Arabia to be appropriate.

27. CAAT commenced these proceedings against the Secretary of State for Business, Innovation and Skills by a judicial review claim form dated 9 December 2015 seeking judicial review of: "(a) the Defendant's on-going failure to suspend extant licences for the sale or transfer of arms and military equipment to Saudi Arabia for possible use in the conflict in Yemen; and (b) the Defendant's decision, communicated to the Claimant on 9 December 2015, to continue to grant new licences for the sale or transfer of arms or military equipment to Saudi Arabia in respect of such equipment".

28. The relief claimed in the claim form and in the statement of facts and detailed statement of grounds dated 8 March 2016 was: (1) a prohibiting order

prohibiting the Defendant from granting further export licences for the sale or transfer of arms or military equipment to Saudi Arabia, for possible use in Yemen, pending a lawful review by the Secretary of State as to whether such sales comply with the EU Common Position and/or the Consolidated Criteria; (2) a mandatory order requiring the Defendant to suspend extant licences pending such a review; and (3) a quashing order quashing the decision to continue to grant new licences.

29. Following the grant by Gilbart J on 30 June 2016 of permission to apply for judicial review in respect of all the grounds advanced by CAAT, permission was given to Amnesty International, Human Rights Watch and Rights Watch (UK) to intervene and make written and oral submissions and subsequently to Oxfam to make written submissions.

30. In July 2016 responsibility for export control passed to the Secretary of State for International Trade, who was substituted as the defendant.

31. Following an order on 13 October 2016 by Cranston J for a declaration pursuant to section 6 of the Justice and Security Act 2013, the proceedings continued with both closed and open material.

The open judgment of the Divisional Court

32. The judicial review claim was heard by Burnett LJ and Haddon-Cave J, sitting as the Divisional Court, between 7 and 10 February 2017 in both open and closed sessions. They handed down their joint judgment on 10 July 2017, dismissing the claim.

33. The judgment of the Divisional Court is comprehensive, detailed and meticulous. It runs to 214 paragraphs. The following is a very brief summary.

34. The court set out the relevant principles of public law at [25]-[38]. Having cited *Kennedy v Charity Commission* [2015] AC 455 at [51], *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945 at [32] and [88], *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at [50] and [57], *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [29], *Bank Mellat v HM Treasury* [2014] AC 700 at [93] and *Harrow Community Support Limited v. Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [24], the Divisional Court stated at paragraph [35] that the particular context of this case necessitates that considerable respect should be accorded to the decision-maker by the Court.

35. The Divisional Court then at paragraph [36] referred to *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 (at pp. 1064-5) for the proposition that a public body has a duty to carry out a sufficient inquiry prior to making its decision. It quoted the Divisional Court in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB); [2015] 3 All E.R. 261 at paragraph [100] as to the relevant legal principles, and the following passage at paragraph [139] for the basic test:

> "Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same?"

36. After summarising the relevant background facts, the submissions of counsel, and the open evidence relied upon by the parties, the Divisional Court reached its conclusions on each of the pleaded grounds of challenge at paragraphs [176]-[211].

37. Under the heading "Ground 1: Failure to ask correct questions and to make sufficient enquiries" the Divisional Court addressed CAAT's allegation that the Secretary of State had failed to ask the correct questions or make sufficient enquiries, and in particular had failed to consider questions identified as relevant by the User's Guide in order to make a lawful risk assessment in accordance with Criterion 2c. The Divisional Court summarised at paragraph [179] its view of the legal position and construction of Criterion 2 and paragraph 2.13 of the User's Guide as follows:

> "179 …
>
> i) the relevant question for the Secretary of State to ask under Criterion 2c is whether there is a clear risk that the items to be licensed might be used in the commission of a serious violation of international humanitarian law;
>
> ii) the *User's Guide* is non-binding guidance. This is clear from the explanation in its "Introductory Note":
>
> > "The *User's Guide* is intended to help Member States apply the Common Position. It does not replace the Common Position in any way, but summarises agreed guidance for the interpretation of its criteria and implementation of its articles. It is intended for use primarily by export licensing officials";
>
> iii) in order to carry out "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" when addressing the Criterion 2c question, the *User's Guide* suggests that Secretary of State's inquiry should include three key matters in particular:
>
> > (a) the recipient country's past and present record of respect for international humanitarian law;

(b) the recipient country's intentions as expressed through formal commitments;

(c) the recipient country's capacity to ensure that the equipment or technology transferred 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;

iv) para.2.13 of the *User's Guide* states that "isolated incidents" of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law but a "pattern of violations" or failure to punish violations should be cause for serious concern;

v) the list of suggested "relevant questions" of the *User's Guide* (see pp.50, 55 and 56) are merely indicative of the sort of questions which the decision-maker might consider in order to assist him or her in addressing the three key matters highlighted in para.2.13. The policy articulated by the Secretary of State did not commit the government to consider that suggested non-exhaustive list serially. Neither does the Guide itself indicate such an approach;

vi) the flexibility properly and lawfully inherent in the inquiry process was wide and it was for the Secretary of State to decide how to go about inquiring into the three key matters highlighted in para.2.13 and what specific subsidiary questions to ask or inquiries to make; and

vii) the fact that the Secretary of State did not expressly consider or address each or any of the subsidiary questions does not mean that he failed to discharge his *Tameside* duty.

38. The Divisional Court rejected at paragraphs [180]-[182] CAAT's argument (as the Divisional Court understood it, but which CAAT has told us it never made) that the Secretary of State's failure to make a determination of the likelihood of a breach of IHL having been committed by the Coalition in relation to each and every past specific incident about which concern had been expressed was a failure to make sufficient inquiry and was irrational and a failure to take relevant information into account. In the view of the Divisional Court, such an obligation was neither necessary nor practical given, among other things, that Criterion 2c requires a prospective assessment to be made about the risk of violations of IHL in the future; and that, the Court said, involves looking at all the information in the round, of which the recipient's "past and present record" is part, but which also includes factors such as the nature of the conflict, the sophistication of the

intelligence-gathering, equipment and training of those charged with the targeting exercise, and their willingness to learn from mistakes.

39. The Divisional Court rejected at paragraphs [183]-[185] CAAT's criticism of the limitations of "the Tracker", a central database maintained by the Ministry of Defence ("the MoD") of allegations of breaches of IHL, including those made in the media and NGO reports (and which was described more fully at paragraph [105]ff of the Divisional Court's judgment). The Divisional Court said that the MoD's analysis was more wide-ranging and sophisticated than as suggested by CAAT and was valuable and instructive in that it: (1) provided information as to the pattern, frequency, nature and intensity of Coalition attacks; (2) assisted in identifying whether a military object was within the vicinity of the alleged incident; (3) enabled focus on investigating incidents of particular concern; (4) enabled areas of priority and particular concern to be raised and discussed with Saudi Arabia; and (5) ensured that particular incidents were made the subject of investigation by the Coalition. The Divisional Court said that the fact that a significant proportion of incidents listed on the Tracker did not refer to a "legitimate military target" did not mean that there was in fact no such target; and also rejected any significance in the fact that the Tracker originally included a column headed "International Humanitarian Law Breach" which was subsequently removed.

40. The Divisional Court addressed at paragraph [186] CAAT's criticism that the Secretary of State had failed to make clear to Parliament what assessments were, and were not, being carried out regarding alleged breaches of IHL in Yemen, and that he had been inconsistent in Parliamentary responses on the subject.

41. The Divisional Court addressed and rejected at paragraphs [187]-[191] CAAT's allegation made in its written Grounds, but not pursued in oral submissions, that the Secretary of State had not considered adequately the risk of diversion of weaponry in Yemen.

42. The Divisional Court concluded as follows on Ground 1 at paragraph [192]:

> "The reality of the position is that the Secretary of State has available to him and his advisers a significant amount of information relating to the conflict in Yemen and the conduct of Saudi Arabia as part of the Coalition. There is no sustainable public law criticism of the scope of the inquiries made on his behalf or the quality of the information available to him. The evidence shows beyond question that the apparatus of the state, ministers and officials, was directed towards making the correct evaluations for the purposes of the Consolidated Criteria."

43. Under the heading: "Ground 2: Failure to apply the "suspension mechanism", the Divisional Court at paragraphs [194]-[198] addressed CAAT's submission that the Secretary of State had wrongly failed to suspend the transfer of arms to Saudi Arabia. Having quoted the policy of the Government as articulated in a statement to Parliament on 7 February 2012, the Court rejected CAAT's criticism, expressing its conclusion at paragraph [198] as follows:

> "In our judgment, however, the Secretary of State was reasonably able: (i) to assess the gaps in his knowledge and "known-unknowns" against what information and materials he did have and how critical or not the gaps were; (ii) to test and assess the reliability of the UNs' and NGO's findings against the other sources of information at his disposal; and (iii) to assess the significance of his knowledge (or lack of it) as to Saudi Arabian investigations into individual incidents. Moreover these matters were factors in an overall assessment to be made by the Secretary of State in relation to Criterion 2c in the light of the wide range of sophisticated first-hand and other evidence available to him. In these circumstances the Secretary of State's decision not to suspend at any stage cannot be said to have been irrational or unlawful."

44. Under the heading "Ground 3: Irrationality in concluding that there was no "clear risk" under Criterion 2c, the Divisional Court addressed and rejected CAAT's contention that it was irrational for the Secretary of State to decide that there was no clear risk of violations of IHL. The Divisional Court said at paragraph [201] that the following general matters were clear from the evidence.

