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# **LEGAL OPINION**

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**THE LAWFULNESS OF THE AUTHORISATION  
BY THE UNITED KINGDOM  
OF WEAPONS AND RELATED ITEMS FOR EXPORT  
TO SAUDI ARABIA  
IN THE CONTEXT OF SAUDI ARABIA'S MILITARY  
INTERVENTION IN YEMEN**

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## INTRODUCTION AND OVERVIEW

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1. We are asked to advise on whether the export by the United Kingdom (“UK”) of weapons to the Kingdom of Saudi Arabia (“Saudi Arabia”) in the context of its military intervention in Yemen breaches the UK’s obligations arising under domestic, European and/or international law.
2. Our opinion consists of nine sections, the first four providing the relevant factual and legal background to the advice, and the subsequent five sections considering that background against the key legal framework for arms exports from the UK.
3. Our opinion is structured as follows. After an initial introduction and summary, we set out **(1) the factual background** to the conflict. We then address **(2) the international law framework** applicable to the conflict, **(3) the allegations and evidence** of serious violations of international law, and **(4) the UK Government’s response** to those allegations.
4. The subsequent three sections address the UK’s obligations arising under international arms control agreements which are applicable to the UK, namely **(5) the Arms Trade Treaty**, **(6) the European Council’s Common Position on arms exports** and **(7) the Principles of the Organisation of Security and Cooperation in Europe (“OSCE”)** governing conventional arms transfers. We then address the obligations arising under domestic law, as set out in **(8) the domestic Export Control Act 2002, the Export Control Order 2008** and **the EU and National Consolidated Criteria**. We then set out a short **conclusion**, containing some brief recommendations.
5. The advice also has an **Annex**, which sets out our analysis of ten incidents, which raise serious concerns as to the compliance by the Saudi Arabian-led Coalition with international law.
6. In drafting this opinion, we have not conducted any primary research ourselves and have therefore necessarily relied on factual accounts as reported in the media and as documented in statements and reports by United Nations representatives, international organisations and NGOs, including those NGOs instructing us.

## SUMMARY

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### **Factual background**

7. The UK is a major arms supplier to Saudi Arabia. Saudi Arabia has been identified as a “priority market” for the UK, with licences for arms exports to the State, including exports of combat aircraft and air-delivered bombs, exceeding a value of £1.75 billion over the course of the first six months of 2015 alone. Throughout that time, Saudi Arabia has also been officially identified by the UK as one of 27 countries in the world, in relation to which the UK has wide-ranging, grave human rights concerns.
8. Since March 2015, Saudi Arabia has been engaged in an armed conflict in Yemen, leading a military coalition of nine States, in support of internationally-recognised Yemeni President Hadi, until recently in exile in Saudi Arabia, against an armed group known as the “Houthis” and other forces loyal to former Yemeni President Saleh, which have seized large swathes of Yemeni territory. The conflict has had a significant impact on Yemen’s already impoverished population. More than 5,600 people are reported to have been killed, and over 26,000 injured, including large numbers of civilians killed and injured by aerial explosive weapons. The damage and destruction of civilian objects, including homes, markets, hospitals, critical infrastructure and buildings of cultural significance, is reported to be extensive. A naval blockade of Yemeni ports imposed by the Coalition is contributing to severe food and fuel shortages in the country, which is said to be on the brink of famine.

### **Allegations of serious breaches of international law**

9. All sides to the conflict in Yemen are accused of serious breaches of international law by the United Nations and other international organisations and NGOs. These bodies have documented *prima facie* evidence that Saudi Arabia (the actions of which are the particular focus of this advice, in circumstances in which the UK is not known to have supplied arms to the Houthis or their allies) has committed serious violations of the laws of war and of fundamental human rights, including by engaging in wide-spread aerial bombardments of civilian areas, resulting in significant numbers of civilian casualties and extensive destruction of civilian property, including civilian homes, factories and medical facilities. The effects of the naval blockade also constitute serious violations of international law, not least for their reported impact on the Yemeni civilian population. Such violations may give rise to a dual responsibility under international law: of Saudi Arabia, under the rules of international responsibility of States, and of the individual offenders, under the rules of international criminal law.

### **Compliance by the UK with its obligations under the Arms Trade Treaty (ATT)**

10. On the basis of the evidence and information available to us, it appears that the UK Government has misdirected itself in fact and law in relation to its obligations arising under the ATT by: (i) placing undue reliance on Saudi assurances that they are

complying with international law, which assurances do not appear to be supported by independent evidence from reliable sources, including UN and EU bodies, international organisations and NGOs; and by (ii) having regard to questions of ‘intent’ or ‘state of mind’ which have limited application outside of the international criminal law context and are inappropriate to considerations of State responsibility for serious violations of international humanitarian law (IHL) and international human rights law (IHRL). The available evidence and information provides *prima facie* evidence that members of the Saudi armed forces have committed serious violations of IHL and IHRL, including (i) attacks directed against the civilian population and civilian objects, and (ii) acts capable of constituting the *actus reus* of war crimes, which constitute internationally wrongful acts for which Saudi Arabia bears responsibility.

11. In light of the above, and in the apparent absence of any credible or other investigations by Saudi Arabia into allegations of violations of IHL, it is reasonable to conclude that in such circumstances future transfers by the UK of weapons or items capable of being deployed against civilians or civilian objects would be used in a manner that is internationally unlawful. We conclude that the UK has – or should be recognised as having – knowledge that weapons or related items exported to Saudi Arabia would be used in future attacks directed against civilian objects or civilians protected as such, or in the commission of war crimes in Yemen. Consequently, we further conclude on the basis of the evidence available to us that, in these circumstances, the future authorisation of transfers of weapons or related items within the scope of the ATT, which would be deployed in a similar way, would constitute a breach by the UK of its obligations under Article 6(3).
12. In addition, (i) there is *prima facie* evidence of serious violations of IHL and IHRL having been – and still being – committed by the Saudi-led Coalition; (ii) there exists a risk that such violations *could* occur in the future or continue to occur; and (iii) there is no evidence to suggest that UK exported weapons or items *would* make such a contribution to peace and security so as to override that risk. In such circumstances, future transfer of weapons or related items within the scope of the ATT by the UK to Saudi Arabia, capable of being used in its military campaign in Yemen to commit or facilitate such a violation, including in particular in the enforcement of its blockade on Yemeni ports, would constitute a breach by the UK of its obligations under Article 7.
13. Further, previous authorisations by the UK of the transfer of such arms or items are likely to have constituted a breach by the UK of its obligations under Article 6(3) and Article 7 ATT, at the very least since May 2015. By that time, the designation of entire Yemeni cities as military targets and their subsequent subjection to aerial bombardment had occurred, and a clear pattern of behaviour of the type identified in Articles 6(3) and 7 had emerged.

### **Compliance by the UK with its obligations under the EU Common Position on Arms Exports**

14. For the reasons set out above, there is a clear risk that arms and related military technology or equipment, capable of being used in military attacks on Yemen or in the maintenance of the naval blockade of her ports, might be used in the commission of serious violations of IHL by Saudi Arabia. On that basis, we are of the view that future transfers to Saudi Arabia of such weapons or equipment, to which the EU Common Position pertains, would constitute a breach by the UK of Criterion 2 of the EU Common Position (concerned with the risk of weapons being used to violate IHL by the recipient State and/or IHRL in the territory of the recipient State). Further, transfers authorised since July 2015, when there was clear *prima facie* evidence of serious breaches by the Saudi-led Coalition of IHL would have constituted such a breach.
15. Given Saudi Arabia's generally poor record of compliance with its international obligations arising under customary and treaty-based IHL and IHRL, weapons exports to the State also appear to breach EU Criterion 6, concerned with the general respect by States for international law.

### **Compliance by the UK with its obligations under the OSCE Principles governing conventional arms transfers**

16. On the basis of the available evidence, any past (since May 2015) or future transfer by the UK to Saudi Arabia of conventional weapons, within the scope of the OSCE Principles, capable of being used by the Saudi Arabia in its military engagement in Yemen, including in support of its blockade of Yemeni ports, would constitute a breach of the UK's obligations under the OSCE Principles. That is because: they are "likely" to be used in the violation of human rights, including the right to food of the Yemeni civilian population (in breach of OSCE Criterion 1); their transfer would likely violate the UK's international commitments, including its commitments under the ATT and the EU Common Position (OSCE Criterion 3); and they are "likely" to be used other than for the legitimate self-defence of Saudi Arabia, in circumstances where Saudi Arabia is recognised to be acting in defence of the security needs of *Yemen* (OSCE Criterion 9). Transfers may also constitute a breach of OSCE Criterion 4, insofar as they are "likely" to prolong or aggravate the armed conflict in Yemen. The grant of export authorisations which infringe the OSCE Principles is unlawful under UK domestic law and policy, under Criterion 1 of the UK's Consolidated EU and National Arms Export Licencing Criteria.

### **Compliance by the UK Government with its obligations under UK domestic law and policy**

17. On the basis of the available evidence, any past (at least since May 2015) or future transfer by the UK to Saudi Arabia of weapons and related items, governed by the Export Control Act 2002, the Export Control Order 2008 and the Consolidated EU and National Arms Export Licencing Criteria ("Consolidated Criteria"), capable of being used by Saudi Arabia in its military engagement in Yemen, including in support of its

blockade of Yemeni ports, would constitute a breach by the Secretary of State for Business, Innovation and Skills of the Consolidated Criteria. In particular, they would constitute a breach of UK Criterion 1 (concerned with the UK's obligations under the ATT, the EU Common Position and the OSCE Principles) and UK Criterion 2 (concerned with the risk that the weapons to be exported might be used to commit violations of international law). In our view, there is also a strong argument that they would breach UK Criterion 6 (concerned with the general respect shown by the buyer country for international law).

### **Conclusions and recommendations**

18. For the reasons set out in this opinion, on the basis of the evidence available to us, any authorisation by the UK of the transfer to Saudi Arabia of weapons and related items within the scope of the Arms Trade Treaty, the EU Common Position and the UK Consolidated Criteria, in circumstances where such weapons are capable of being used in the conflict in Yemen, including to support its blockade of Yemeni territory, and in circumstances where their end-use is not restricted, would constitute a breach by the UK of its obligations under domestic, European and international law.
19. In the current circumstances we can be clear in concluding what the UK is required to do to bring itself into full compliance with its legal obligations: it should halt with immediate effect all authorisations and transfers of relevant weapons and items to Saudi Arabia, capable of being used in the conflict in Yemen, pending proper and credible enquiries into the allegations of violations of IHL and IHRL that have arisen and that could arise in the future, as addressed in this opinion and the sources here referred to.



# 1. FACTUAL BACKGROUND

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1.1. This section sets out the factual background to the advice, including (I) the nature and extent of **UK arms exports to Saudi Arabia**, (II) the background to **Saudi Arabia's military intervention in Yemen** and (III) the **impact of the conflict** in Yemen. Specific allegations of breaches of international law by the Saudi Arabian-led Coalition in Yemen are dealt with in greater detail in Section 3.

## (I) UK ARMS EXPORTS TO SAUDI ARABIA

1.2. The UK has been a major arms supplier to Saudi Arabia since the 1960s. Saudi Arabia is classified as a “priority market” by the UK Government,<sup>1</sup> with 42% of all UK arms exports between 2009 and 2013 destined for the State.<sup>2</sup> In recent years, export licences have been granted for a broad range of different weapons and munitions, including assault rifles, command and control vehicles, crowd control ammunition, hand grenades, machine guns, submachine guns and tear gas/irritant ammunition.<sup>3</sup> The UK Ministry of Defence (“MoD”) and a UK company, BAE Systems, also provide military and civilian personnel support to Saudi Arabia *inter alia* to maintain the operational capability of exported UK arms and equipment.<sup>4</sup>

1.3. The information available to us regarding specific arms transfers is limited. However, it is known that between January and June 2015, the UK issued licences for exports to Saudi Arabia, exceeding a value of £1.75 billion, including for combat aircraft and air-delivered bombs.<sup>5</sup> Between mid-March and the beginning of October 2015, 104 export

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<sup>1</sup> J. Doward, “Revealed: how UK targets Saudis for top contracts”, *The Guardian*, 18 October 2015, available at <http://www.theguardian.com/world/2015/oct/17/uk-courts-saudi-arabia-arms-sales>; all websites referred to in these footnotes were accessed in late November / early December 2015.

<sup>2</sup> SIPRI, S. T. Wezeman, and P.D. Wezeman, *Trends in International Arms Transfers*, March 2014, available at <http://books.sipri.org/files/FS/SIPRIFS1403.pdf>, p. 2.

<sup>3</sup> UK Parliament, House of Commons, Committees on Arms Exports Controls, *Scrutiny of Arms Exports and Arms Controls (2015)* Vol. II, 9 March 2015, available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608ii.pdf>, pp. 257-258.

<sup>4</sup> See BAE Systems website available at <http://www.baesystems.com/en/what-we-do/suppliers/saudi-arabia>; see also Campaign Against Arms Trade, “MODSAP and SANGCOM”, available at <http://www.caat.org.uk/resources/countries/saudi-arabia/modsap>, and UK Parliament, House of Commons, “Yemen: Armed Conflict: Written question – 7889”, 23 July 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-17/7889>. As at 21 July 2015, there were over 166 such personnel working with Saudi Arabia: UK Parliament, House of Commons, “Yemen: Military Aid: Written question – 6002”, 21 July 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-07/6002/>.

<sup>5</sup> Calculations provided by those instructing us, made on the basis of information contained in the following reports: Department for Business Innovation & Skills, *Strategic Export Controls: Country Pivot Report 1<sup>st</sup> January 2015 – 31<sup>st</sup> March 2015*, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/469112/15-603-strategic-export-controls-country-pivot-report-2015-qtr-1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469112/15-603-strategic-export-controls-country-pivot-report-2015-qtr-1.pdf); Department for Business Innovation & Skills, *Strategic Export Controls: Country Pivot Report 1<sup>st</sup> April 2015 – 30<sup>th</sup> June 2015*, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468919/15-583-strategic-export-controls-country-pivot-report-2015-qtr-2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468919/15-583-strategic-export-controls-country-pivot-report-2015-qtr-2.pdf). Department for Business, Innovation and Skills and Export Control Organisation, *Strategic export controls: licencing statistics, 1 January to 31 March 2015*, 21 July 2015, available at <https://www.gov.uk/government/statistics/strategic-export-controls-licencing-statistics-1-january-to-31-march-2015>

licences were reportedly granted for military goods,<sup>6</sup> including for combat aircraft and “Paveway IV” bombs, used by military jets.<sup>7</sup> Non-Governmental organisations (“NGOs”) estimate that over 1,000 bombs were exported by the UK to Saudi Arabia in the first half of 2015 alone.<sup>8</sup>

## (II) SAUDI ARABIA’S MILITARY INTERVENTION IN THE CONFLICT IN YEMEN

1.4. In March 2015, a complex and long-running political crisis in Yemen – a State bordering Saudi Arabia – escalated into an all-out military conflict.<sup>9</sup> The situation in Yemen had been steadily worsening over the previous six months, as armed groups from northern Yemen, known as the forces of Ansar Allah or “the Houthis”, took control of large swathes of Yemeni territory, including the capital city Sana’a.<sup>10</sup> On 25 March 2015, the Yemeni President, Mr Abdu Rabu Mansour Hadi (“President Hadi”), fled to Saudi Arabia, establishing a government in exile.

1.5. On fleeing Yemen, President Hadi requested the assistance of Saudi Arabia and other States in repelling the Houthi forces.<sup>11</sup> In so doing, he reportedly invoked *inter alia* Article 51 of the Charter of the United Nations (“UN”), which provides for the right of countries to engage in self-defence, including collective self-defence, against an armed attack.<sup>12</sup> The stated text of that request was communicated to the UN Security Council in a joint letter on behalf of Saudi Arabia and other Gulf States.<sup>13</sup> It provided as follows:

“I urge you, in accordance with the right of self-defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide immediate support in every

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<sup>6</sup> 37 export licences were granted between March and June 2015 and 67 thereafter: see, UK Parliament, House of Commons, “Arms Trade: Saudi Arabia: written question-3711”, 1 July 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-06-23/3711> and UK Parliament, House of Commons, “Arms Trade: Saudi Arabia: Written question – 11231”, 19 October 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-09/11231>

<sup>7</sup> Ian Black, “Britain urged to stop providing weapons to Saudi Arabia,” *The Guardian*, October 6, 2015, <http://www.theguardian.com/world/2015/oct/07/britain-urged-stop-providing-weapons-saudi-arabia>.

<sup>8</sup> Calculations provided by those organisations instructing us.

<sup>9</sup> For further background to the conflict, see International Crisis Group, *The Houthis: from Saada to Sanaa, Middle East Report 154*, 10 June 2014, available at [http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/Iran%20Gulf/Yemen/154-the-houthis-from-saada-to-sanaa.pdf](http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iran%20Gulf/Yemen/154-the-houthis-from-saada-to-sanaa.pdf); and International Crisis Group, *Yemen at War*, 27 March 2015, available at <http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/Iran%20Gulf/Yemen/b045-yemen-at-war.pdf>.

<sup>10</sup> “Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council”, available at [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_217.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_217.pdf) (S/2015/217); see also Human Rights Watch, *Targeting Saada*, 30 June 2015, available at <https://www.hrw.org/report/2015/06/30/targeting-saada/unlawful-coalition-airstrikes-saada-city-yemen>, p. 11.

<sup>11</sup> “Statement by Saudi Ambassador Al-Jubeir on Military Operations in Yemen”, Royal Embassy of Saudi Arabia, Washington DC, Press release, 25 March 2015, available at: <https://www.saudiembassy.net/press-releases/press03251501.aspx>.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant.”<sup>14</sup>

- 1.6. On 26 March 2015, a coalition of nine States – Bahrain, Egypt, Jordan, Kuwait, Morocco, Qatar, Sudan and the United Arab Emirates, led by Saudi Arabia (“the Coalition” or “the Saudi-led Coalition”) – began military operations in Yemen.<sup>15</sup> The Coalition has engaged in intensive aerial attacks in Yemeni territory and has imposed a naval blockade (in varying degrees over the course of the conflict) on the main Yemeni ports.<sup>16</sup> Hostilities have further escalated in recent months; with the involvement of Coalition ground forces.<sup>17</sup> The Houthis have also been responsible for attacks on Saudi Arabian territory.<sup>18</sup>
- 1.7. The conflict in Yemen is complex. It pits the Saudi-led Coalition, units of the Yemeni Army loyal to President Hadi, Southern separatists, tribal factions and others on the one side, against the Houthis, and other Northern Yemeni armed groups and units of the Yemeni Army loyal to former Yemeni president, Ali Abdullah Saleh (“former President Saleh”), who lost power following the 2011 “Arab Spring” revolution in Yemen, on the other side.<sup>19</sup> In addition, a number of Jihadi groups, including the Islamic State of Iraq and the Levant (“ISIL”) and Al Qaeda in the Arab Peninsula (“AQAP”), are reportedly using the conflict to increase their own influence and operations, with multiple attacks in the country.<sup>20</sup> The United States is providing direct assistance to the Coalition.<sup>21</sup>

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<sup>14</sup> See Letters at fn. 10, pp. 4-5.

<sup>15</sup> M. Mazzeti and D. D. Kirkpatrick, “Saudi Arabia leads air assault in Yemen”, *New York Times* 25 March 2015, available at <http://www.nytimes.com/2015/03/26/world/middleeast/al-anad-air-base-houthis-yemen.html>.

<sup>16</sup> “In Yemen, Anti-Houthi Operations Confront Forceful Opposition”, *Stratfor Global Intelligence*, 25 August 2015, available at: <https://www.stratfor.com/analysis/yemen-anti-houthi-operations-confront-forceful-opposition>.

<sup>17</sup> See, e.g., “Egypt Sends up to 800 Ground troops to Yemen’s War”, *Reuters*, 9 September 2015, available at: <http://uk.reuters.com/article/uk-yemen-security-idUKKCN0R911720150909>.

<sup>18</sup> See e.g., “Yemen’s Houthis attack Saudi border towns”, *Al Arabiya News*, 4 July 2015, available at <http://english.alarabiya.net/en/News/middle-east/2015/07/04/Yemen-s-Houthis-attack-Saudi-border-towns.html>; and I. Black, “Saudis strike in response to Houthi Scud attack as forgotten war rages on”, *The Guardian*, 15 October 2015, available at: <http://www.theguardian.com/world/2015/oct/15/saudi-arabia-strike-response-houthi-scud-attack-forgotten-war>.

<sup>19</sup> See e.g., “Yemen crisis: Who is fighting whom?”, *BBC News*, 26 March 2015, available at: <http://www.bbc.com/news/world-middle-east-29319423>; Human Rights Watch report *Targeting Saada* at fn. 10; and “Yemen’s Houthi rebels get boost from country’s ousted dictator,” *Washington Post*, 31 March 2015, [http://www.washingtonpost.com/world/rebels-push-offensive-in-aden-killing-dozens-with-artilleryfire/2015/03/31/79f53d9e-d729-11e4-bf0b-f648b95a6488\\_story.html](http://www.washingtonpost.com/world/rebels-push-offensive-in-aden-killing-dozens-with-artilleryfire/2015/03/31/79f53d9e-d729-11e4-bf0b-f648b95a6488_story.html).

<sup>20</sup> See, e.g., M. Ghabrial, “Yemen conflict: How al-Qaeda is thriving in the nation’s civil war”, *The Independent*, 12 October 2015, available at: <http://www.independent.co.uk/news/world/middle-east/yemen-conflict-how-al-qaeda-is-thriving-in-the-nation-s-civil-war-a6691471.html>; “Al-Qaeda seizes key Yemeni towns from pro-Hadi forces”, *Al Jazeera*, 3 December 2015, available at: <http://www.aljazeera.com/news/2015/12/al-qaeda-seizes-key-yemeni-towns-pro-hadi-forces-151202130518746.html>; “Yemen conflict: Governor of Aden killed in Islamic State attack”, *BBC News*, 6 December 2015, available at: <http://www.bbc.com/news/world-middle-east-35019302>; and S. Aboudi, “In Yemen chaos, Islamic State grows to rival al Qaeda”, *Reuters*, 30 June 2015, available at: <http://www.reuters.com/article/us-yemen-security-islamicstate-insight-idUSKCN0PA1T920150630>.

<sup>21</sup> See, e.g., M. Abi-Habib and A. Entous, “U.S. Widens Role in Saudi-led Campaign Against Houthi Rebels in Yemen”, *The Wall Street Journal*, 12 April 2015, available at: <http://www.wsj.com/articles/u-s-widens-role-in-saudi-led-campaign-against-yemen-rebels-1428882967>.