> "i) The process of governmental decision-making as to arms export licencing is a highly sophisticated, structured and a multi-faceted process, involving … multiple Government departments, all levels within Government including those at the very top of Government, judgement by officials at many levels of seniority with particular expertise to make those judgements, and judgements which are prospective and predictive.
>
> ii) There is a significant *qualitative* difference between the risk analysis which the government agencies involved in the decision-making process are able to carry out, on the one hand, and the reports of the NGOs and press as to incidents in Yemen, on the other. The government system involves drawing upon, and drawing together, a large number of significant strands and sources of information, including evidence and intelligence not available to the public, NGOs or press, including through close contacts with the Saudi military. By contrast, the reports of the NGOs and press of incidents suffer from a number of other relative weaknesses. These include, that such organisations often have not visited and conducted investigations in Yemen, and are necessarily reliant on second-hand information. Moreover, ground witnesses may draw conclusions about airstrikes without knowledge of all the circumstances.
>
> iii) There were gaps in the analysis of the Foreign Office and MoD of the situation. The UK is a bystander in this volatile conflict, is not a member of the Coalition, and the MoD is not involved in identifying targets and does not have access to the operational intelligence. But the Government's knowledge and

experience of Saudi Arabia, borne of its close contacts, place it well to make the necessary assessment for the purpose of Criterion 2c.

iv) The MoD has a coherent evidence-gathering system using the Tracker. Major incidents of concern coming to the attention of the MoD were the subject of intense scrutiny and activity by the MoD and Foreign Office, involving immediate inquiries and exchanges with the Saudi authorities. …

v) The question of arms sales to Saudi Arabia for use in Yemen was the subject of intense, genuine concern and debate by those officials charged with advising the Foreign Secretary and Secretary of State. …"

45. At paragraphs [202]-[204] the Divisional Court reviewed correspondence, communications and other documents within the executive in February 2016 relating to the question whether the Secretary of State should or should not suspend arms export licences to Saudi Arabia, and to the decision of the Secretary of State to accept the Foreign Secretary's advice not to suspend such licences.

46. The Divisional Court rejected at paragraph [207] the submission that third party reports of United Nations agencies (including the United Nations Panel of Experts), the reports of the European Parliament, the reports of UK Parliamentary Committees, the reports of NGOs, the reports of the CAAT and the Intervenors and press and other media reports alleging numerous breaches of IHL by the Coalition in Yemen raised a legal presumption that Criterion 2c was triggered, while acknowledging that their content had to be properly considered in the overall evaluation.

47. Having set out a number of "pertinent points" in paragraph [208], including that it was clear that the Secretary of State and his advisers had treated the allegations drawn to their attention in the third party reports seriously and as a matter of concern, and that a request by the Middle East and North Africa Directorate ("MENAD") at the Foreign Office for further information from the United Nations Panel of Experts on seven of the incidents specified in a report by the Panel had not been answered, the Divisional Court stated its decision on this Ground as follows in paragraph [209]:

"In our view, the fact that senior officials were advising the Secretary of State that the decision was "finely balanced", and the Secretary of State himself expressly acknowledged that this was the case, is instructive. It points to the anxious scrutiny - indeed at what seems like anguished scrutiny at some stages - given to the matter and the essential rationality and rigour of the process in which the Secretary of State was engaged. The picture was acknowledged to be far from a black and white. The decision involved balancing a series of complex and competing factors. Such self-evidently finely balanced judgements are paradigm matters for evaluation and decision by the Executive in conformity with the scheme established by Parliament. Theyare,

> of course, subject to scrutiny in the High Court, but with a suitable recognition of the institutional competence of those charged with the decision-making process. So it is in this case. The Claimant appeared at one stage to suggest that because the Government themselves considered the decision to be finely balanced that would enable a Court more readily to interfere. On the contrary, in an area where the Court is not possessed of the institutional expertise to make the judgments in question, it should be especially cautious before interfering with a finely balanced decision reached after careful and anxious consideration by those who do have the relevant expertise to make the necessary judgements."

48. The Divisional Court expressed its overall conclusion on the judicial review claim, as follows at paragraph [210]:

> "In conclusion, in our judgment, the open and closed evidence demonstrates that the Secretary of State was rationally entitled to conclude as follows: (i) the Coalition were not deliberately targeting civilians; (ii) Saudi processes and procedures have been put in place to secure respect for the principles of International Humanitarian Law; (iii) the Coalition was investigating incidents of controversy, including those involving civilian casualties; (iv) the Saudi authorities have throughout engaged in constructive dialogue with the UK about both its processes and incidents of concern; (v) Saudi Arabia has been and remains genuinely committed to compliance with International Humanitarian Law; and (vi) that there was no "clear risk" that there might be "serious violations" of International Humanitarian Law (in its various manifestations) such that UK arms sales to Saudi Arabia should be suspended or cancelled under Criterion 2c."

The appeal

49. There were four open grounds of appeal specified in the written grounds of appeal accompanying the notice of appeal. Ground 1 was that the evidence shows that the Secretary of State's consideration of Saudi Arabia's past and present record of respect for IHL, including whether a pattern of violations could be discerned, was fundamentally deficient. Ground 2 was that the Secretary of State failed to ask the questions identified in the User's Guide, and in particular failed to answer the following matters specified in the User's Guide: (1) whether the state in question has legislation in place prohibiting and punishing violations of IHL, (2) whether there are mechanisms in place to ensure accountability for violations of IHL committed by the armed forces, and (3) whether there is an independent and functioning judiciary capable of prosecuting violations of IHL. Ground 3 was that the Divisional Court adopted an incorrect approach to the standard of review in the present case. Ground 4 was that the Divisional Court had failed to answer the question whether the term "serious violations" of IHL in Criterion 2c was synonymous with "grave breaches" of the Geneva Conventions and war crimes

under international law or, as CAAT submitted, referred to serious violations of IHL more generally, and should have resolved that issue in CAAT's favour.

50. On 4 May 2018 Irwin LJ and Flaux LJ granted permission to appeal on Grounds 1, 2 and 4 but refused permission to appeal on Ground 3.

51. Special advocates for CAAT also filed closed grounds of appeal. Permission to appeal was granted by Irwin LJ and Flaux LJ on 4 May 2018 for Closed Ground 1 and for Closed Grounds 2 and 3 to be argued as consequential matters. As mentioned at the beginning of this judgment, the appeal has proceeded, therefore, with open and closed material and was heard in open and closed sessions, and this is the open judgment.

52. By order dated 13 July 2018 Irwin LJ gave Amnesty International, Human Rights Watch and Rights Watch UK, as First Intervenors, permission to intervene by way of written submissions only in relation to (1) the position under international law with respect to the interpretation of the threshold of "clear risk" of a "serious violation of international humanitarian law" in Criterion 2c, and (2) the value and unique advantages of the NGO, UN and other third party reports filed as evidence of violations of international humanitarian law on the part of the Coalition, as well as the methodology underpinning them. Irwin LJ also granted Oxfam, as the Second Intervenor, permission to intervene by way of written submissions only in relation to the same issues.

The correct approach to judicial review in the present case

53. The essential principles of law which govern the approach which the court should take to a claim for judicial review of this kind are not in dispute. In view of the importance of the issues, however, it is appropriate that we should state some fundamental principles at this stage.

54. The first point which deserves emphasis is that this is a claim for judicial review. As the Divisional Court (comprising Singh LJ and Carr J) put it in *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin), at paragraph [326]:

> "…judicial review is an important mechanism for the maintenance of the rule of law. It serves to correct unlawful conduct on the part of public authorities. However, judicial review is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and, in a democratic society, must be a matter for the elected government alone. … Judicial review is not, and should not be regarded as, politics by another means."

55. Secondly, and equally importantly, "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself": see *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at paragraph [42] (Lord Bingham of Cornhill).

56. In this appeal, therefore, we are not concerned with the merits of the position taken by the Secretary of State in applying criterion 2c. Different people in society may or may not approve of the sale of arms to Saudi Arabia. They may nor may not share the Secretary of State's view about the assessment of risk required by criterion 2c. It is simply not the function of the court to adjudicate on those underlying merits. If, however, the Secretary of State has erred as a matter of law in the approach taken to the assessment of those merits, it is the role of the court to say so.

57. Thirdly, the principal error of law which it is alleged was committed by the Secretary of State in the present case is that he acted irrationally in the process which he adopted in order to make the assessment required by criterion 2c. We will return to other alleged errors of law when we address Grounds 2 and 4 in the appeal specifically. What is important for present purposes, and in particular in addressing Ground 1 in the appeal, is that the only legal error which is alleged to have been committed is founded on the public law doctrine of irrationality. This sets a deliberately high threshold. The court is not entitled to interfere with the process adopted by the Secretary of State merely because it may consider that a different process would have been preferable. What must be shown by CAAT is that the process which was adopted by the Secretary of State was one which was not reasonably open to him.

58. Fourthly, a specific application of the doctrine of irrationality which is invoked by CAAT in the present case is the duty recognised by the courts ever since the well-known speech of Lord Diplock in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, at 1065. This is the duty which falls upon a decision-maker to "take reasonable steps to acquaint himself with the relevant information" in order to enable him to answer the question which he has to answer. Here that question is to be found in the assessment of risk required by criterion 2c.

59. The general principles on the *Tameside* duty were summarised, as we have said earlier, by the Divisional Court. They have recently been approved by the Court of Appeal (Underhill, Hickinbottom and Singh LJJ) in *Balajigari & Ors v Secretary of State for the Home Department* [2019] EWCA Civ 673, at paragraph [70] in the following way:

> "The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further

> enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

60. The final point of principle to emphasise at this stage is to note that the present claim for judicial review concerned a process of decision-making which was necessarily "iterative". As we have mentioned earlier in outlining the nature of the proceedings in this case, what was under challenge was not only a specific decision communicated to the appellant on 9 December 2015 but, more significantly, the Secretary of State's on-going approach to the assessment of the criteria for the grant of new licences. It was common ground before us in this appeal that it followed that it was appropriate for the Divisional Court to have regard to all relevant material up to the time of the hearing before it. It was not confined to the material which was before the Secretary of State, for example, up to 9 December 2015. It was also common ground in the appeal before us that the question for this court is whether the decision of the Divisional Court was "wrong". Accordingly, this court must approach its task by reference to the material which was available to the Divisional Court and does not consider subsequent material.