- 1.8. The British Government has issued a statement in support of the Saudi-led Coalition.<sup>22</sup> It has asserted that the UK is “*not participating directly in Saudi Arabian led military operations in Yemen*”, yet it has also confirmed that the UK is “*providing technical support, precision-guided weapons and exchanging information with the Saudi Arabian armed forces through pre-existing arrangements*”.<sup>23</sup> That support includes the provision of “*liaison personnel in the Saudi coalition Headquarters*”.<sup>24</sup>
- 1.9. The UK Government has further confirmed that “*the Royal Saudi Air Force is flying British-built aircraft in the campaign over Yemen*”,<sup>25</sup> and that UK-supplied weapons have been deployed and used by Saudi Arabia in the course of the conflict.<sup>26</sup> Recent reports appear to confirm that a British-supplied weapon was used in the bombing of a civilian factory in Yemen, resulting in the death of a civilian.<sup>27</sup> The evidence suggests that UK-supplied weapons and related items are also being deployed by the Saudi-led Coalition to enforce its naval blockade of Yemeni ports.<sup>28</sup>

### (III) IMPACT OF THE CONFLICT IN YEMEN

- 1.10. Yemen is one of the poorest countries in the Arab world.<sup>29</sup> The humanitarian situation in the State was already difficult prior to March 2015, with over half of the Yemeni population of 26.7 million people living on less than \$2 USD a day, without access to clean water.<sup>30</sup> Since then, the impact of the conflict on Yemen’s already impoverished

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<sup>22</sup> UK FCO, Corporate Report, *Yemen-in-year update 2015*, 15 July 2015, available at <https://www.gov.uk/government/publications/yemen-in-year-update-july-2015/yemen-in-year-update-july-2015>.

<sup>23</sup> Parliamentary question 7889 at fn. 4 *supra*.

<sup>24</sup> Parliamentary question 6002 at fn. 4 *supra*.

<sup>25</sup> UK Parliament, House of Commons, “Saudi Arabia: Arms Trade: Written question - 11948”, 19 October 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-14/11948>.

<sup>26</sup> See e.g., the acknowledgment by the UK Foreign Secretary, Mr Philip Hammond MP that “*Those weapons are being used in Yemen*”, made during the course of a *BBC Newsnight* interview, as subsequently reported in J. Stone, “Philip Hammond says he wants UK to sell even more weapons to Saudi Arabia”, *The Independent*, 11 November 2015, available at: <http://www.independent.co.uk/news/uk/politics/philip-hammond-says-he-wants-to-sell-even-more-weapons-to-saudi-arabia-a6730066.html>. See also the acknowledgement by Tobias Ellwood MP, Parliamentary Under Secretary of State at the FCO with special responsibility for the Middle East and North Africa, that British-manufactured arms “*probably have been used*” by the Saudi-led Coalition, as made during the course of Parliamentary debates on 22 October 2015, as recorded in the House of Commons *Daily Hansard Daily* 22 Oct 2015, Column 444WH, available at: <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151022/halltext/151022h0001.htm>.

<sup>27</sup> Amnesty International UK, “UK-made missile used in airstrike on ceramics factory in Yemen”, 25 November 2015, available at: <https://www.amnesty.org.uk/press-releases/uk-made-missile-used-airstrike-ceramics-factory-yemen>. Peter Walker and Richard Norton-Taylor, “UK-made missile hit civilian target in Yemen, say human rights groups”, *The Guardian*, 25 November 2015, available at <http://www.theguardian.com/world/2015/nov/25/uk-made-missile-hit-civilian-target-yemen-say-human-rights-groups>.

<sup>28</sup> J. Borger, “Saudi-led naval blockade leaves 20m Yemenis facing humanitarian disaster”, *The Guardian*, 5 June 2015, available at: <http://www.theguardian.com/world/2015/jun/05/saudi-led-naval-blockade-worsens-yemen-humanitarian-disaster>.

<sup>29</sup> UN Development Programme (“UNDP”), “About Yemen”, available at: <http://www.ye.undp.org/content/yemen/en/home/countryinfo.html>.

<sup>30</sup> M. J. Altman, “9 Things To Know About Hunger And Poverty In Yemen”, *World Food Programme USA News*, 27 January 2015, available at <http://wfpusa.org/blog/9-facts-about-hunger-yemen>.

population (approximately half of whom are under 18 years old) has been significant. It is estimated that more than 5,600 people have been killed to date since March 2015, including hundreds of women and children.<sup>31</sup> Over 26,000 people have also been injured.<sup>32</sup> Civilians account for approximately 95% of people killed or injured by explosive weapons in populated areas.<sup>33</sup> Sana'a city, the north-eastern Houthis-controlled Saada governate, and the cities of Taiz and Aden have witnessed particularly high levels of civilian casualties and destruction.<sup>34</sup> 60% of civilian deaths and injuries are said to have been caused by air-launched explosive weapons.<sup>35</sup> Such weapons are also reportedly responsible for widespread damage and destruction to civilian homes, hospitals, markets, schools, heritage sites and civilian infrastructure, including bridges, markets, food stores, food trucks and water bottling plants.<sup>36</sup>

1.11. The situation in Yemen is now one of the worst humanitarian crises in the world.<sup>37</sup> At least 2.3 million Yemenis have been internally displaced,<sup>38</sup> with more fleeing across State borders.<sup>39</sup> Almost 80% of the population in need of humanitarian assistance, including water, protection, food and health care.<sup>40</sup> The UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator has reported to the UN Security Council that the *“scale of human suffering is almost incomprehensible”*.<sup>41</sup>

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<sup>31</sup> See, e.g., World Health Organisation (“WHO”), *Yemen Crisis: Health Facility-Based Reported Deaths and Injuries, 19 March – 16 October 2015*, available at <http://www.emro.who.int/images/stories/yemen/YEM-casualties-october2015.pdf?ua=1>; and Save the Children, *Nowhere Safe for Yemen's Children – the Deadly Impact of Explosive Weapons in Yemen*, 2015, available at: [http://www.savethechildren.org.uk/sites/default/files/images/Nowhere\\_Safe\\_for\\_Yemens\\_Children.pdf](http://www.savethechildren.org.uk/sites/default/files/images/Nowhere_Safe_for_Yemens_Children.pdf).

<sup>32</sup> *Ibid.*

<sup>33</sup> UN Office for the Coordination of Humanitarian Affairs (“OCHA”) and UK-based charity Action on Armed Violence (“AOAV”), *State of Crisis: Explosive Weapons in Yemen*, 22 September 2015, available at <https://aoav.org.uk/wp-content/uploads/2015/09/State-of-Crisis.pdf>.

<sup>34</sup> “Yemen: UN warns of ‘untenable’ humanitarian situation and steep increase in civilian casualties”, *UN News Centre*, 1 September 2015, available at <http://www.un.org/apps/news/story.asp?NewsID=51762#.Vm8jvkqyOko>; “Heavy fighting breaks out in Yemen's Taiz city, ICRC says situation 'dire'”, *Reuters*, 22 October 2015, available at <http://www.reuters.com/article/us-yemen-security-idUSKCN0SG1IS20151022>; “Coalition forces set for sweeping attacks on Taiz”, *Emirates News 24/7*, 28 November 2015, available at <http://www.emirates247.com/news/region/coalition-forces-set-for-sweeping-attacks-on-taiz-2015-11-28-1.612106>; “Saudi-led air strikes hit Yemen after truce expires”, *Reuters*, 18 May 2015, available at <http://www.reuters.com/article/us-yemen-security-idUSKBN0030II20150518>.

<sup>35</sup> See *State of Crisis* report at fn. 33.

<sup>36</sup> See e.g., Amnesty International, *Nowhere Safe for Civilians: Airstrikes and Ground Attacks in Yemen*, 17 August 2015, available at [http://www.amnestyusa.org/sites/default/files/nowhere\\_safe\\_for\\_civilians\\_yemen\\_briefing\\_formatted.pdf](http://www.amnestyusa.org/sites/default/files/nowhere_safe_for_civilians_yemen_briefing_formatted.pdf); and UN Office of the High Commissioner for Human Rights (“OHCHR”), “Yemen spiraling into major food crisis – UN expert warns against deliberate starvation of civilians”, 11 August 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16307&LangID=E>.

<sup>37</sup> UK Parliament, House of Commons, “Yemen: Humanitarian Aid: Written question - 11278”, 15 October 2015, available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-12/11278/>

<sup>38</sup> Relief Web, 2016 Humanitarian Needs Overview, “Yemen”, November 2015, available at [http://reliefweb.int/sites/reliefweb.int/files/resources/2016\\_HNO\\_English\\_%20FINAL.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/2016_HNO_English_%20FINAL.pdf).

<sup>39</sup> *Ibid.*

<sup>40</sup> UN Human Rights Council (“UNHRC”), Thirtieth Session, Report of the UN High Commissioner for Human Rights, *Situation of human rights in Yemen*, 7 September 2015, UN Doc. A/HRC/30/31 available at [http://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_30\\_31\\_AEV.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_30_31_AEV.pdf).

<sup>41</sup> United Nations Security Council, 7507<sup>th</sup> Meeting, “Agenda: The Situation in the Middle East”, 19 August 2015, UN Doc. S/PV.7507, available at: [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_pv\\_7507.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7507.pdf).

1.12. The situation is reportedly being seriously aggravated by the Coalition-imposed naval blockade,<sup>42</sup> which has limited the entry of food and fuel into a country which imports almost 90% of its food<sup>43</sup> and all of its fuel,<sup>44</sup> and has hampered their distribution throughout the country.<sup>45</sup> Steep price increases of nearly 50% for food and fuel, resulting from the restrictions, are reportedly having “*a devastating impact on food security*”.<sup>46</sup> International organisations have warned that the country is currently but one step away from famine.<sup>47</sup> Over 1.8 million children are said to be at risk of malnutrition.<sup>48</sup> In Yemen’s fourth largest city, Al Hudaydah, alone, UNICEF have warned that nearly 10,000 severely malnourished children are at risk of dying.<sup>49</sup> Fuel shortages caused by the blockade have also affected the functioning of essential infrastructure such as hospitals.<sup>50</sup>

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<sup>42</sup> See UNHRC report, at fn. 40, §§ 16 and 17.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, §§ 17 & 18.

<sup>45</sup> *Ibid.*

<sup>46</sup> UN OHCHR, “Yemen spiraling into major food crisis – UN expert warns against deliberate starvation of civilians”, 11 August 2015, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16307&LangID=E>.

<sup>47</sup> “WFP Warns of Food Crisis in Yemen Amid Challenges in Reaching People and Shortage Of Funding”, *World Food Programme News*, 19 August 2015, available at <http://www.wfp.org/news/news-release/wfp-head-warns-growing-food-crisis-yemen-amid-challenges-reaching-people-and-short>.

<sup>48</sup> UN OCHA, “Humanitarian Bulletin Yemen”, 15 October 2015, available at

[https://www.humanitarianresponse.info/en/system/files/documents/files/yemen\\_humanitarian\\_bulletin-15\\_october\\_2015\\_1.pdf](https://www.humanitarianresponse.info/en/system/files/documents/files/yemen_humanitarian_bulletin-15_october_2015_1.pdf).

<sup>49</sup> *Ibid.*

<sup>50</sup> See Borger at fn. 28.

## 2. THE LAW APPLICABLE TO THE CONFLICT IN YEMEN

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2.1. This section considers the international legal framework governing the conflict in Yemen. It addresses (I) the **law governing the resort by Saudi Arabia to military force**, (II) the **international law classification of the conflict**, (III) the **international humanitarian law** (“IHL”) rules applicable to the conflict, (IV) **relevant rules of international human rights law** (“IHRL”) and (V) **relevant rules of international criminal law**. This international legal framework is fundamental to any assessment of the lawfulness of the UK’s export of arms to Saudi Arabia.

### (I) THE LAWFULNESS OF THE SAUDI-LED MILITARY INTERVENTION

2.2. The “*use of force against the territorial integrity or political independence of any state*” is prohibited by the UN Charter, which forbids a State from undertaking military operations in the territory of another State without its consent (Article 2(4)). The unlawful use of force can also give rise to the crime of aggression.