Ground 1: Background and the Judgment below

61. Ground 1 of the OPEN appeal was written discursively. As we have indicated above, the contention is that the Secretary of State's consideration of Saudi Arabia's past and present record of respect for IHL, including whether a (historic) pattern of violations could be discerned, was fundamentally deficient. As expressed in a key passage of the appellant's Amended Skeleton Argument in Support of Permission to Appeal:

> "31. The essential argument of the Claimant on ground 1 is that both the Secretary of State and the Divisional Court made a fundamental error of approach in relation to the independent OPEN evidence showing a pattern of violations of IHL, some of them serious. Where, as here, there is a body of independent evidence demonstrating such a pattern, rationality requires the

> Secretary of State to consider that evidence and reach a view about whether such a pattern has been shown or not. This is because the existence of a pattern of violations is, given the Secretary of State's own policy and the considerations set out in the User's Guide, obviously and centrally relevant to the question whether there is a "clear risk" that UK-supplied weapons might be used to commit serious violations in the future.
>
> 32. The Claimant's argument before the Divisional Court was not that the Secretary of State had reached the wrong factual conclusion on this question. It was that, on his own evidence, he had failed to reach any conclusion (even in private); and that as a result he had failed to have regard to a centrally and obviously relevant factor. This was a classic public law error, which vitiated his decision (which the evidence showed had been "finely balanced"). The Divisional Court's failure to identify this error was itself an error of approach, which this Court can and should correct."

62. Accordingly, the central contention under Ground 1 and, it might well be said, in the case is that the question of whether there was a historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was central to the estimation of the risk of future violations. It was not merely an interesting starting point, but a question requiring an answer. It was susceptible of a rational and sensible answer in the form of an overall assessment. CAAT asks rhetorically, given the wealth of information and evidence available, how can the approach to assessing future risk of violation be considered rational, where those advising the Secretary of State have eschewed making an assessment of whether, and to what extent, there have been violations in the past? How can such an approach be rational, when other important and authoritative bodies, such as the United Nations Expert Panel, Human Rights Watch and Amnesty International have been able to make and publish such assessments, and conclude that widespread violations have been demonstrated?

63. The essence of the reply from the Secretary of State is that it is indeed a rational approach to make an assessment of the risk of future violations of IHL without answering what Sir James Eadie QC terms the "binary question" whether there have been historic violations on the part of Saudi Arabia, even as an overall assessment. The test laid down has other important elements, in particular the "attitude" of Saudi Arabia: see the first phrase in the second sentence of Criterion 2. Making the "binary judgment" about violation was highly problematic in respect of any given incident. The Secretary of State had far more and better information than the Interveners, but the assessment was not therefore easier, because the information was still limited. The engagement of the United Kingdom with the Kingdom of Saudi Arabia was such that, from high-level contacts, the Secretary of State was well-informed as to the intentions of Saudi Arabia, and as to the strong desire to adhere to IHL. Even proof of one or more historic violations of the IHL would not necessarily answer the question as to future risk since the question was predictive, not a historic enquiry.

Ground 1: The Decision in the Divisional Court

64. It is common ground that the Secretary of State has reached no conclusion on the "binary question", not even in the form of an overall assessment. The process of decision-making is described in the OPEN judgment in the Divisional Court, between paragraphs [91] and [102].

65. Three senior officials gave evidence in statements: Neil Crompton, the Director of the MENAD at the Foreign Office; Peter Watkins, the Director General of Security Policy at the MoD; and Edward Bell, Head of the Export Contract Organisation ["ECO"] at the Department of Business, Innovation and Skills ["BIS"], latterly the Department for International Trade. Both the Foreign Office and the MoD have key roles giving advice to the Secretary of State.

66. Between paragraphs [103] and [175] of the judgment below, the Divisional Court set out the "six strands of information" relied on by the Secretary of State, the first of which was described under the rubric "MoD's Methodology and Analysis of Allegations of IHL Violations". The judgment sets out the variety of sources of information available to government, including monitoring media and NGOs' reports for allegations of breaches of IHL. Such incidents were recorded by the Operations Directorate in tabular form known as "the Tracker". This consists of a summary of the possible breach incidents. The Tracker consisted of six columns recording the date of the alleged incident, a short description of the alleged incident, the source of information, some key details of the incident, an assessment of whether or not the alleged incident was likely to have been caused by a coalition strike, and lastly an assessment, or indication, of whether a legitimate military target had been identified.

67. By 13 January 2017 the number of allegations of possible breaches of IHL included in the Tracker had reached 251 incidents. Aside from reports from other sources, an important source of allegations was the United Nations Panel of Experts. Their first report was dated 26 January 2016. Their second report was subject to general distribution on 31 January 2017. This second report was not available in OPEN to the Divisional Court, since the Government had received it at that point only on a confidential basis. It was disclosed to the Court in CLOSED. All parties have referred to it in OPEN in the course of the hearing before us.

68. The Divisional Court accepted the submission from the Secretary of State that the MoD and joint HQ had available to them "a much wider range of information upon which to base their assessment of incidents than that to which the NGOs and others …. have access" (paragraph [116]). Those sources of information were categorised in paragraph [117] as including, notably:

> "As Mr Watkins explained, the sources of information available to the MoD include, notably: (i) coalition fast-jet operational reporting data passed to the UK Liaison Officers; (ii) sensitive

> MoD sourced imagery which can represent a more comprehensive, high resolution and immediate picture than that provided by third party commercial imagery; and (iii) other reports and assessments, including UK Defence Intelligence reports and some initial battle damage assessment which makes an assessment of the impact of a strike on the intended target. Much of this information is sensitive and necessarily cannot be referred to in detail in open session for national security reasons, but we have had sight of it in closed material."

69. In paragraph [120], the Court went on to characterise the process of analysis which they found was undertaken by the MoD and the Foreign Office into alleged IHL violations in the following terms:

> 120 … This was no superficial exercise. It has all the hallmarks of a rigorous and robust, multi-layered process of analysis carried out by numerous expert Government and military personnel, upon which the Secretary of State could properly rely."

70. The judgment proceeds to describe the process of analysis under a further series of headings: (2) UK Knowledge of Saudi Arabia Military Processes and Procedures; (3) UK Engagement with Saudi Arabia; (4) Saudi Investigations into Incidents and Establishments of Joint Incident Assessment Team ["JIAT"]; (5) Public Statements by Saudi Arabia Officials and Post-incident Dialogue; (6) The Role of the Foreign Office and MENAD, including IHL Updates.

71. We do not intend to repeat or summarise all of the content set out by the Divisional Court under each of those heads. It is worth emphasising the "IHL Updates" which were produced periodically from October 2015. These Updates consist of reports and commentary on the question of IHL violations. Important aspects of some of these are set down in the judgment between paragraphs [152] and [175]. The Update of October 2015 (judgment paragraph [153]) is of some importance in relation to Ground 4 in this appeal and is addressed below. An important feature from the January 2016 Update is highlighted (judgment, paragraph [159]). At that point the "MoD has tracked 114 alleged incidents of potential concern" of which "over a third" are assessed as probably coalition strikes. The Update states that "MoD has been unable to identify a legitimate military target for the majority of strikes".

72. The January 2016 Update included the following:

> "Overall assessment of Saudi compliance with IHL
>
> - From all of the information available, we have not reached the view that there has been a violation (including a serious violation) of IHL by Saudi Arabia…"

73. The Updates through the remainder of 2016 and up to January 2017 are characterised by the Divisional Court as demonstrating that "the Saudi authorities and military appeared to be increasingly engaged with the importance of IHL compliance" (judgment, paragraph [170]) and, in relation to the January 2017

Update, as indicating that "the steady trend of incremental improvement has continued with no major incidents of concern".

74. Despite the wording of the passage from the January 2016 Update quoted above, it remains the case that no "overall assessment" of violations of IHL was made, either in the course of the Tracker document and its supporting memoranda, or in the course of the successive Updates.

Ground 1: Contemporaneous Statements about Process

75. An interesting perspective on the process adopted can be derived from a sequence of contemporary statements by government. As we have indicated, Edward Bell was the head of the Export Control Organisation, then at BIS. Before the legal challenge began, in early November 2015, CAAT's solicitors wrote to the ECO asking for information. Two questions in the letter were directed to compliance with IHL. The letter noted that "ministers have informed Parliament that the Government has 'concerns' with regard to" compliance with IHL. The further question was directed to any assurances received from Saudi Arabia. The answer given by Mr Bell in his reply of 9 December 2015 began by describing the degree of diplomatic and other communication with Saudi Arabia and continued:

> "At these meetings we have raised our concerns over reports of alleged violations of International Humanitarian Law, as well as stressing the importance of conducting transparent investigations into incidents where it is alleged that International Humanitarian Law has been breached. The Saudis have given us assurances that they are complying with International Humanitarian Law, and we have offered advice and training to demonstrate best practice and to help ensure continued compliance with International Humanitarian Law."

76. On 4 January 2016, the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, Tobias Elwood MP, gave a written answer in Parliament, stating:

> "I regularly review the situation with my own advisers and have discussed it on numerous occasions with my Saudi counterpart. Our judgement is that there is no evidence that IHL has been breached, but we shall continue to review the situation regularly."

77. On 8 January 2016, CAAT's solicitors wrote once more to BIS asking further questions.

78. On 4 February 2016, Mr Chew, Head of Policy at the ECO, sent a submission to the Secretary of State for BIS. By then the Foreign Secretary had recommended a renewal of the export licences. The submission noted that "FCO provide advice to us on Criterion 2, although the final decision to grant or refuse an export licence rests with you". The Secretary of State was specifically directed to read the FCO confidential note "Yemen – Saudi-led Coalition Compliance with IHL". Mr Chew summarised key arguments from the FCO as follows:

"7. …

- MOD have been tracking 114 incidents of potential IHL concern; only a very, very small percentage of the overall coalition airstrikes carried out, have been tracked. Preliminary analysis of the UN Panel of Experts' Report has identified a further 19 incidents, and MOD have separately become aware of a number of other allegations, bringing the total to "approximately 145".

- Based on "all the information available", however, FCO maintain that "we have not established any violations of IHL by the Coalition in this conflict".

- FCO do acknowledge that there are gaps in their knowledge but they say there are "always some gaps in our knowledge when we are conducting Consolidated Criteria assessments in relation to exports to any country". In this case they consider they are "in possession of sufficient information, despite not being in possession of complete information, to conduct a Consolidated Criteria assessment". They consider that the flow of information they receive from the [redacted] from Post, and from open sources including NGOs, "continues to provide adequate detail and context to make an informed assessment against the Consolidated Criteria".