2.3. In relation to Yemen, the Saudi-led Coalition is said to be acting at the invitation and request of President Hadi, following his departure from Yemen by Houthi forces.<sup>51</sup> His authority to offer such an invitation and make such a request has been challenged *inter alia* by Iran (on the grounds that he has lost effective control of Yemeni territory) and the Houthis (who argue that the Saudi-led operations constitute an armed attack on the State).<sup>52</sup> However, President Hadi continues at present to be internationally recognised as the legitimate Yemeni Head of State, notwithstanding his apparent loss of territorial control. The UN Security Council, in particular, has “*reaffirm[ed] its support for the legitimacy of the President of Yemen*”.<sup>53</sup> It is unclear whether the Houthi forces themselves can properly be said to have met the requirements for legitimate effective government, in any event, in order to be able to protest the use of force. In such circumstances, President Hadi’s consent to the military operations suggests that such operations are unlikely to be deemed to constitute a breach of Article 2(4) of the UN Charter, or aggression, as a matter of *jus ad bellum* (the laws governing the resort to force).

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<sup>51</sup> “Statement by Saudi Ambassador Al-Jubeir on Military Operations in Yemen”, Royal Embassy of Saudi Arabia, Washington DC, Press release, 25 March 2015, available at: <https://www.saudiembassy.net/press-releases/press03251501.aspx>.

<sup>52</sup> See e.g., V. Sridharan, “Yemen crisis: Rebel leader Abdulmalik al-Houthi promises to create ‘graveyard’ of Sunni invaders”, *International Business Times*, 27 March 2015, available at: <http://www.ibtimes.co.uk/yemen-crisis-rebel-leader-abdulmalik-al-houthi-warns-saudi-led-forces-against-ground-invasion-1493778>; and J. Onyanga-Omara, “Yemen’s president arrives in Saudi Arabia”, *USA Today*, 26 March 2015, available at: <http://www.usatoday.com/story/news/world/2015/03/26/iran-yemen-airstrikes/70475038/>.

<sup>53</sup> UNSC Resolution 2216 (2015), 14 April 2015, UN Doc. S/RES/2216(2015), available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2216\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2216(2015)).

2.4. Our analysis in this opinion will therefore focus on the manner in which military operations are being conducted as a matter of *jus in bello* (the laws governing the conduct of hostilities).

## (II) THE NATURE OF THE CONFLICT IN YEMEN

2.5. International law generally recognises two different situations of armed conflict: international armed conflicts (“IACs”), between at least two State actors, and non-international armed conflicts (“NIACs”), between a State and one or more non-State actors or between two or more non-State actors. The distinction is relevant, as different rules of international law apply depending on whether an armed conflict is an IAC or a NIAC.

2.6. In our view it is clear that the conflict in Yemen meets – at the very least – the criteria for classification as a NIAC. That is because, on the evidence available to us: (i) the Houthis and their allies clearly have a sufficient level of organisation to be capable of sustaining military operations and of adhering to international humanitarian law; and (ii) there is a sufficient degree of intensity in hostilities between the Houthis and their allies and the forces loyal to President Hadi, and their allies, as measured *inter alia* by the weapons employed and the duration of the conflict.<sup>54</sup>

2.7. The question of whether the conflict should instead properly be classed as an IAC, *i.e.* a conflict resulting from a “*difference arising between two States*”<sup>55</sup> is less clear. Whether there is an existing IAC between Yemen and Saudi Arabia and its allies is largely dependent on: (i) the continuing legitimacy of President Hadi’s presidency – notwithstanding his apparent lack of territorial control in Yemen; (ii) the consequent legitimacy of his consent to Saudi Arabia’s intervention in the conflict by Saudi Arabia and the other States involved in its Coalition; and (iii) the extent to which the Houthis can now be said to exercise sufficient territorial and other control in Yemen, so as to constitute a functioning government. These are dynamic rather than static assessments, subject to development and change over time. We note that the UK Foreign Secretary, Philip Hammond, has stated publicly that the conflict in Yemen is “*an international armed conflict*”.<sup>56</sup>

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<sup>54</sup> R. Pinto, *Report of the Commission of Experts for the Study of the Question of Aid to the Victims of Internal Conflicts*, International Review of the Red Cross, February 1963, particularly pp. 82– 83, as quoted in Sylvain Vite, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, *International Review of the Red Cross*, Vol. 91 No. 873, March 2009.

<sup>55</sup> See J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, International Committee of the Red Cross (“ICRC”), Geneva, 1952, p. 32, regarding Common Article 2 of the Four Geneva Conventions.

<sup>56</sup> See *e.g.*, B. Quinn and D. Smith, “Calls for investigation into Saudi Arabia’s actions in Yemen”, *The Guardian*, 11 November 2015, available at: <http://www.theguardian.com/world/2015/nov/11/calls-for-investigation-into-saudi-arabias-actions-in-yemen>; and J. Stone, “Philip Hammond says he wants UK to sell even more weapons to Saudi Arabia”, *The Independent*, 11 November 2015, available at: <http://www.independent.co.uk/news/uk/politics/philip-hammond-says-he-wants-to-sell-even-more-weapons-to-saudi-arabia-a6730066.html>.



- 2.8. For reasons set out below, the classification of the conflict is significant, as it informs the authorisation process for weapons transfers from the UK to Saudi Arabia: insofar as the UK deems the conflict to be an IAC, it is required to consider its arms exports to Saudi Arabia against the IHL regime applicable in IACs, which is somewhat more detailed than that applicable in NIACs (see further paragraphs 2.17-2.22 and 2.33 below).
- 2.9. There is no basis, however, in our view, for any finding that there is presently an IAC between Yemen (or Saudi Arabia) and Iran, on the basis of the latter State's alleged financial and military assistance to the (Shia) Houthis.<sup>57</sup> That is because there is insufficient evidence available to us to suggest that Iran has "overall control" of the Houthis, a test which requires not just that: (i) it be involved in financing, training, equipping, or providing operational support to the Houthis; but also that (ii) it has a role in organising, coordinating or planning Houthi military actions.<sup>58</sup>

### **(III) INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO THE CONFLICT**

- 2.10. The existence of an armed conflict triggers the application of IHL, a body of law which imposes obligations and limits on how parties may conduct hostilities, and which protects all persons affected by the conflict. In a NIAC, these obligations arise by operation of (a) Common Article 3 to the Four Geneva Conventions, (b) Additional Protocol II to the 1949 Geneva Conventions ("APII"), to which both Saudi Arabia and Yemen are parties, and (c) customary international law. In an IAC, (d) the regime of the Four Geneva Conventions and of Additional Protocol I to the 1949 Geneva Conventions, broadly accepted to reflect customary international law, applies instead of Common Article 3 and APII. Special rules also apply in armed conflicts to (e) certain civilian persons and objects, including hospitals and humanitarian objects, and (f) situations of military blockade.
- 2.11. Pursuant to customary international law, as largely codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 ("ILC Articles"), a State is responsible for violations of the rules of IHL committed *inter alia* by its armed forces and/or by persons or groups acting on its instructions or under its direction or control.<sup>59</sup> Such violations may also give rise to individual criminal responsibility on the part of those involved, when perpetrated with the requisite intent.

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<sup>57</sup> See e.g. Karen DeYoung, "Officials: Saudi-led action relied on U.S. intelligence", *The Washington Post*, 26 March 2015, available at [https://www.washingtonpost.com/world/national-security/officials-saudi-led-action-in-yemen-relied-heavily-on-us-intelligence/2015/03/26/6d15302c-d3da-11e4-8fce-3941fc548f1c\\_story.html](https://www.washingtonpost.com/world/national-security/officials-saudi-led-action-in-yemen-relied-heavily-on-us-intelligence/2015/03/26/6d15302c-d3da-11e4-8fce-3941fc548f1c_story.html)

<sup>58</sup> ICTY, Appeals Chamber, *Prosecutor v Tadić*, Case No. IT-94-1-A, Appeals Judgment, 15 July 1999, § 137.

<sup>59</sup> ILC, *Text of the Draft Articles with Commentaries Thereto: Responsibility of States for Internationally Wrongful Acts* (2001) GAOR 56th Session Supp 10, Arts. 1-3, available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

### **(a) Common Article 3 to the 1949 Geneva Conventions**

2.12. Insofar as the conflict in Yemen is deemed to constitute a NIAC, the prohibitions of Common Article 3 to the 1949 Geneva Conventions, to which Saudi Arabia and Yemen are both parties (and which is widely recognised to constitute customary international law), would apply. Common Article 3 prohibits “*at any time and in any place whatsoever... violence to life and person*” of persons “*taking no active part in the hostilities*”. “Violence to life and person” includes, but is not limited to, murder, torture or other cruel, humiliating or degrading treatment.

2.13. Breaches of Common Article 3 constitute serious violations of IHL.<sup>60</sup> They are prohibitions binding on States, but their violation may also give rise to individual criminal responsibility, when committed with the requisite intent.<sup>61</sup>

### **(b) Additional Protocol II of 1977 to the 1949 Geneva Conventions**

2.14. Additional Protocol II 1977 to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (“APII”),<sup>62</sup> to which both Yemen and Saudi Arabia are parties, would also apply to the conflict in Yemen, insofar as it is deemed to constitute a NIAC rather than an IAC. That is because (i) the conflict is taking place on the territory of a State Party; (ii) the conflict is between the Houthis, an “organised armed group” operating under responsible command and armed forces loyal to the Government of Yemen, which the Saudi-led Coalition has joined;<sup>63</sup> and (iii) the Houthis control large swathes of territory, including the capital (Sana’a) and most of Yemen’s other major cities,<sup>64</sup> enabling them to carry out sustained and concerted military operations.<sup>65</sup>

2.15. The key relevant applicable provisions of APII are:

- the prohibition of violence to life, health and physical or mental well-being and collective punishment (Article 4);

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<sup>60</sup> See *e.g.* *Prosecutor v. Blaškić*, Judgment Case No. IT-95-14-T ICTY Trial Chamber 3 March 2000, § 176.

<sup>61</sup> See *e.g.*, *Prosecutor v Tadić*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, §§ 128-129; *Prosecutor v. Mucić et al.*, (Appeals Chamber), February 20, 2001, §§ 162 and 171; and *Prosecutor v. Naletilić and Martinović*, (Trial Chamber), March 31, 2003, § 228;

<sup>62</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, available at: <https://www.icrc.org/ihl/INTRO/475?OpenDocument>.

<sup>63</sup> We take the view that Saudi is a party to the existing NIAC between the Government of Yemen and the Houthis, rather than that Saudi Arabia is engaged in a separate, distinct NIAC with the Houthis and their allied forces.

<sup>64</sup> See *e.g.* Katherine Zimmerman, “Al Houthi Areas of Influence”, *Critical Threats*, 16 July 2015, available at <http://www.criticalthreats.org/yemen/al-houthi-areas-influence>; “Yemen crisis: Who is fighting whom?”, *BBC News*, 26 March 2015, available at <http://www.bbc.co.uk/news/world-middle-east-29319423>.

<sup>65</sup> See *e.g.* M. Gray, “Saudi-led coalition strikes back after deadly Houthi attack”, *CNN*, 6 September 2015, available at <http://edition.cnn.com/2015/09/05/middleeast/yemen-weapons-depot-attack>; and Rory Jones and Ahmed Al Oran, “Houthi Rebels Kill 60 Coalition Soldiers in Yemen”, *The Wall Street Journal*, 5 September 2015, available at <http://www.wsj.com/articles/houthi-rebels-were-behind-attack-that-killed-45-u-a-e-soldiers-in-yemen-1441446816>.