- Saudi Arabia is "seeking to comply with IHL and broadly has IHL-compliant processes in place". In addition, "Given the very small percentage of incidents which are considered as being of potential concern, it is not clear that a pattern of violations can be discerned". They conclude that while "there is a risk here, that risk is not 'clear'"

…

Our Concerns

9. While FCO appear confident about their ability to make proper assessments against the Consolidated Criteria we do have concerns regarding the acknowledged gaps in knowledge about Saudi targeting processes and about the military objectives of some of the strikes; in particular, the fact that while MOD consider only a third of the incidents they have been tracking to have been the result of Coalition airstrikes, the MOD are only able to identify a "valid military target" for the majority of them. Additionally they cannot be certain that the vast majority of the total airstrikes that are not being tracked have all been IHL-compliant. We are also concerned that FO/MOD appear only to have insight into Saudi processes in respect of pre-planned strikes and have very little insight into so-called "dynamic" strikes –

> where the pilot in the cockpit decides when to despatch munitions – which account for a significant proportion of all strikes.
>
> 10. On the other hand, we accept that the arguments are finely balanced and that the FCO is the competent authority to assess compliance with Criterion 2 of the Consolidated Criteria."

79. On 12 February 2016, Mr Elwood gave another written answer to a written question, stating:

> "We have assessed that there has not been a breach of IHL by the coalition".

80. However, in answer to a further Parliamentary Question, a further answer on 24 February was phrased rather differently:

> "We have not assessed that there has been a breach of IHL by the coalition."

81. On 21 July 2016, Mr Elwood corrected his answers of 4 January and 12 February. The corrected version of the answer given on 4 January was:

> "I regularly review the situation with my own advisers and have discussed it on numerous occasions with my Saudi counterpart. Looking at all the information available to us we have been unable to assess that there has been a breach of IHL by the Saudi-led coalition. The situation is kept under careful and continual review."

82. It would appear that the government's public description of the process moved from an assertion that there was a process of review with a finding of no breaches of IHL, to a more ambiguous formulation, albeit one capable of being read as implying a continuing review and assessment of whether breaches had taken place. Yet there was no such assessment.

83. In this context it is helpful to consider part of the Special Advocates' OPEN submissions, admitted into OPEN on 17 January 2017 in advance of the hearing in the Divisional Court. The Special Advocates note that:

> "On review of the open and closed material …
>
> (1) In particular, the 'Tracker' does not generally provide any assessment of whether the actions of the responsible party are compatible with IHL or not. In its initial format the Tracker included a question for each incident: "IHL breach?", but in no case was an assessment of this question addressed in the box provided. That question was removed from subsequent versions of the Tracker (the SAs have asked D – in their Submissions on Further Disclosure/ Supplementary Evidence dated 11 January 2017 – to clarify when this was done and why).

(2) The Ministerial Statement making corrections in relation to Parliamentary Questions and Debates stated:

> "*It is important to make clear that neither the MOD nor the FCO reaches a conclusion as to whether or not an IHL violation has taken place in relation to each and every incident that comes to its attention. This would simply not be possible in conflicts to which the UK is not a party, as is the case in Yemen*"

On the material disclosed in open and closed, it appears that statement is, strictly speaking, generally correct. However, it is potentially misleading by giving the impression that a conclusion is reached in relation to some alleged incidents of IHL violation. The true position (as it appears to the SAs) is that it appears that D has deliberately decided not to make any assessment of the likelihood or otherwise of a breach of IHL in relation to <u>any</u> specific incident contrary to the most obvious interpretation of the assertion by GLD on 16.2.16.

(3) Mr Crompton (FCO) has emphasised in his first open statement (§111) that the Ministerial Statement making the corrections "*does not represent or contain any change in policy*".

Thus, it seems clear that the Government does not seek to assess the likelihood of a breach of IHL having been committed by the Coalition in any specific case.

84. On 24 January 2017 the Defendant provided further information, of which the following may be stated in OPEN:

> "When the Tracker was initially created it was thought that the MOD would be able to come to conclusions in relation to individual allegations of breaches of IHL. Although it was quickly realised that this was not the case this was not immediately rectified administratively. The decision to change the column heading was reached in approximately July 2016. There are no documents recording this decision."

85. The Special Advocates' approved communication in OPEN is, of course, based on knowledge of what was in CLOSED. It follows that, although there would appear to have been an initial decision to make the assessment of violation (or at least an assumption that would be done), and a subsequent decision not to do so (or at least a change of position), the latter decision, and the reasoning for it were not reduced to writing.

Ground 1: The Interveners

86. Since an element of the Secretary of State's argument is that the government was in an obviously stronger position than the UN or the non-governmental organisations ("NGOs") to analyse and assess events on the ground in Yemen, it is right to record the dissent of the Interveners.

87. The submissions of all the Interveners emphasise the long line of authority recording the importance of evidence from organisations such as NGOs and the UN. There is no need for long recital of these cases. The ECtHR in *Saadi v* Italy (2009) 49 EHHR 30, *NA v United Kingdom* (2009) 48 EHHR 15, and in *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, and the Court of Appeal in *MS (Bangladesh) v SSHD* [2018] EWCA Civ 1258 make the point firmly as to the general authority of Amnesty International and Human Rights Watch. Similarly, in *R (EM (Eritrea)) v SSHD* [2014] AC 134 (UKSC), the Supreme Court emphasised the authority of the UNHCR, Amnesty and Human Rights Watch. The broad proposition is hardly in doubt.

88. The more focused points advanced would appear to be, firstly, that the NGOs and the UN may in some respects have better potential to adjudge events on the ground, and thus in some ways are equipped to make an assessment of violations of IHL, and secondly have felt no compunction in doing so.

89. It can hardly be challenged that the UK government, through its close contacts with the Saudis and its technical resources, will be better equipped than any outsider to assess many of the military aspects of events in the Yemen, so far as planning and technical matters are concerned. The CLOSED evidence in this case confirms that proposition. However, the NGOs emphasise that the material from the Interveners had "rigorous methodology", was based on "detailed in-country research [and] … extensive interviews with recent refugees".

90. Sufficient detail is expressed in the following paragraphs in the written submissions filed in this appeal on behalf of the First Interveners:

> "14. As regards the Human Rights Watch reports published since the Saudi-led coalition's intervention in Yemen in March 2015, the organisation has conducted field research in the north and south of Yemen, including the Sana'a, Aden, Sa'ada, Hajjah, 'Amran, Ibb, Taiz, and Hodeidah governorates. When conducting investigations into possible unlawful airstrikes, Human Rights Watch sought to gather a range of information, including interviews with victims, witnesses, and medical workers (in person or by telecommunication), site visits, analysis of satellite imagery, review of individual medical records and hospital log books, and examination of physical evidence such as weapons' remnants, craters and physical destruction, videos and photos, including by arms experts. Human Rights Watch has also conducted dozens of interviews with local activists, domestic and international human rights and humanitarian organizations, lawyers representing victims, and Yemeni government officials. Human Rights Watch analysed public statements that the Joint

Incidents Assessment Team ('JIAT') produced over the last two years, as well as statements by coalition officials posted on government websites. All interviewees provided consent to be interviewed and were informed of the purpose of the interview and how their information would be documented or reported. No interviewee received remuneration for giving an interview.

15. Further, Human Rights Watch has repeatedly written to the coalition, its current and former member countries and the coalition's investigative mechanism since 2015 after conducting research, seeking information on coalition attacks documented by Human Rights Watch and any investigations the coalition has undertaken into these attacks. The purpose of such letters is to provide an opportunity for member states, or for JIAT on behalf of the coalition, to confirm or deny the findings and their factual basis. As one example, before publishing its most recent report in August 2018, Human Rights Watch wrote to JIAT in early 2017, and to current and former coalition member countries in mid-2017. Human Rights Watch then published the letters but still received no reply. In 2018, Human Rights Watch again wrote to JIAT, and sent a copy to Saudi Arabia, the United Arab Emirates, Yemen, Qatar, Bahrain, and Kuwait, who sat on JIAT when it was initially announced. No current members of the coalition responded. Qatar provided a response in June 2018, which was included as an annex to the report.

16. As regards Amnesty International's work in the field, between February 2015 and May 2018, Amnesty International conducted seven field missions in the north and south of Yemen, covering Sana'a, Saada, Amran, Hodeidah, Ibb, Ta'iz, Lahj, and Aden. When conducting investigations, Amnesty International gathers information by interviewing survivors, victims, witnesses, medical and NGO personnel, journalists, lawyers and government officials on the ground, either in person or by telecommunication. All interviews are conducted in Arabic. Amnesty International investigates and corroborates the circumstances and impact of attacks by examining satellite imagery, medical reports, physical evidence (such as remnants from munitions used in attacks), and photos and videos with the original metadata. Images of weapon remnants are analysed by weapons experts, and images of the impact site are sent for ballistic analysis where possible. Amnesty International has repeatedly written to the Saudi authorities, detailing its findings and requesting information about the choice of targets, the decision-making process, and the rationale behind the airstrikes documented in its reports. Amnesty International has also requested that the Saudi authorities share the findings of any investigations that may have been carried out so far into documented airstrikes. No responses have been received."

91. The UN Panel's two reports were generated following Security Council Resolutions 2140 (2014), and 2204 (2015). The Panel of Experts was established, and reported in January 2016 and 2017. In contrast with the NGOs, the Panel did not have representatives on the ground in Yemen. However, they did have access to documents provided by Member States, satellite imagery from "private providers", commercial databases recording "maritime and aviation traffic, and social media traffic, but in the case of the latter they relied on it only where "it could be corroborated using multiple independent sources".

92. The argument of CAAT is that there was sufficient material identified by these sources to found proper assessments and conclusions. It was wrong to discount this material as the Divisional Court did, and wrong to treat the information available to the Secretary of State as displacing or fully discounting the evidence available from the Interveners and the UN.