- the prohibition of attacks on medical units and transport (Article 11);
- the prohibition of attacks on the civilian population or individual civilians not taking part in hostilities (Article 13);
- the prohibition of attacks on or the destruction of objects indispensable to the survival of the civilian population, including food-stuffs, drinking water installations and supplies (Article 14);
- the prohibition of acts of hostility directed against historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of people (Article 16); and
- the prohibition of forced movement of civilians, unless demanded by imperative military reasons or the security of the civilians, and where such displacements must be carried out, “*all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition*” (Article 17).

2.16. Violations of APII give rise to State responsibility, when committed *inter alia* by a State’s armed forces and/or by persons or groups acting on its instructions or under its direction or control,<sup>66</sup> even when committed contrary to orders or instructions.<sup>67</sup> Notably, there is no “intent” requirement in relation to the prohibitions under APII,<sup>68</sup> meaning that State responsibility is to be assessed “objectively” rather than “subjectively”: the intent or advertence of relevant State organs or agents is not relevant to an assessment of whether a violation of APII has occurred. However, violations of APII may also, in parallel, give rise to individual criminal responsibility, when perpetrated with the requisite intent (“*mens rea*”) on the part of an individual and fulfilling the elements of the relevant war crime.

### (c) Customary IHL

2.17. Customary international law, the body of international law obligations arising from established State practice, rather than from treaty obligations, is binding on all parties to a conflict in NIACs and IACs. Relevant violations include:

- **attacks directed against the civilian population and/or civilian objects**, including buildings directed to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (*i.e.*, objects which by their nature, location, purpose or use make an effective contribution to military

<sup>66</sup> UN International Law Commission, *Text of the Draft Articles with Commentaries Thereto: Responsibility of States for Internationally Wrongful Acts* (“ILC Articles”) (2001) GAOR 56th Session Supp 10, 59, available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), commentary to Art. 7, § 4.

<sup>67</sup> *Ibid*, commentary to Art. 7, § 4.

<sup>68</sup> In this, APII differs, for example, from the Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2, which states that “[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such...” (emphasis added).

action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage);<sup>69</sup>

- **indiscriminate attacks** that fail to distinguish between military forces and objectives and civilians and civilian objects, that employ a method or means of combat which cannot be directed at a specific military objective or that have effects which cannot be limited, as required by IHL;<sup>70</sup> area bombardment, involving attacks by any method or means which treat 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 civilians or civilian objects are prohibited as a form of indiscriminate attack;<sup>71</sup>
- **disproportionate attacks** launched in the knowledge that they will cause incidental harm to civilians or civilian objects that is excessive in relation to the anticipated concrete and direct military advantage;<sup>72</sup> and
- **attacks launched without feasible precautions** having been taken to avoid and/or minimise incidental loss of civilian life, injury to civilians and/or damage civilian objects;<sup>73</sup> this requires parties to do everything feasible to verify that targets are military objectives, to take all feasible precautions in the choice of means and methods of warfare to avoid or minimise such loss, injury or damage, and to do everything feasible to assess whether the attack may be expected to cause such loss, injury or damage, which would be excessive in relation to the concrete and direct military advantage anticipated; it also requires parties to do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause harm to civilians and/or civilian property excessive to the concrete and direct military advantage anticipated, and to give effective advance warning of attacks which may affect the civilian population, unless the circumstances do not permit.<sup>74</sup>

2.18. In circumstances where the above violations entail serious consequences for individual civilians or for the civilian population more generally, they constitute “serious violations” of IHL, engaging the international responsibility of States and non-State actors that are parties to the armed conflict. State responsibility is engaged if acts or omissions attributable to the State constitute a breach of one or more of its international obligations.<sup>75</sup> Importantly, as the ILC Articles make clear, there is no

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<sup>69</sup> See J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law – Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005, as catalogued on the website of the ICRC at <https://www.icrc.org/customary-ihl/eng/docs/v1>, at Rules 1 and 7.

<sup>70</sup> *Ibid*, Rules 11-12.

<sup>71</sup> *Ibid*, Rule 13.

<sup>72</sup> *Ibid*, Rule 14.

<sup>73</sup> *Ibid*, Rules 16-19.

<sup>74</sup> *Ibid*, Rules 16-19.

<sup>75</sup> ILC Articles, Art. 2

separate requirement of fault or wrongful “intent” under customary international law in order for a violation of the above prohibitions be said to have been committed.<sup>76</sup>

**(d) The regime of the Four Geneva Conventions and of Additional Protocol I of 1977**

2.19. Insofar as the conflict in Yemen is considered to constitute an IAC, the applicable treaty law would be the Four Geneva Conventions of 1949 and Additional Protocol I of 1977 to the Four Geneva Conventions (“Additional Protocol I” or “API”), rather than Common Article 3 and APII. Both Saudi Arabia and Yemen – and the UK<sup>77</sup> – are parties to the Four Geneva Conventions and to API, which would apply to the conflict, insofar as it constitutes an IAC.

2.20. A key relevant applicable provision of the First Geneva Convention of 1949, for the Amelioration of the Condition of the Wounded in Armies in the Field (“GCI”) is Article 19, which prohibits attacks on “*fixed establishments and mobile medical units of the Medical Service*”, and requires their respect and protection by all parties to the conflict (see further paragraph 2.23 below).

2.21. Key relevant applicable provisions of API are:

- the prohibition on making medical units the object of attack (Article 12);
- the requirement to respect and protect medical units and medical personnel (Articles 12 and 15);
- the prohibition on making the civilian population or individual civilians the object of attack (Article 51(1));
- the prohibition on indiscriminate attacks (Article 51), including
  - those which are not directed at a specific military objective, which employ a method or means of combat which cannot be directed at specific military objective, or which employ a method or means of combat the effects of which cannot be limited, and are therefore of a nature to strike military objectives and civilians or civilian objectives without distinction (Article 51(4)); and
  - attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military

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<sup>76</sup> For a discussion of the ILC Articles, see, e.g. J. Crawford, “Oxford Public International Law: State Responsibility”, *Max Planck Encyclopedia of Public International Law*, 2015, available at:

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>.

<sup>77</sup> Saudi Arabia ratified GC on 18 May 1963 and API on 21 August 1987; Yemen ratified GC on 16 July 1970 and API on 17 April 1990; and the UK ratified the GC on 23 September 1957 and API on 28 January 1998, subject to a reservation. The reservation has no bearing on our analysis, in circumstances where we rely on API not in relation to ATT, Art. 6(3) (regarding war crimes contrary to international agreements *to which the UK is a party*) but in relation to ATT, Art. 7 (regarding broader violations of IHL), the EU Common Position and the UK Consolidated Criteria.

objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects (Article 51(5)(a)).

2.22. A violation occurs on the part of a State or armed group when the prohibition is breached as a matter of fact. Article 91 API makes clear that a Party to a conflict is “*responsible for all acts committed by persons forming part of its armed forces*”. The reference to all acts underscores that they include acts committed by members of a State’s armed forces, including those committed contrary to or beyond explicit orders. As in relation to APII, there is no “intent” requirement in relation to the prohibitions under API, meaning that a violation of API – and the ensuing responsibility on the part of the parties to the conflict – is to be assessed objectively, in light of the facts, rather than subjectively, in relation to a Party’s subsequent explanations or justifications. Violations may also – in parallel – constitute a grave breach of API, pursuant to Article 85 API, capable of giving rise to individual criminal liability when perpetrated with the requisite intent.

#### **(e) Special protections under IHL**

2.23. Certain categories of civilians and civilian objects are afforded special protections under the customary IHL applicable in both NIACs and IACs, under APII (applicable in NIACs) and the GCI and API (applicable in IACs). They include:

- **medical personnel and units** (including hospitals), which must be respected and protected in all circumstances;<sup>78</sup> making medical personnel or objects the object of an attack is a serious violation of IHL, engaging the responsibility of the State (hospitals lose their protected status only if they are used to commit hostile acts and, even then, cannot be targeted without appropriate warning);<sup>79</sup> and
- **objects used for humanitarian relief operations**, which must be respected and protected in all circumstances<sup>80</sup> (this rule is a corollary to the prohibition of starvation and of the deliberate impediment of the delivery of humanitarian relief, because the safety and security of humanitarian relief objects are an indispensable condition for the delivery of humanitarian relief to civilian populations in need).<sup>81</sup>

2.24. Attacks on medical personnel or objects or on objects used for humanitarian relief operations constitute serious violations of IHL engaging State responsibility. They may also, in parallel, give rise to individual criminal liability if committed intentionally.<sup>82</sup>

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<sup>78</sup> CIHL Study at fn. 69, Rules 25 and 28; APII, Arts. 9 and 11; API, Arts. 12 and 15; and GCI, Art. 19.

<sup>79</sup> APII, Art 11(2).

<sup>80</sup> CIHL Study at fn. 69, Rule 32.

<sup>81</sup> *Ibid.*

<sup>82</sup> Under customary international law, API, Art 85, and, *e.g.*, GCI, Art. 19 read in conjunction with Art. 50.

## **(f) Military blockades under international law**

2.25. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 12 June 1994, which (in this respect) reflects customary international law, sets out clear rules governing naval blockades. It provides as follows.

“102. The declaration or establishment of a blockade is prohibited if  
[...]

(b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies...”

2.26. This supplements the customary law obligation on parties to a conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.<sup>83</sup> It also supplements the provisions of APII Art 18(2), which mandate that relief actions “shall” be undertaken if the civilian population is “*suffering undue hardship owing to a lack of the supplies essential for its survival*”.<sup>84</sup>

2.27. There is a further question as to whether the use of military blockades is permitted in NIACs at all.<sup>85</sup> International opinion on this is divided, and a detailed analysis of the matter is beyond the scope of this opinion. Nevertheless, it is matter on which the UK Government would need to take (and have taken) a view in determining whether to supply arms to Saudi Arabia capable of being used to enforce such a blockade.

## **(IV) INTERNATIONAL HUMAN RIGHTS LAW**

2.28. IHL is not the only body of law that guarantees protection for persons in situations of NIAC. The provisions of IHRL are complementary to IHL and offer additional protections, in particular, to the vulnerable civilian population. As confirmed by the International Court of Justice (“ICJ”) “*the protection offered by human rights conventions does not cease in case of armed conflict*”, except where the relevant States make appropriate and permissible derogations. The UN Human Rights Committee has confirmed that rights contained in particular in the International Covenant on Civil and Political Rights (“ICCPR”) – many of which are recognised as reflecting customary

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<sup>83</sup> CIHL Study at fn. 69, Rule 55 and commentary.

<sup>84</sup> APII, Art. 18(2).

<sup>85</sup> See, e.g., M. Weller, *The Oxford Handbook of the Use of Force in International Law*, (Oxford, United Kingdom, Oxford University Press, 2015), p. 932; Sanger, A, “The Contemporary Law of Blockade and the Gaza Freedom Flotilla”, 13 *Yearbook of International Humanitarian Law* 2010, 397, available at: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8354067>; K. Watkin and A. J. Norris, *Non-international Armed Conflict in the Twenty-first Century*, Naval War College (United States) Government Printing Office, 2012), p. 228; D. Guilfoyle, “The Mavi Marmara Incident and Blockade in Armed Conflict”, 81 (1) *British Yearbook of International Law* 2010, p. 171, available at: <http://bybil.oxfordjournals.org/content/81/1/171.full>.

international law, and so would bind Saudi Arabia, notwithstanding that it is not a State party to the ICCPR – apply “*also in situations of armed conflict to which the rules of international humanitarian law are applicable*”.<sup>86</sup> The same analysis may also apply to rights set forth in the International Covenant on Economic, Social and Cultural Rights, although the customary status and effect of some of those rights is disputed.

2.29. IHRL obligations which are of particular relevance in the context of the conflict in Yemen include the prohibition on the arbitrary deprivation of life, and the requirement to respect, protect and fulfil the right to food, which is itself closely linked to the right to life, in situations of famine or near famine. These obligations remain fully binding on Yemen and any States that assist it, including Saudi Arabia. As the UN Special Rapporteur on the Right to Food has emphasised in relation to the conflict in Yemen:

“The right to food does not cease in times of conflict, indeed it becomes more crucial as a result of the acute vulnerabilities in which individuals find themselves... Parties to the conflict must be reminded of their obligations under international humanitarian law to ensure that civilians and prisoners of war have access to adequate food and water during armed conflict.”<sup>87</sup>

2.30. While extensive analysis of IHRL obligations are beyond the scope of this opinion, we note that the Saudi-led Coalition appears to be exercising full control over Yemeni ports in imposing a *de facto* blockade: vessels must reportedly be approved and inspected by Coalition forces in order to enter Yemen’s territorial waters.<sup>88</sup>

## **(V) INTERNATIONAL CRIMINAL LAW**

2.31. Neither Saudi Arabia nor Yemen are States parties to the Rome Statute of the International Criminal Court (“ICC Statute”).<sup>89</sup> Accordingly, the ICC has no jurisdiction to prosecute any war crimes committed by their nationals or on their territory, including during the course of the conflict in Yemen.

2.32. The war crimes regime established by the ICC Statute remains relevant and important, nevertheless, to the arms export control framework, because the UK is a party to the ICC Statute. The UK is required under the Arms Trade Treaty (as addressed below) to assess the actions of the Saudi-led Coalition by reference to the war crimes defined in the ICC Statute, for the purpose of determining whether it may lawfully export

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<sup>86</sup> UNHRC, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at § 11, available at: <http://www.refworld.org/docid/478b26ae2.html>.

<sup>87</sup> UN OHCHR, “Yemen spiralling into major food crisis – UN expert warns against deliberate starvation of civilians”, 11 August 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16307&LangID=E>.

<sup>88</sup> “Yemen: Port Situation \*UPDATE\*”, *NORTH P & I Club News*, 8 December 2015, available at: <http://www.nepia.com/news/industry-news/yemen-port-situation-starupdatestar/>.

<sup>89</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 9 (“ICC Statute”).



weapons or related items to Saudi Arabia. Relevant ICC crimes, capable of being committed in a NIAC, may include:

- breaches of Common Article 3 of the four Geneva Conventions, applicable in NIACs, including violence to life and person committed against persons taking no active part in the hostilities (ICC Statute, Article 8(2)(c)(i));
- intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities (Article 8(2)(e)(i));
- intentionally directing attacks against buildings... using the distinctive emblems of the Geneva Conventions in conformity with international law (Article 8(2)(e)(ii));
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations... (Article 8(2)(e)(iii));
- intentionally directing attacks against buildings directed to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (Article 8(2)(e)(iv)); and
- destroying the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict (Article 8(2)(e)(xii)).

2.33. Insofar as the UK considers the conflict to be an IAC, it would also have to consider ICC crimes capable of being committed in such conflicts. They include:

- extensive destruction of protected property, not justified by military necessity and carried out unlawfully and wantonly (ICC Statute, Article 8(2)(a)(iv));
- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (Article 8(2)(b)(i));
- intentionally directing attacks against civilian objects, that is, objects which are not military objectives (Article 8(2)(b)(ii));
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations. (Article 8(2)(b)(iii));
- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (Article 8(2)(b)(iv));
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places

where the sick and wounded are collected, provided they are not military objectives (Article 8(2)(b)(ix));

- destroying the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war (Article 8(2)(b)(xiii));
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (Article 8(2)(b)(xxiv); and
- intentionally using starvation of civilians as method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions (Article 8(2)(b)(xxv).

2.34. War crimes are ordered, solicited, induced, committed and facilitated by *individuals*, not States. In order for an individual to be responsible for a war crime contrary to the ICC Statute, not only must the material elements of the crime be made out (“*actus reus*”), but the individual must also have intended to perform the acts specified as material elements (“*mens rea*”), and must have done so with relevant knowledge.<sup>90</sup> It is for that reason that a prompt, detailed investigation must be undertaken into any incident giving rise to a serious, credible war crimes allegation. However, in the absence of any such investigation, or pending its conclusion, the occurrence of acts which appear to constitute the *actus reus* of war crimes will necessarily give rise to the most serious of concerns. They are capable of providing *prima facie* evidence of war crimes, particularly when they form part of a clear pattern of acts.

2.35. Importantly, in circumstances where matters of intention are incident-specific and individual-specific, it is clear that States cannot, as a matter of legal construction, provide blanket prospective or retroactive assurances as to the purported ‘intention’ of each and every member of its armed forces or other persons under its effective control, or of individuals involved in specific operations. Such broad State assurances are no substitute for investigations and have no legal or practical consequence in determining whether or not war crimes have been committed.

2.36. Furthermore, it is important to underscore that individual criminal responsibility for an act is co-extensive with State responsibility, when the act is committed by a member of the State’s armed forces or of other persons under its effective control.<sup>91</sup> As set out above, under Common Article 3, API, APII and customary international law, there is no need for any wrongful “intent” on the part of the State to be established in order for the State’s international responsibility to be engaged: it is sufficient that the act complained of constitute a breach of the State’s international obligations and that it be

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<sup>90</sup> ICC Statute, Art. 30(3) stipulates that knowledge means “*awareness that a circumstance exists*”.

<sup>91</sup> See, e.g., P. Gaeta ‘The Interplay Between the Geneva Conventions and International Criminal Law’ in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions – A Commentary* (Oxford: Oxford University Press, 2015), 737-753 at p. 752; and B. Bonafé, *The Relationship between State Responsibility and Individual Responsibility for International Crimes* (Leiden/Boston, Mass: Martinus Nijhoff, 2009).

attributable to the State, for having been committed *inter alia* by a member of its armed forces.

### 3. ALLEGATIONS OF SERIOUS VIOLATIONS OF INTERNATIONAL LAW

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3.1. The UN Special Envoy to Yemen has informed the UN Security Council that the conflict in Yemen is being conducted with “*blatant disregard for the law of war*”.<sup>92</sup> All parties to the conflict have been accused by UN spokespersons and by local and international NGOs, including Amnesty International, Human Rights Watch and Oxfam, of committing widespread violations of international law, including war crimes.<sup>93</sup> The UN High Commissioner for Human Rights has underscored the

“urgent need to establish credible and independent investigations, with relevant jurisdiction and capacity, to ensure that alleged serious violations of international humanitarian law and human rights law by all parties are verified, that perpetrators are held accountable and that victims receive adequate reparations.”<sup>94</sup>

3.2. The UN High Commissioner for Human Rights has called on the international community to consider “*all available options... to support accountability*”.<sup>95</sup>

3.3. In this Opinion we are asked to address breaches of international law by the Saudi-led Coalition. That is because the focus of the Opinion is on UK arms exports and we are instructed that none of the parties fighting against the Coalition are being armed by the UK. We therefore consider below: (I) **allegations against the Saudi-led Coalition of serious violations of IHL**, and (II) allegations against Saudi Arabia and its Coalition of **serious violations of IHRL**.

#### (I) ALLEGATIONS OF SERIOUS VIOLATIONS OF IHL BY THE SAUDI-LED COALITION

##### (a) Allegations against the Saudi-led Coalition

3.4. Reports indicate that the Saudi-led Coalition has engaged in extensive airstrikes in Yemeni territory. Local human rights organisations estimate that between 26 March

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<sup>92</sup> “23 October 2015, Security Council briefing on the situation in Yemen, Special Envoy for Yemen Ismail Ould Cheikh Ahmed”, UN Department of Political Affairs, 23 October 2015, available at <http://www.un.org/undpa/speeches-statements/23102015/yemen>.

<sup>93</sup> See, e.g., Human Rights Watch’s *Targeting Saada* at fn. 10; “Yemen: Airstrike and weapon analysis shows Saudi Arabia-led forces killed scores of civilians”, *Amnesty International*, 2 July 2015, available at <https://www.amnesty.org/en/latest/news/2015/07/yemen-airstrike-analysis-shows-saudi-arabia-killed-scores-of-civilians/>; “Oxfam’s statement amended 8 May 2015: Oxfam condemns coalition bombing of a warehouse containing vital humanitarian aid”, *Oxfam International*, 19 April 2015, available at <https://www.oxfam.org/en/pressroom/reactions/oxfams-statement-amended-8-may-2015-oxfam-condemns-coalition-bombing-warehouse>; and UNHRC report at fn. 40 *supra*.

<sup>94</sup> “Statement by the UN Special Adviser on the Prevention of Genocide and the UN Special Adviser on the Responsibility to Protect, on the situation in Yemen”, *United Nations Press Release*, 15 September 2015, available at <http://www.un.org/en/preventgenocide/adviser/pdf/2015-09-15%20Statement%20on%20Yemen%20-%20final.pdf>.

<sup>95</sup> *Ibid.*

and 11 June 2015 alone, the Coalition carried out over 2,724 airstrikes.<sup>96</sup> The UN estimates that the majority of civilian deaths and injuries in the conflict have been caused by heavy explosive devices launched from Coalition aircraft,<sup>97</sup> including in densely populated areas.

3.5. UN spokespersons, the EU Parliament, international organisations and NGOs have been vocal in their criticism of the nature and extent of the Coalition bombing campaign. By way of example:

- the UN Under-Secretary-General for Humanitarian Affairs has condemned Saudi-led airstrikes as being “*in clear contravention of international humanitarian law and unacceptable*”;<sup>98</sup>
- the UN High Commissioner for Human Rights has underscored that the high numbers of civilian deaths “*ought to be a clear indication... that there may be serious problems with the conduct of hostilities*”;<sup>99</sup>
- the EU Parliament passed a resolution in early July 2015 “*condemn[ing] the air strikes by the Saudi-led coalition*”,<sup>100</sup> which it recalled had “*killed civilians, in violation of international humanitarian law, which requires all possible steps to be taken to prevent or minimise civilian casualties*”;<sup>101</sup>
- the International Committee of the Red Cross (“ICRC”) has deplored the “*indiscriminate air strikes and shelling have been going on in many parts of Yemen for more than six months, causing huge suffering to the civilian population*”;<sup>102</sup> and
- Amnesty International has accused the Saudi-led Coalition of knowingly violating IHL in its bombing campaign, highlighting that there “*is no indication that the Saudi Arabia-led military coalition has done anything to prevent and redress [international law] violations*”.<sup>103</sup>

3.6. Particular concerns have been raised about the legality of the military blockade imposed by the Saudi-led Coalition and its impact on civilians in Yemen. The UN

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<sup>96</sup> See *Targeting Saada* at fn. 10.

<sup>97</sup> See *State of Crisis* report at fn. 33 *supra*, p.7.

<sup>98</sup> Michelle Nichols, “U.N. says air strikes on Yemen port could worsen aid crisis”, Reuters, 19 August 2015, available at <http://www.reuters.com/article/2015/08/19/us-yemen-security-un-idUSKCN0Q028Y20150819#ptdOwuKemW5cGGiC.99>.

<sup>99</sup> UN OHCHR, “Zeid calls for investigations into civilian casualties”, 14 April 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15836&LangID=E>.

<sup>100</sup> European Parliament Resolution of 9 July 2015 on the Situation in Yemen (2015/2760(RSP)), 9 July 2015, § 3, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0270>.

<sup>101</sup> *Ibid*, preambular § G.