Ground 1: The Secretary of State's Approach: Part 1

93. Before summarising the submissions of CAAT, we set down some of the submissions of the Secretary of State. Firstly, this is because the submissions are agreed. Secondly, it is because the submissions from the Secretary of State are made from a deeper base of information, i.e. from CLOSED as well as OPEN evidence, and (of course) come from the decision-maker.

94. The Secretary of State emphasises a number of points which are not in issue but help to set the context for any review of the actions of the Executive in relation to Criterion 2c. The exercise is predictive and involves the evaluation of risk and as to the future conduct of Saudi Arabia in a fluid and complex situation. The information upon which any assessment had to be made was complex and drawn from a wide variety of sources, including sensitive sources. In making his decision, the Secretary of State had to rely on advice from those with specialist diplomatic and military knowledge. Such evaluations are analogous to national security assessments. For all these reasons, the approach to assessment under Criterion 2c is for the Executive, should command considerable respect in any review and is capable only of rationality challenge. We accept those broad points.

Ground 1: CAAT's Submissions Part 1

95. Likewise, CAAT sought to narrow the issues. Mr Chamberlain QC began his submissions with a series of disavowals, stating what was not involved or implied by the appeal. He sought from us no adverse findings of fact in relation to Saudi Arabia. The relevant issue was the legality of the decision-making process of the Secretary of State: the way the Secretary of State reached the (continuing) decision to supply weapons. CAAT does not contend to us that an assessment of past violations of IHL necessarily establishes a clear risk of future violations. The contention is that an assessment of whether there is, or is not, a pattern of violations is an essential starting point for estimating the future risk. If the assessment of the past is flawed, so will be the assessment of the "clear risk test", particularly so in a case which is acknowledged in the evidence and by the Divisional Court to be a "finely balanced decision".

96. Next, Mr Chamberlain does not submit that the Secretary of State was bound by the conclusions or opinions of the NGOs or the UN Panel. It was open to the Secretary of State to differ from their conclusions. However, given that their evidence and conclusions were relevant, consistent and apparently well-founded, rationality required that those conclusions were either accepted or that proper reasons were formulated to reject them.

97. Next, Mr Chamberlain conceded that the Secretary of State may not be able to give full reasons for his decision in public. In a case such as this that might not be possible and might be very undesirable. It was for that reason that the appellant supported the application for a declaration in favour of Closed Material Proceedings pursuant to s.6 of the Justice and Security Act 2013. The relevant point here is whether the analysis was done at all, even in CLOSED. It was not.

98. As his next point, Mr Chamberlain submits that CAAT is not saying that the Secretary of State had an obligation to analyse each and every incident which was credibly suggested to be a violation of IHL. It might well be that in relation to some episodes the evidence did not permit a conclusion to be drawn. Such a contention had never been made by CAAT, despite the (erroneous) suggestion in paragraph [180] of the Divisional Court judgment. Here Mr Chamberlain points to CAAT's Written Points in Reply of 9 February 2017, the relevant part of which reads:

> "This submission does not entail that the SoS [Secretary of State] must form a concluded view about each and every incident where an IHL violation is alleged. But he does have to have evidence that is rationally capable of displacing the *prima facia* OPEN evidence of a pattern."

99. Finally, relevant to Ground 1, CAAT does not seek an order in the appeal that the grant of licences for continued supply of arms should be suspended. Consistently with the approach generally to the appeal, the order sought is that the Secretary of State should re-take the decision, on what CAAT contends to be the correct legal basis and, of course, taking into account any new material.

Ground 1: CAAT's Submissions Part 2

100. As to the law, Mr Chamberlain accepts that the rules adopted pursuant to the European Council Common Position do not import obligations in domestic law, but are obligations in international law. He also emphasises that the provision in Article 10 of the common position permitting Member States "where appropriate" to take into account "their economic, social, commercial and industrial interests". That does not import any discretion on the part of the Member State, since Article 10 is clear that "these factors shall not affect the application of the above criteria" including Criterion 2c.

101. CAAT further submits that when the criteria are to be considered, they must be considered together, without disaggregation. Mr Chamberlain also adopts the formulation put forward by the Secretary of State in pre-action correspondence that, given the seriousness of the question in hand "special caution" was necessary when considering whether there was a "clear risk" of future IHL violation. In Mr

Chamberlain's submission such a "clear risk" does not require a risk of a whole future series of violations. As he put it, a clear risk of another bombing of an additional MSF Hospital would be enough.

102. Against that backdrop, the submissions of CAAT in relation to Ground 1 really fall under three headings. First, the quality of the information and the evidence from the UN and the NGOs was of such range and depth that it called for a full engagement and critique by the Secretary of State. Had the Secretary of State and his advisers engaged in a proper process of assessment, even overall assessment, of past violations of IHL, they could not have avoided a proper engagement with the information coming from external agencies. It should be borne in mind that the User's Guide specified the "competent Bodies … to Establish Serious Violations of Human Rights" as including the Special Panels appointed by the UNHCHR (Annex III to Chapter 2, Section 2). Security Council Resolution 2140 (2014) mandated the creation of the Panel of Experts, with a view (*inter alia*) to the future designation of "individuals and entities" (including potentially states and armed forces) engaging in violation of IHL, as the basis for the imposition of sanctions (paragraphs [21(a)] and [19]). This was a serious body with a serious and responsible function, well-equipped to perform the task set. Second, some of the incidents which took place were so striking and so suggestive of violation that they called for detailed assessment as to whether a violation had taken place. Had the Secretary of State and his advisers engaged in an assessment of past violations, that would necessarily have brought with it a close critique of this body of evidence. Third, in the course of an iterative process of assessment of the real risk of future violations, such matters as the UK's relations with Saudi Arabia, the positive expressed attitudes of their leadership to observance of IHL and the various inputs of support and training for their military procedures, could only be a good basis for assessment of future risk if they were in fact effective in preventing violations. That necessitated assessment of breach or violation as matters proceeded. In the absence of assessment of violation, the reliability and effectiveness of assurances and other inputs simply could not be judged.

103. Overall, CAAT submits that the Divisional Court failed sufficiently to grapple with these arguments.

104. In relation to the investigations and findings by the UN and other international bodies, CAAT describes this material, taken together, as constituting "compelling *prima facie* OPEN evidence of a pattern of violations of IHL by [Saudi Arabia], some of them serious". CAAT supports the submissions of the Interveners as to the quality of their reporting and assessment. Mr Chamberlain emphasised the sheer quantity of information from such a variety of reputable sources. Much of the material sprang from first-hand accounts of eye witnesses and those on the ground. The reports from the UN and the Interveners are detailed and comprehensive and were "fully reasoned". In particular, the reports do not assume that there is an equation between a high incidence of civilian casualties and violation of IHL.

105. Mr Chamberlain's criticism of the Divisional Court's treatment of this material is really two-fold. Firstly, he submits that the Divisional Court made generic criticisms of the material, preferring the approach of the Secretary of State in

general terms. The Court failed to reflect the fact that the Secretary of State simply had no representatives on the ground, which the Interveners did. The Divisional Court did not focus on the Secretary of State's failure to engage with this material, as he says it was. It was incumbent on the decision-maker to look at this material and engage with it in detail and, if the accounts emanating from the UN and the NGOs were not accepted, or to the extent that they were not accepted, the Secretary of State had an obligation to explain why. Mr Chamberlain says there is no evidence of that and that the Divisional Court failed to grapple with the point.

106. So far as particular striking episodes are concerned, Mr Chamberlain emphasised three. Taking them in chronological order, the first is the declaration by the Saudi General Assiri on 8 May 2015 that the city of Sa'dah and the region of Mar were "military targets". Mr Chamberlain began by taking us to the rules of Customary IHL, published by the Red Cross. Rule 13 reads:

> "Rule 13
>
> Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian or civilian objects are prohibited."

107. The city of Sa'dah is, we were told, a city of around 100,000 people. The declaration was a direct or "flagrant" breach of IHL and of Rule 13. A declaration was followed by widespread coalition airstrikes: see the January 2016 UN Panel report at paragraph [140] and following. Satellite imagery of 22 May 2015 (compared with imagery of 6 January 2015) demonstrates very widespread damage to Sa'dah. As the UN Panel put it in the first report at paragraph [141]:

> "Sa'dah has suffered the most damage of all cities targeted for airstrikes, with at least 226 buildings having been destroyed only less than two months after the beginning of the airstrikes."

It appears to be the case that warnings were given of the impending bombing, and of the fact that the whole city was a target, four to five hours before the bombing began on 8 May 2015. "Warning" leaflets were dropped across Sa'dah approximately one to two hours before strikes were conducted. This, however, is "an area of high illiteracy": see the 2016 UN Panel Report, Annex 56.

108. The second striking example advanced by CAAT is the attack on Abs Hospital, Hajjah, one of the hospitals being run by MSF on 15 August 2016. Following previous strikes on MSF hospitals, for example repeated strikes on the hospital on Haidan on 25/26 October 2015, it was the practice of MSF to provide their GPS coordinates regularly to the coalition (see the report of the BBC of 27 October 2015 included in the material from the Divisional Court). The attack on the hospital is dealt with in Annex 49 to the 2017 UN Panel report. 19 Civilians were killed and 24 civilians were injured in the attack: see Appendix C to Annex 49 of the 2017 report. The casualties included hospital workers, patients and other civilians. The report details:

> "The high number of civilian casualties was a result of the point of detonation being close to the emergency department and waiting hall of the patients. The car that was used to transport injured individuals was also destroyed and its occupants killed."

109. The explosion was caused by a detonation of what was assessed to be 87kg of high explosives, which according to the technical analysis of the explosion at paragraph 3 of Appendix C:

> "This is the explosive weight of the Mark 82 variant high explosive (HE) Aircraft (A/C) bomb. The crater profile is highly indicative of that typically caused…"

At the scene was found a fragment indicating it came from the rear wing of a GBU-12 PAVEWAY II guided bomb, in other words munition supplied by the United Kingdom.

110. In relation to this episode there was a public reply to the UN on the part of Saudi Arabia included in Annex 49 in the following terms:

> "On 15 August 2016 [i.e. the evening of the incident], the Saudi Arabia-led coalition acknowledged its responsibility for the air strike and stated to MSF that "the objective of the air strike was a moving vehicle that had entered the hospital compound".
>
> On 8 December 2016 JIAT provided the Panel with the following information:
>
> "Doctors without borders (MFS (sic)) posted a statement on its official website claiming that the coalition forces struck Abs-Hospital in Abs city, Hajjah Governorate, on 15 August 2016, resulted with (7) people dead, and (13) injured. The JIAT investigated the facts and the circumstances of this incident, and found out that on 15 August 2016 the coalition forces received intelligence information about presence of Houthi Leadership gathering northern Abs City, thus they were targeted and attacked by coalition Air Force. After that the aircrew observed that a vehicle leaving the site, and proceeding south. The fighters followed the vehicle, and struck it next to a building that does not bear any marks that would indicate before the strike that it is a hospital, which has appeared later that it is (Abs-Hospital). In light of the facts, the JIAT have found that, damages inflicted on the building were because of the targeted vehicle (which was a legitimate military target) next to the building which were unintentional. Thus, the JIAT have found that, the coalition forces must extend an apology for this unintentional mistake, and provide the proper assistance to the families with affected persons. The coalition forces must also investigate those responsible for that, to identify extent of their violation of the approved Rules of Engagements (ROEs), and take the proper actions in this regard."

111. The UN Panel reviewed the JIAT response, concluding that the Coalition "should have been aware that the vehicle entered the Abs Hospital prior to the airstrike" (paragraph [11]) and observed that the Panel was not convinced that the 'moving vehicle that entered the compound' was a legitimate military objective. The Panel's investigations revealed that the vehicle was a civilian car transporting wounded individual(s) (wounded, possibly from a previous airstrike elsewhere) to the hospital.

112. Mr Chamberlain points out that an attack on a wounded fighter being taken to hospital would, without more, be a breach of IHL.

113. The third striking incident highlighted by the appellant concerns the strike on a civilian funeral hall, "the Great Hall" episode on 8 October 2016. Both the Abs Hospital attack and that upon the Great Hall came relatively late in the history of the campaign and both followed the resumption of hostilities after the pause in the summer of 2016. The details of this episode are very well known. The episode was addressed in detail by the second UN Panel report. In brief, two guided bombs were dropped on 8 October in the mid afternoon, when around 1000 people were attending the funeral. The funeral was of the father of an acting Minister of the Interior and as the UN Panel terms it:

> "A significant number of Houthi-Saleh-affiliated military and political leaders were expected to attend"

114. In CAAT's submission, this episode raises an overwhelming inference of a breach of IHL. We consider this episode and the response to it from the UK authorities in the CLOSED judgment.

115. The third limb of CAAT's submissions is to consider the engagement of the Secretary of State with the Saudi authorities in a chronological relationship to the continuing episodes of concern. Mr Chamberlain and those with him prepared a chronology of such incidents, correlated with the OPEN evidence of training input by the United Kingdom and with statements from the Saudi Authorities. This chronology highlights a series of episodes, including the three striking episodes just mentioned, but including many more. It is unnecessary to try to summarise all of the contents.

116. The thrust of CAAT's submission is that, assuming this analysis drawn from the OPEN material available in the case to be correct, there was a continuation of very serious episodes, giving rise at the very least to significant concern as to breaches of IHL. This continued, apparently unaffected by the good relations, training and other support offered by the UK to the Saudi Arabian authorities and military, or the expressed attitudes of the Saudi authorities.

117. One critical part of the engagement of the UK with Saudi Arabia was the advice and support given to the formation of JIAT. That was established in February 2016 and published its first findings in August 2016 (Divisional Court judgment, paragraph [130]). By December 2016, JIAT had made known the results of 14 investigations. The Divisional Court noted at paragraph [132] the serious complaints voiced by CAAT as to these investigative measures and the reports themselves. As noted by the Divisional Court in that paragraph, CAAT submitted

that little comfort could be gleaned from the existence of the Saudi investigation procedures because they had been too slow and too few in number. Further, the JIAT's reports and methodology had been the subject of criticism by Human Rights Watch.

118. Thus, the core submission is that reliance on the continuing engagement, training and support given to Saudi Arabia, as the basis for concluding that assessment of past violations was unnecessary, was simply unreliable and irrational. Without assessment of whether there had been violations of IHL, there was no evidence that such engagement had been, and therefore would be, effective in preventing future violations. The criticism of the Divisional Court's conclusions is that they failed properly to address this critique.

Ground 1: the Secretary of State's Submissions Part 2

119. The Secretary of State does not challenge the conclusion of the Divisional Court, that the OPEN source reporting constituted "a substantial body of evidence suggesting that the coalition has committed serious breaches of IHL in the course of… the Yemen conflict" (judgment paragraph [86]). The Secretary of State does emphasise, however, the Divisional Court's conclusion that this was "only part of the picture".

120. Both in OPEN and in CLOSED submissions, the Secretary of State emphasises the continuing close engagement with Saudi Arabia, as well as the consistent efforts on the part of the UK, to foster respect and observance of IHL by the Saudi-led Coalition. The CLOSED evidence gives support to this contention.

121. The Secretary of State also emphasises how seriously these matters were taken. By way of example, when the 2016 UN Panel report became available, as the Divisional Court observed (judgment, paragraph [208(6)]), the MoD carried out the preliminary assessment of the 119 allegations and some "39 allegations were eventually added on to the MoD Tracker as a result". In the Secretary of State's submissions it is emphasised that the importance of considering allegations of past breaches "and seeking to analyse, to the extent possible, patterns of concern" is accepted. Such "patterns of concern" were identified and "fed into the overall analysis". Particular examples advanced by the Secretary of State include the levels of civilian casualties noted in the October 2015 IHL Update and again in the November 2015 IHL Update, the latter highlighting the attack on the MSF Hospital in Haidan. The January 2016 IHL Update "recorded particular concern" as to two further alleged strikes against MSF facilities and as to the use of cluster munitions over Sana'a. The March 2016 IHL Update accepted that the MSF incident (meaning the Haidan strike) was "of very real concern" but the Saudis "had admitted responsibility for the strike and put in place procedures to prevent a recurrence".

122. As against this level of concern, the Secretary of State in OPEN emphasises a number of specific developments. In the January 2016 IHL Update a continuing engagement with Saudi Arabia was noted, "to better understand the dynamic targeting processes and to help improve any processes (as may be necessary)…" In March 2016, the IHL Update recorded the fact that the British MoD had offered training to the Saudis. It was further noted that Saudi Arabia had announced their

intention to form a high level team to assess and verify incidents of concern: this became the JIAT. The JIAT was formed during the summer of 2016 and had received advice and training from the UK.

123. During the summer of 2016 there was a pause in hostilities in Yemen, which largely held. Hostilities resumed in August. A number of airstrikes in August and September were highlighted by the UN Panel's Second Report. Subsequently, on 8 October 2016 the bombing occurred of the civilian funeral hall ["the Great Hall"] in Sana'a, where around 1,000 mourners were attending a funeral. According to the UN, 132 people were killed and 695 injured. The Secretary of State emphasises that the October 2016 IHL Update records that the "clear risk" threshold had not been met before the Great Hall strike. As Mr Crompton of the FCO summarises it, the October 2016 IHL Update went on to say:

> "It was noted that the KSA authorities and military appeared to be increasingly engaged with the importance of IHL compliance and were making efforts to decrease the risk of IHL violations. They had initiated urgent investigations [into the Great Hall incident]. It was noted that the complexity of the circumstances were unprecedented."

124. The Secretary of State emphasises that the December 2016 and January 2017 IHL Updates record "steady progress". As the Divisional Court noted, the details of the steps taken by the Secretary of State following the Great Hall strike were the subject of CLOSED evidence.

125. In addition, the Secretary of State relies on a number of core conclusions by the Divisional Court following the detailed review of both OPEN and CLOSED evidence. Firstly (judgment, paragraphs [113]-[115]), the MoD was in fact reviewing a larger number of alleged or possible incidents than were identified by CAAT from OPEN source reporting. Secondly (judgment paragraph [116]-[117]), the MoD had a much wider range of information available than could be available to NGOs or the UN. Thirdly, the material generated in the course of the IHL assessment process was considerable and, as the respondents put it, "demonstrated the genuine concern and scrutiny that the MoD and Foreign Office were determined to give to the reports of alleged IHL violations". As the Divisional Court characterised it (judgment paragraph [120]), the exercise "has all the hallmarks of a rigorous and robust, multi-layered process of analysis carried out by numerous expert government and military personnel, upon which the Secretary of State could properly rely". The Secretary of State adopted that description.

126. Next, the Secretary of State relies on the Court's conclusion that the UK had considerable insight into the military systems, processes and procedures of Saudi Arabia (judgment paragraph [121]), that there had been extensive political and military engagement with Saudi Arabia (judgment paragraph [126]), that Saudi Arabia had been "mindful of concerns" in relation to civilian casualties and had sought to address those concerns (judgment paragraph [128]), that the "growing efforts to establish and operate procedures to investigate incidents of concern" were significant (judgment paragraph [133]), and that the Secretary of State was

entitled to take into account positive statements by Saudi officials as to the importance of IHL "as part of a wider, complex patchwork of evidence" (judgment paragraph [136]).

127. Against that background, Sir James submits that there are "most serious constraints" and potentially serious objections to the imposition of an obligation on exporting states to reach conclusions as to whether past incidents of concern did or did not amount in fact and law to violations of IHL. Exporting states are not courts. They are engaged in "a government risk analysis" about future use of exports by a Sovereign State. Setting aside any difficulty or disagreement as to the principles of IHL, in the context of active and ongoing military operations, the questions that would require resolution are particularly complex with facts emerging as a conflict continued. In many instances, such decisions would have to be taken without information from the importing state. Here, Sir James relies on paragraphs [180]/[181(i)] of the judgment below, where the Court observed:

> "it is not necessary, nor is it practical, for a judgement to be made by reference to IHL about every past incident to make an assessment under Criterion 2c… An inquiry into "the recipient's past and present record" does not require a quasi-judicial examination of every previous incident in which a breach of IHL is suspected … The October 2016 update … reflects the evaluative nature of the exercise performed by the Secretary of State. It recognises, for example, that the fact that it cannot be said that a series of events *were* violations of IHL (or serious violations) does not render consideration of the incidents irrelevant."