<sup>102</sup> ICRC, “Yemen: Two volunteers of the International Red Cross and Red Crescent Movement killed in airstrike”, 30 September 2015, available at <https://www.icrc.org/en/document/yemen-two-volunteers-international-red-cross-and-red-crescent-movement-killed-airstrike>

<sup>103</sup> Amnesty International, *Yemen: Airstrike and Weapon Analysis Shows Saudi Arabia-Led Forces Killed scores of Civilians*, 2 July 2015, available at: <https://www.amnesty.org/en/latest/news/2015/07/yemen-airstrike-analysis-shows-saudi-arabia-killed-scores-of-civilians/>.

Human Rights Council holds the naval blockade responsible for “*dramatically worsen[ing] an already dire humanitarian situation*”,<sup>104</sup> and the European Parliament’s resolution on Yemen condemned the blockade for its impact on the Yemeni population.<sup>105</sup>

3.7. A detailed assessment of all of the reported violations of international law alleged against Saudi Arabia in Yemen is beyond the scope of this advice. However, in order to inform our opinion, we have focused on an indicative sample of ten reported incidents, about which serious concerns have been raised. They are intended to illustrate the nature of the attacks that have raised international concerns; however, our advice does not turn on them specifically. They are listed below, and analysed comprehensively in the Annex to this advice:

- (i) ***30 March 2015 airstrikes on the al-Mazraq camp for internally displaced persons*** in Harad, hosting more than 300 displaced families, killing at least 19 civilians and injuring as many as 200.
- (ii) ***18 April 2015 airstrike on an Oxfam storage facility*** in Saada governorate, containing humanitarian supplies.
- (iii) ***8 May 2015 designation of the entire cities of Saada and Marran (home to tens of thousands of people) as military targets and subsequent airstrikes***, resulting in “overwhelming” destruction to civilian buildings, alongside civilian casualties.
- (iv) ***Multiple airstrikes in Saada governorate in April-July 2015***, striking numerous residential houses, markets and schools, killing dozens of civilians and wounding many more, many of them women and children.
- (v) ***24 July 2015 multiple air strikes on a residential compound in the port city of Mokha, housing over 1,300 civilians***, resulting in at least 65 civilian deaths, including rescue workers who had responded to the first strikes.
- (vi) ***23 September 2015 attack on a ceramics factory***, in a residential area in the Sana’a governorate, killing one civilian and injuring two others; debris from a UK-made PGM-500 Hakim missile was found in the rubble.
- (vii) ***28 September and 8 October 2015 airstrikes on wedding parties***, resulting in the deaths of 130 and 45 people respectively.

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<sup>104</sup> See UNHRC report at fn. 40 *supra*.

<sup>105</sup> See European Parliament Resolution at fn. 100, preambular § H and § 3. N.B. The UN Security Council has imposed an arms embargo on the Houthis and their allies, and has called on States to operate an interdiction regime on cargo to Yemen, pursuant to UNSC Resolution 2216 (2015), 14 April 2015, UN Doc. S/RES/2216(2015). The embargo was intended to supersede the naval blockade, to move towards specific prohibition of certain imports rather than blanket prohibitions on cargo reaching Yemeni ports.

- (viii) **27 October 2015 multiple airstrikes on a Médecins sans Frontières hospital** in Saada governorate, resulting in multiple casualties and the destruction of the hospital, condemned by the UN Secretary General and the World Health Organisation as a violation of IHL. The Coalition had been provided with the coordinates of the hospital two weeks beforehand.
- (ix) **Repeated use of cluster munitions since April 2015**, confirmed by the Cluster Munitions Monitor.<sup>106</sup> At least two cases involved the use of US-made and supplied weapons, which Saudi Arabia acknowledges having used in the conflict.
- (x) **Ongoing blockade on Yemeni ports and airports**, which has impacted the entry of aid shipments and food and fuel supplies, with devastating consequences for Yemeni civilians.

3.8. In our view, as set out in the Annex, the information available indicates that these ten incidents offer *prima facie* evidence of serious violations of IHL by the Saudi-led Coalition.

#### **(b) Response by the Saudi authorities**

3.9. Saudi Arabia has denied allegations that it is deliberately targeting civilians. In a statement issued by its Embassy in London, it has asserted that:

“Recent allegations claim that war crimes have been committed by the coalition in Yemen as a result of the deliberate targeting of civilians. The Kingdom of Saudi Arabia firmly denies these allegations. The coalition has not intentionally bombed civilians and any accusation of such intentions is a false claim spread by those who support the rebels attempting to wreak havoc in Yemen.”<sup>107</sup>

3.10. Saudi Arabia has further insisted that its armed forces take all necessary precautions to minimise harm to civilians:

“Prior to the airstrikes, Brigadier General Ahmed Assiri advised all Yemenis to stay away from Houthi strongholds for their own safety. All precautions were taken to avoid the death of civilians. Precision weapons were used on targets identified and scrutinised by a multinational council that meticulously vets target

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<sup>106</sup> International Campaign to Ban Landmines – Cluster Munition Coalition, *Cluster Munitions Monitor 2015*, August 2015, available at [http://www.the-monitor.org/media/2135498/2015\\_ClusterMunitionMonitor.pdf](http://www.the-monitor.org/media/2135498/2015_ClusterMunitionMonitor.pdf), pp. 1, 2, 5, 9, 11, 16.

<sup>107</sup> Statement from The Royal Embassy of the Kingdom of Saudi Arabia, London, on military operations in Yemen, *Embassy News*, 7 October 2015, available at: <http://embassies.mofa.gov.sa/sites/uk/EN/AboutDiplomaticMission/MissionNews/Pages/Royal-Embassy.aspx>.

coordinates to ensure that they do not include civilians or non-essential military elements.”<sup>108</sup>

3.11. However, the Saudi authorities have failed to give any or any detailed explanation *inter alia* for any of the above ten attacks, other than issuing broad denials of the fact of any strikes and/or of the assertions that they hit civilian objects. Indeed, there is no information in the public domain regarding *any* investigations undertaken by Saudi Arabia to date into any allegations of breach of international law in Yemen.<sup>109</sup> Requests for information made by NGOs, including Oxfam and Human Rights Watch, are unanswered.<sup>110</sup> The Coalition’s response to a recent detailed report on the conflict by Human Rights Watch<sup>111</sup> consisted of a broad retort that:

“The person who wrote the report and the witnesses quoted did not demonstrate that the attacks in question were carried out by coalition aircraft”.<sup>112</sup>

3.12. We do not know whether Saudi Arabia has provided the UK Government with detailed accounts of the above attacks and of other attacks, which have been criticised and condemned by the international community. However, we note that the UK has not made any public mention of having been provided with such information, and no such information appears to have been provided to the UN or to the EU, so as to similarly reassure its spokespersons that no violations of international law have been committed. In the absence of any such information we proceed on the basis that the UK has not been provided with such accounts.

3.13. In September 2015, proposals for an independent, international inquiry into the conduct of all warring parties in Yemen were dropped at the UN Human Rights Council, reportedly at the urging of Saudi Arabia and certain Western States, including the UK.<sup>113</sup> Instead, a national inquiry led by the Saudi-backed Yemeni Government – until recently in exile – is to be set up.<sup>114</sup> It has not yet made any public pronouncements.

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<sup>108</sup> Statement from The Royal Embassy of the Kingdom of Saudi Arabia, London on Military operations in Yemen, *Embassy News*, 7 October 2015, available at:

<http://embassies.mofa.gov.sa/sites/uk/EN/AboutDiplomaticMission/MissionNews/Pages/Royal-Embassy.aspx>.

<sup>109</sup> “Saudis failed to investigate air strikes on Yemen civilians: rights group”, *Egypt Independent*, 28 November 2015, available at: <http://www.egyptindependent.com//news/saudis-failed-investigate-air-strikes-yemen-civilians-rights-group>.

<sup>110</sup> “Yemen: Coalition Fails to Investigate Unlawful Airstrikes”, *Human Rights Watch*, 26 November 2015, available at: <https://www.hrw.org/news/2015/11/26/yemen-coalition-fails-investigate-unlawful-airstrikes>;

<sup>111</sup> Human Rights Watch, ‘*What Military Target Was in My Brother’s House?: Unlawful Coalition Airstrikes in Yemen*’, 26 November 2015, available at: <https://www.hrw.org/node/283702>.

<sup>112</sup> See e.g., “Saudis failed to investigate air strikes on Yemen civilians - rights group”, *Reuters*, 27 November 2015, available at: <http://uk.reuters.com/article/uk-yemen-security-watchdog-idUKKBN0TG2A920151127>; and “Saudis failed to investigate air strikes on Yemen civilians: rights group”, *Egypt Independent*, 28 November 2015, available at: <http://www.egyptindependent.com//news/saudis-failed-investigate-air-strikes-yemen-civilians-rights-group>.

<sup>113</sup> “UN Resolution on Yemen Fails to Launch International Investigation into War Crimes”, *Amnesty International* Press Release, 2 October 2015, available at: <https://www.amnesty.org/en/press-releases/2015/10/un-resolution-on-yemen-fails-to-launch-international-investigation-into-war-crimes/>; T. Miles and S. Nebehay, “Saudi Arabia deters bid for U.N. human rights probe in Yemen”, *Reuters*, 2 October 2015, available at: <http://www.reuters.com/article/2015/10/02/us-yemen-rights-idUSKCN0RW1ES20151002>.

<sup>114</sup> “Saudi Objections Halt UN Inquiry of Yemen War”, *New York Times* 30 September 2015.



3.14. More generally, it is unclear whether there is any possible accountability for breaches of war crimes in Saudi Arabia. It is unclear, for example, whether breaches of IHL are criminalised under Saudi legislation or to what extent persons responsible for breaches of IHL are open to prosecution through the criminal court system. There is also no publicly available information regarding Saudi military manuals and the extent to which IHL is incorporated into them.

## (II) ALLEGATIONS OF SERIOUS VIOLATIONS OF IHRL BY SAUDI ARABIA

3.15. Many of the allegations of serious violations of IHL directed at the Saudi-led Coalition are also capable of constituting serious violations of IHRL, the provisions of which, as noted above, remain applicable in NIACs. Of particular importance is the blockade on Yemeni ports and the resultant serious impact on the rights of the Yemeni population, in particular the right to food.<sup>115</sup>

3.16. Saudi Arabia's broader human rights record is also relevant to the legality of UK arms exports, pursuant to the various legal instruments by which the UK is bound. The State is consistently ranked amongst the "*worst of the worst*" States in relation to political and civil rights. The NGO Freedom House lists Saudi Arabia as one of 12 countries in the world where rights are least protected, classifying the country as "*not free*".<sup>116</sup> The Foreign and Commonwealth Office ("FCO") has also listed Saudi Arabia as one of 27 countries in the world in relation to which the UK has "*wide-ranging concerns*", reflecting inter alia "*the gravity of the human rights situation in the country, including both the severity of particular abuses and the range of human rights affected*".<sup>117</sup>

3.17. Saudi Arabia has been repeatedly criticised by UN and EU bodies for its record in relation to the death penalty, including the execution of minors; its use of torture to extract confessions; and its continuing failure to secure fundamental human and political rights, including the right to a fair trial, freedom of expression, religion and

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<http://www.nytimes.com/2015/10/01/world/middleeast/western-nations-drop-push-for-un-inquiry-into-yemenconflict>. I. Johnston, "Anger as Saudi Arabia blocks UN inquiry into 'war crimes' in Yemen", *The Independent*, 1 October 2015, available at: <http://www.independent.co.uk/travel/middle-east/un-inquiry-into-saudi-arabia-war-crimes-in-yemen-shelved-after-saudi-opposition-a6676141.html>.