128. Moreover, the Divisional Court remarked on "the impracticality of such an exercise", observing that "there would be inherent difficulties for a non-party to a conflict to reach a reliable view on breaches of IHL by another sovereign state" (judgment paragraph [181(ii)]).

129. The Secretary of State seeks to support this conclusion by striking at what is said to have been the submission of CAAT below: that there was an obligation to reach a conclusion as to violation in respect of each incident identified. Sir James says that is indeed an impossible obligation. If CAAT is driven from that position, Sir James then submits that the obligation becomes "vague and impractical". How many incidents must be assessed to the point of conclusion? What is the standard of proof? Where is the threshold in such a process so far as judging the risk of future violations? The lack of utility in such an exercise is all the more apparent given the forward-looking assessment required.

130. In OPEN argument, Sir James emphasises the impact of much of the CLOSED evidence as demonstrating the high level of concern and engagement by the British government and all relevant officials with the issue of breaches of IHL. In no modern warfare is it feasible or practical to avoid all civilian casualties. That said, there can be no doubt as to the commitment of the UK in seeking to avoid civilian casualties in general and breaches of IHL in particular. On the specific point arising under Ground 1, the essence of the test is to assess the future risk and that is critically dependent on "the attitude" of the state to which arms will be

exported. The Users' Guide is guidance only as the general introduction to "criteria guidance" makes clear: the intention is "to share best practice in the interpretation of criteria rather than to constitute a set of instructions: individual judgement is still an essential part of the process and member states are fully entitled to apply their own interpretations".

131. For those reasons, the Secretary of State submits, we should reject the appeal under Ground 1.

Ground 1: Conclusions

132. We emphasise that in reaching the following conclusions, we have taken fully into account the CLOSED evidence and submissions, as well as those we have been able to summarise above. We have summarised the submissions of both parties and the Interveners reasonably fully, so that our conclusion on Ground 1 can be expressed shortly.

133. We are grateful to all counsel for the clarity of their submissions, and for narrowing the issues in the way we have summarised above.

134. Turning firstly to the Interveners, we accept that the major NGOs, including the Interveners, and the UN Panel of Experts had a major contribution to make in recording and analysing events on the ground in the Yemen conflict. The NGOs did have the capacity to introduce representatives on the ground and to interview eye witnesses, which the Secretary of State could not do. It is the case, however, that the Secretary of State could access a great deal of information which the NGOs and the UN Panel could not see. As we have indicated, the CLOSED evidence makes that clear. 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.

135. Having considered the CLOSED evidence, we do not accept that, broadly speaking, the UK military and other analysts and advisers wrongly discounted the evidence coming from the NGOs and the UN Panel of experts. We do accept that the evidence was considered, in each case where a concern was raised. The summary of additional sources of information available was accurately expressed in paragraph [117] of the Divisional Court judgment, as cited above.

136. We also accept as broadly accurate the description of the process of analysis undertaken by the MoD and the Foreign Office given in paragraph [120] of the Divisional Court judgment, cited above. So far as we can determine, the processes were "rigorous and robust", were "multi-layered" and they were certainly "carried out by numerous expert government and military personnel", upon which the Secretary of State could rely, and in fact had no choice but to rely. That conclusion does not of course mean that every piece of analysis or advice was correct.

137. It is also right to emphasise, from both the OPEN and CLOSED material that those advising the Secretary of State were all along keenly alive to the question of possible violation of IHL and its impact on continued supply of weapons. There

is no doubt that the UK made sustained efforts in offering training, support and in other ways at all levels to emphasise the importance of observance of IHL to Saudi Arabia.

138. All that said, however, we conclude that CAAT has succeeded in the central argument advanced in Ground 1. The question whether there was an historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced. Even if it could not be answered with reasonable confidence in respect of every incident of concern (which CAAT accepts, and so do we) it is clear to us that it could properly be answered in respect of many such incidents, including most, if not all, of those which have featured prominently in argument. At least the attempt had to be made.

139. Criterion 2c and the User's Guide call specific attention to the question of past violation as a relevant consideration when assessing whether there is a real risk of future violation. In our view that is obviously correct. How could it reasonably be otherwise?

140. The Special Advocates' OPEN submission of 17 January 2017, which was before the Divisional Court, was correct in stating that:

> "In its initial format the Tracker included a question for each incident: "IHL breach?", but in no case was an assessment of this question addressed in the box provided. That question was removed from subsequent versions of the Tracker."

141. A close reading of the CLOSED evidence would suggest that in the early months of 2016 there was either a decision, or a change of position, so that there would be no assessment of past violation of IHL. This was followed by a later decision to remove the relevant column or box from the Tracker. It is correct that there is no direct evidence of a positive decision. Hence there is no document or documents to which the Secretary of State can turn, setting out the rationale by which it was thought right that no assessments of past violations should be made or even attempted.

142. We cannot accept the argument from Sir James that it was in some way inappropriate for the Secretary of State to make such an assessment. That is a difficult proposition to make in the face of the Common Position, and represents something of a contradiction with the proposition that the Secretary of State was in a markedly better position to assess events than the NGOs, the UN or others.

143. We have in any event highlighted in CLOSED at least some evidence indicating that such assessments routinely can be and have been made in similar but different contexts.

144. In addition to the points already made, 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

such 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. We should emphasise that it is not our conclusion that there would only be one answer on future risk, if historic violations were found to have taken place, bearing in mind paragraph 2.13 of the User's Guide, and the question whether or not any violations are "isolated incidents", as the Divisional Court put it, in paragraph [208(iii)] of their judgment. That will be for the Secretary of State and his advisers, as Mr Chamberlain rightly conceded.

145. In reaching this conclusion, we have followed the approach laid down in paragraphs 53-60 above. We emphasise that we have borne fully in mind the complex and difficult nature of the decisions in question, the fact that this is an area particularly far within the responsibility and expertise of the executive branch and that, as a consequence, rationality alone can properly found interference by way of judicial review. We agree with the Divisional Court (judgment paragraph [35]) that in such a case as this, the courts must accord considerable respect to the decision-maker. It is in the application of that test that we have concluded it was irrational and therefore unlawful for the Secretary of State to proceed as he did.

Ground 2: error in relation to the Secretary of State's failure to ask the questions identified in the User's Guide

146. On behalf of CAAT it is submitted that Ground 2, like Ground 1, identifies an error of approach in both the Secretary of State's and the Divisional Court's reasoning.

147. This ground focuses in particular on three questions, said to be essential to the assessment required by Criterion 2c and to be found among the 21 bullet points in the User's Guide (at pp.55-56): (1) whether the receiving state has legislation in place prohibiting violations of IHL; (2) whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and (3) whether there is an independent and functioning judiciary in the receiving state capable of punishing members of the armed forces who violate IHL.

148. CAAT's case is that the Secretary of State did not and still does not know the answers to those questions in relation to the Kingdom of Saudi Arabia. Further, it is submitted that, as a consequence, the Secretary of State breached his duty to ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly, as required by *Tameside*.

149. The duty to address the above three specific questions is said to arise in either or both of two ways:

(1) The guidance in the User's Guide is to be regarded as having a status similar to that of statutory guidance pursuant to legislation in the United Kingdom. It is submitted that this flows from article 13 of the EU Common Position, which provides that the User's Guide "shall serve as guidance for the implementation of this common position". This proposition is based on first principles since neither side has

drawn the attention of this Court to any European jurisprudence on the use of guidance. It is submitted that, in the case of domestic statutory guidance, public law imposes a duty (a) to follow such guidance or (b) to provide "cogent reasons" for departing from it when it is decided not to follow it: see e.g. *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, at paragraph [21] (Lord Bingham).

(2) In any event, the duty is alleged to flow from the general *Tameside* duty. It is submitted that the three matters identified above were "so relevant that they must be taken into account" as a matter of rationality. In support of that submission particular reliance is placed on the decision of the Court of Appeal in *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, at paragraph [63] (Sedley LJ).

150. On behalf of the Secretary of State it is disputed that *Munjaz* is authority for the proposition that, as a general principle of public law, statutory guidance must be followed unless there are cogent reasons for departing from it. It is unnecessary, however, for this court to resolve that particular dispute, upon which we did not hear full argument. This is because we accept the Secretary of State's fundamental submission in this regard that the analogy with domestic statutory guidance is not a sound one. The introduction to the criteria guidance (at p.13), which was highlighted by the Divisional Court at paragraph [11], makes it clear that the purpose of the User's Guide is to "share best practice in the interpretation of the criteria rather than to constitute a set of instructions."

151. Furthermore, we agree with the Divisional Court that the User's Guide itself does not purport to require, or have the effect of requiring, each and every question mentioned in it to be posed, still less in a serial way in every case. When the relevant passage in paragraph 2.13 of the Guide opens with the words "relevant questions include", it is simply making the point that these are questions (set out in a non-exhaustive manner) which the decision-maker may or may not consider. Everything will depend on a highly fact-specific enquiry in the particular case.

152. Turning to the alternative source of the duty alleged, that is the standard of rationality required by *Tameside*, we again reject the submission advanced on behalf of CAAT. As we have said earlier, the standard of irrationality is a deliberately strict one. It is only if the process adopted by the Secretary of State was one which was not reasonably open to him that the court could interfere as a matter of public law. As the Secretary of State submits, the standard of rationality also contains within it an inherent flexibility, which is capable of meeting the demands of the particular situation faced by the Secretary of State. The specific questions on which CAAT now focuses may be highly relevant in some cases; in others they may be of lesser or no particular significance in the context. Such judgements are essentially ones for the Secretary of State to make provided that he acts rationally.

153. We are unable to accept the submission that in respect of the matters raised in Ground 2 the Secretary of State adopted a process which was irrational. As Sir James Eadie submitted before us, the essential focus of the present case has not been on individual responsibilities for war crimes, to which the three questions

identified above would be particularly relevant. The focus has been on whether the Kingdom of Saudi Arabia *as a state* has a record of compliance with IHL, for example in relation to the principles of distinction and proportionality. If, and in so far as, the Secretary of State's process erred as a matter of law under Ground 1, we have already addressed that above and found that ground to be made out. In our judgment, however, Ground 2 adds nothing to Ground 1. We can see no additional requirement founded in rationality that the Secretary of State had to ask the three specific questions which are the focus of Ground 2. In the context of this particular case, it was reasonably open to the Secretary of State to focus on other matters. That is essentially what the Divisional Court held. As that court said, at paragraph [128]:

> "it was clear from the evidence that, far from being immune to international criticism and concern as to civilian casualties alleged to have been caused by the Coalition in the Yemen conflict, Saudi Arabia has been mindful of the concerns expressed, in particular by the UK. It is also clear from the evidence that Saudi Arabia has sought positively to address these concerns, in particular by conducting investigations into incidents and setting up a permanent investigatory body."

154. The Secretary of State enjoyed a broad area of judgment in assessing how to go about his task in addressing Criterion 2c. He was not required, in our judgment, as a matter of rationality to pose the three specific questions upon which CAAT has now focused under Ground 2 in this appeal. This conclusion is also supported by what we say in our CLOSED judgment.

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

155. As we have noted above, Criterion 2c refers to there being a clear risk of "serious violations" of IHL. CAAT submits as follows:

> (1) Before the Divisional Court there was a dispute between the parties as to the meaning of "serious violations" and, in particular, whether it was synonymous with "war crimes" or grave breaches of IHL.
>
> (2) The Divisional Court did not rule on that dispute. CAAT submits that there is nothing in its judgment to indicate that the Divisional Court considered that it was resolving any dispute on the meaning of the term "serious violations". More fundamentally, CAAT submits that, if the Divisional Court had in fact resolved the dispute in its favour, it would have had to go on to consider whether its conclusion meant that the Secretary of State's decision had been taken on a flawed legal basis and whether that error was material.
>
> (3) On the evidence as to the decision-making process adopted in this case, CAAT submits that the Secretary of State did indeed fall into error by equating "serious violations" of international humanitarian law with "war crimes" or grave breaches of IHL. In particular, CAAT submits, he fell into error because he considered that some mental element, at

least recklessness if not intention or (elsewhere) "deliberate" conduct was required. CAAT submits that that is not required as a matter of international law before there can be a serious violation of IHL. CAAT submits that a mental element is only required in order to establish individual criminal responsibility, whereas the present case is concerned with the responsibility of a state as a whole for violations of IHL.

156. In support of its submissions as to the meaning of "serious violations" of IHL, and the contrast with grave breaches or individual criminal responsibility, the appellant relies on a number of international materials, including decisions of criminal tribunals established in the aftermath of the conflict in the former Yugoslavia: see in particular the decision in *Prosecutor v Tadic*, judgment of 2 October 1995, paragraph [94]; and the commentary issued by the International Committee of the Red Cross on article 89 of Additional Protocol I to the Geneva Conventions.

157. On behalf of the Secretary of State it is submitted as follows:

(1) CAAT overstates the difference, if any, between the parties on the concept of serious violations. The Secretary of State did not and does not disagree with the relevant parts of the User's Guide, for example at paras. 2.10 and 2.11. In the latter passage it is clearly stated that "serious violations" of IHL "include grave breaches of the four Geneva Conventions of 1949…". It is clear therefore, submits the Secretary of State, that serious violations include, but are not synonymous with, grave breaches.

(2) In any event, the Secretary of State submits that the Divisional Court resolved any point of difference in favour of CAAT: see its judgment at paragraphs [15]-[24], in particular at paragraph [16], where the Court said:

> "Thus, the term 'serious violation' is a general term in IHL which *includes* 'grave breaches' and 'war crimes' as defined, in particular, in the four Geneva Conventions, Additional Protocol I and in article 8 of the Rome Statute…" (emphasis in original).

Furthermore, the Secretary of State points out, the Divisional Court was well aware, in particular at paragraphs [22]-[24] of its judgment, that IHL includes a number of obligations which go well beyond individual criminal responsibility: for example the principles of distinction and proportionality. The Court noted that IHL also includes an obligation to take all feasible precautions in an attack; an obligation to investigate or prosecute alleged violations after the event and an obligation to make reparations.

(3) On the evidence the Secretary of State submits that it is inappropriate to take one or two passages out of context. Rather the evidence must be read fairly and as a whole. When that is done, it is submitted that

the Secretary of State and his advisors did not in fact apply a narrow and technical approach to "serious violations" as suggested by CAAT.

(4) The Secretary of State also makes the point that permission was granted to pursue Ground 4 in this appeal on only a limited basis. The Court, when granting permission, after a hearing, said that:

> "…it is arguable that there was an elision of meaning between 'grave breaches' of IHL, 'war crimes' and 'serious violations' of IHL, which may have been material because of some of the advice bearing on the decision" (at paragraph [13] of the permission judgment).

Consequently, the Secretary of State submits, the only issue on this appeal under Ground 4 is whether in fact the Secretary of State's decision-making did wrongly elide those concepts. It is neither necessary nor appropriate for the court to engage in a detailed consideration of the precise scope of "serious violations".

158. We address, first, the question whether the Divisional Court erred in law in misunderstanding the meaning of the term "serious violations of IHL". In our judgment it did not. In particular, it was well aware that that concept was broader than, and not synonymous with, the concept of war crimes or grave breaches of IHL. At paragraph [16] of its OPEN judgment the Divisional Court said that the term "serious violation" is a general term in IHL which includes "grave breaches" and "war crimes". It did not consider those concepts to be synonymous.

159. The high point of CAAT's criticism of the judgment of the Divisional Court in this regard is to be found in paragraph [18], where it said:

> "Article 8 of the ICC Statute requires a mental element for a 'grave' 'breach', i.e. a wilful or deliberate or intentional act. In our view, the generic term 'serious breach' would include reckless as well as deliberate or intentional acts."

160. In our judgment, that passage needs to be read in its proper context. It was not purporting to give a definition of the term "serious violations" of IHL, which is the term used in Criterion 2c. Rather, it was concerned with what mental element is required for there to be a "grave" breach for the purpose of article 8 of the ICC Statute. The court was simply making the point that recklessness will suffice to furnish the requisite mental element for that crime and it is not necessary to establish that there was a wilful or deliberate or intentional act. The fact that the Divisional Court was well aware that IHL imposes other requirements, which may well constitute "serious violations" of it is clear, in our view, from the rest of its judgment, in particular at paragraphs [19]-[24].

161. Furthermore, it seems to us that other parts of the Divisional Court's judgment also demonstrate that it did not consider the concept of serious violations of IHL to be restricted in some way to those cases where there could be established individual criminal responsibility. For example, at paragraph [86] the Court said that there was "a substantial body of evidence suggesting that the Coalition has

committed serious breaches of IHL in the course of its engagement in the Yemen conflict." There the Court clearly had in mind the wider obligations which IHL imposes on a state when conducting its operations in the course of an armed conflict, not only questions of individual criminal responsibility, which is the subject of that body of IHL which concerns grave breaches.

162. Finally, and very importantly, we would emphasise what the Divisional Court said at paragraphs [153] and [156]:

> "153. The October 2015 update summarised the alleged incidents of IHL violations and included, in Annex B, a summary of the MoD's analysis of the most recent allegations in spreadsheet form. The update, at paragraph 7, expressed concern at the 'worrying levels of civilian casualties in some reports' and noted that 'high levels of civilian casualties can raise concerns particularly around the proportionality criteria'. The update notes that intent is a key element in often insufficient information to determine intent. However, it is also clear from the update that those making the assessment were well aware that 'a consistent pattern of non-deliberate incidents (with the same cause and without remedial actions being taken to address that cause) could amount to a breach' (emphasis added).
>
> …
>
> 156. The update records that a consistent pattern of non-deliberate incidents that have the same cause and where remedial action is not taken to address that cause could amount to a breach."

163. In our view, those passages are also highly significant in addressing the other submission now advanced on behalf of CAAT, namely that there was an error of approach in the Secretary of State's own decision-making process. We recall that the Divisional Court had the advantage, which this Court has not had, of considering the whole of the vast evidential material, both OPEN and CLOSED, placed before it. The Divisional Court formed a clear assessment of that evidence. It clearly took the view, as paragraphs [153] and [156] indicate, that the IHL Updates before it did not confine themselves to incidents where there was evidence of intent or deliberate conduct. This is why, as those passages made clear, the Updates included incidents of non-deliberate conduct and considered whether there may have been a consistent pattern of such incidents.

164. We therefore accept the substance of the Secretary of State's submissions on this appeal under Ground 4. We are not persuaded by CAAT's submissions that the Secretary of State erred in his approach in the decision-making process as suggested under Ground 4.

165. At the hearing before us Mr Chamberlain invited this court to provide a definition of "serious violations" of IHL in order to assist the Secretary of State in his future assessments in applying Criterion 2c. In particular, he submitted that (depending on the circumstances) even a single incident could amount to a serious violation

of IHL and that this Court should give guidance to the Secretary of State to that effect. In our view, it would not be appropriate to seek to give some abstract definition of the concept of "serious violations" of IHL, since so much depends on the precise facts. We also remind ourselves that the function of judicial review is generally to assess the lawfulness of past executive action, not to give advice for the future. Judicial review is in this regard highly fact-specific. Furthermore, we have to recall that the context in which the issue arises here is not one in which the Secretary of State is sitting like a court adjudicating on alleged past violations but rather in the context of a prospective and predictive exercise as to whether there is a clear risk that arms exported under a licence might be used in the commission of a serious violation of IHL in the future.

166. For all those reasons, as well as those set out in our CLOSED judgment, we have come to the conclusion that Ground 4 in this appeal must be rejected.

Overall Conclusion

167. For the reasons given above, and those set out in our CLOSED judgment, we allow this appeal on Ground 1 but dismiss it on all other grounds. The consequence will be that the matter will be remitted to the Secretary of State to reconsider in accordance with the correct legal approach.