<sup>115</sup> J. Pejic, "The right to food in situations of armed conflict: The legal framework," *International Review of the Red Cross*, Vol. 83, No. 844, December 2001, p. 1097 ; UN, *International Protection of Human Rights in Armed Conflict*, United National Publication, 2011, HR/PUB/11/01, available at:

[http://www.ohchr.org/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf); UN OCHA, "The Right to Adequate Food", Fact Sheet No. 34, available at: <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf>; (particularly in relation to Yemen) "Yemen: amid food crisis, UN expert warns of deliberate starvation of civilians", *UN News Centre*, 11 August 2015, available at:

<http://www.un.org/apps/news/story.asp?NewsID=51605#.Vmv1QWQrL-Y>.

<sup>116</sup> "Freedom in the World 2015: Saudi Arabia", *Freedom House*, available at: <https://freedomhouse.org/report/freedom-world/2015/saudi-arabia>.

<sup>117</sup> UK Foreign and Commonwealth Office, *Human Rights and Democracy Report 2014*, 12 March 2014, available at <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014>, Chapter XII.

assembly, women's rights, and the rights of migrant workers.<sup>118</sup> At Saudi Arabia's last Universal Periodic Review before the UN Human Rights Council in 2013, the UK "expressed disappointment that [the State] had not implemented previous UPR recommendations. It regretted Saudi Arabia's failure to meet Treaty Body reporting deadlines and the lack of access for several Special Rapporteurs."<sup>119</sup> The UK also drew particular attention to the rule of law deficiencies in the State, including concerns regarding the functioning of the criminal justice system.<sup>120</sup> The latter concerns are particularly relevant in relation to accountability for breaches of IHL and IHRL, including in the context of the attacks in Yemen. They suggest that there are limited, if any, mechanisms for accountability for violations of IHL and/or IHRL by members of the Saudi armed forces, including senior commanders.

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<sup>118</sup> See, by way of example: UN Human Rights, OCHA, "Saudi Arabia must immediately halt execution of children – UN rights experts urge", 22 September 2015, available at:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16487&LangID=E>; Committee on the Rights of the Child, Forty-First Session, "Concluding Observations: Saudi Arabia", 17 March 2006, CRC/C/SAU/CO/2, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SAU/CO/2&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SAU/CO/2&Lang=En); 2015 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 10 June 2015, available at: <http://freeassembly.net/rapporteurreports/communications-2014-15/>; 2014 EU Annual Report on Human Rights and Democracy in the World (adopted by Council of the EU) available at: [http://eeas.europa.eu/human\\_rights/docs/2014-hr-annual-report\\_en.pdf](http://eeas.europa.eu/human_rights/docs/2014-hr-annual-report_en.pdf); European Parliament resolution on Saudi Arabia, its relations with the EU and its role in Middle East and North Africa, 11 March 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0207&language=EN&ring=A7-2014-0125>; European Parliament resolution on the case of Ali Mohammed al-Nimr, 8 October 2015, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2015-0345%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>119</sup> UNHRC, Working Group on the Universal Periodic Review, Seventeenth session (21 October – 1 November 2013), "Draft Report of the Working Group on the Universal Periodic Review: Saudi Arabia", UN Doc.A/HRC/WG.6/17/L.1, available at: [http://www.upr-info.org/sites/default/files/document/saudi\\_arabia/session\\_17\\_-\\_october\\_2013/a\\_hrc\\_wg.6\\_17\\_l.1\\_saudi\\_arabia.pdf](http://www.upr-info.org/sites/default/files/document/saudi_arabia/session_17_-_october_2013/a_hrc_wg.6_17_l.1_saudi_arabia.pdf).

<sup>120</sup> Human Rights Council, Working Group on the Universal Periodic Review, Seventeenth session (21 October – 1 November 2013), "Draft Report of the Working Group on the Universal Periodic Review: Saudi Arabia", UN Doc. A/HRC/WG.6/17/L.1, available at: [http://www.upr-info.org/sites/default/files/document/saudi\\_arabia/session\\_17\\_-\\_october\\_2013/a\\_hrc\\_wg.6\\_17\\_l.1\\_saudi\\_arabia.pdf](http://www.upr-info.org/sites/default/files/document/saudi_arabia/session_17_-_october_2013/a_hrc_wg.6_17_l.1_saudi_arabia.pdf).

## 4. UK GOVERNMENT'S POSITION ON ARMS EXPORTS TO SAUDI ARABIA

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4.1. Against the factual and legal background set out, we turn to UK arms exports to Saudi Arabia. Despite Saudi Arabia's involvement in the conflict in Yemen, the allegations of war crimes, and intensive lobbying from NGOs, to date, the UK has not suspended, revoked or refused any export licences to Saudi Arabia in 2015.<sup>121</sup> We are not privy to classified information, which may bear on these decisions, including UK-Saudi Arabia diplomatic exchanges. However, we have taken careful note of responses to parliamentary questions, of the public statements made by UK Government representatives, and of the exchanges with NGO representatives, in which the UK has publicly explained its position in relation to arms exports to Saudi Arabia. We set out that position below, as it was publicly stated (I) **prior to November 2015** and (II) **thereafter**.

### (I) UK GOVERNMENT POSITION UNTIL NOVEMBER 2015

4.2. Until November 2015, the UK Government's public explanation for its continuing authorisations of arms exports to Saudi Arabia was that – while it was aware of, and took very seriously, reports by NGOs and others alleging breaches of international law against the Saudi-led Coalition – it had sought and received assurances from Saudi Arabia that the State and/or its Coalition had no *intention* to commit such breaches, and had therefore concluded that the evidence of war crimes was not “credible”. UK Government representatives have stressed “*the importance of the state of mind of those planning targeting within IHL*”<sup>122</sup> in assessing the allegations against Saudi Arabia.

4.3. Certain statements made by Mr Tobias Ellwood M.P., Parliamentary Under Secretary of State at the FCO with special responsibility for the Middle East and North Africa, made between June and October 2015, are illustrative:

- **30 June 2015:** “*We have received repeated assurances from the Saudi Arabian-led Coalition that they are complying with International Humanitarian Law and we continue to engage with them on those assurances. We are aware of reports of Coalition airstrikes targeting the city of Saada and have raised these reports with the Saudi Arabian authorities.*”<sup>123</sup>

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<sup>121</sup> UK Parliament, House of Commons, “Arms Trade: Saudi Arabia: Written question - 11124”, 19 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-09/11124>.

<sup>122</sup> This is set out in an email sent to Saferworld from Mr Mike Reilly, Deputy Head, Arms Export Policy Department, Directorate for Defence and International Security, FCO, dated 13 November 2015, with which we have been provided. Our instructions are that this reflects the UK Government position taken in meetings with the organisations instructing us, including a meeting on 13 October 2015 with representatives from the FCO, the Department for International Development, and the Ministry of Defence.

<sup>123</sup> UK Parliament, House of Commons, “Yemen: Armed Conflict: Written question - 6867”, 20 July 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-13/6867>.

- **20 July 2015:** *“We have received explicit assurances from the Saudi Arabian authorities that they are complying with International Humanitarian Law. We have not seen any credible evidence that suggests that the coalition has breached the law.”*<sup>124</sup> (emphasis added)
- **21 July 2015:** *“The UK aims to operate one of the most rigorous and transparent export control regimes in the world. Each licence application is rigorously assessed using internationally recognised criteria. The Saudis have provided repeated assurances to us that they will be used in compliance with international humanitarian law and we continue to engage with them on those assurances.”*<sup>125</sup>
- **21 September 2015:** *“Both the Kingdom of Saudi Arabia and Yemen are parties to the 1954 Hague Convention on the Protection of Cultural Property in the event of Armed Conflict and to the 1972 World Heritage Convention. We have raised our concerns regarding protection of cultural property with the Saudi Arabian government and have received assurances.”*<sup>126</sup>
- **14 October 2015:** *“We are aware of reports of alleged violations of international humanitarian law (IHL) in Yemen by all sides to the conflict and take these very seriously. We have raised our concerns with the Saudi Arabian authorities and have received repeated assurances of IHL compliance and we continue to engage with them on those assurances.”*<sup>127</sup>
- **29 October 2015:** *“We are aware of reports of alleged violations of International Humanitarian Law (IHL). We take such allegations very seriously and regularly raise the issue and seek assurance of IHL compliance with the Government of Yemen and the Saudi Arabian-led Coalition.”*<sup>128</sup>
- **30 October 2015:** *“We are aware of reports on alleged violations of international humanitarian law (IHL) by all sides to the conflict in Yemen, and take them very seriously. We have raised our concerns over alleged IHL violations with the Saudi*

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<sup>124</sup> *Ibid*, “Yemen: Armed Conflict: Written question - 6862”, 20 July 2015, available at:

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-13/6862/>.

<sup>125</sup> *Ibid*, “Saudi Arabia: Yemen: Written question – 7584”, 21 July 2015, available at:

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-16/7584/>.

<sup>126</sup> *Ibid*, “Yemen: Cultural Heritage: Written question - 10334”, 21 September 2015, available at:

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-15/10334/>.

<sup>127</sup> *UK Parliament, House of Commons*, “Yemen: Armed Conflict: Written question – 10564”, 14 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-17/10564/>.

<sup>128</sup> *UK Parliament, House of Commons*, “Yemen: Written question – 12783”, 29 October 2015, available at:

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-21/12783/>.

*Arabian Government and other members of the Coalition, and in return have received repeated assurances of their compliance.”<sup>129</sup>*

- 4.4. The UK Government has further confirmed that it “regularly receives reports on the situation in Yemen through a variety of sources including diplomatic engagement with key parties to the conflict, other governments, international non-governmental organisations and UN agencies”.<sup>130</sup> It has also confirmed that it “undertake[s] appropriate checks using both open and other sources when considering licence applications”.<sup>131</sup> In this regard, the UK Government has made clear that it prefers to rely on political assurances given by Saudi Arabia, rather than what it has deemed to be to be “not... credible” reports and statements to the contrary.<sup>132</sup>
- 4.5. Further to its reliance on assurances, the UK Government has also adopted the position that (i) the end use of arms supplied by the UK to Saudi Arabia is “an operational matter for the Saudi military authorities”, not a matter for the UK;<sup>133</sup> (ii) the use of UK arms in Yemen is “legitimate”, given that the weapons are being deployed in the defence of Yemen;<sup>134</sup> and (iii) it is not for the UK government to adjudge whether or not war crimes have occurred. The UK Minister of State for the FCO, Baroness Anely, explained the UK position as follows:

“We are aware of reports of alleged violations of International Humanitarian Law in Yemen, including by the Saudi-led Coalition – alleged airstrikes resulting in civilian casualties and damage to civilian infrastructure – in Saada and elsewhere across the country. We take such allegations very seriously and have raised our concerns with all parties to the conflict in Yemen... Any judgment on whether specific international war crimes have occurred is a matter for international judicial decision rather than for governments or non-judicial bodies”.<sup>135</sup>

- 4.6. It is not clear to us to what possible “international judicial decision” Baroness Anely is referring: neither of the international courts, namely the International Court of Justice

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<sup>129</sup> *Ibid*, “Yemen: Armed Conflict: Written question - 11580”, 20 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-13/11580/>.

<sup>130</sup> *Ibid*, “Yemen: Armed Conflict: Written question – 10364”, 12 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-09-15/10364>.

<sup>131</sup> *Ibid*, “Arms Trade: Exports: Written question – 10798”, 15 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-09/10798>.

<sup>132</sup> *Ibid*, “Yemen: Armed Conflict: Written question - 11580”, 20 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-13/11580/>.

<sup>133</sup> *Ibid*, “Armed Conflict: Yemen: Written question – 7824”, 27 July 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-17/7824>.

<sup>134</sup> *Ibid*, “Arms Sales (Human Rights)”, 17 September 2015, Column 387WH, available at: <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150917/halltext/150917h0001.htm>.

<sup>135</sup> UK Parliament, House of Lords, “Yemen: Armed Conflict: Written question - HL2723”, 19 October 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-10-19/HL2723>.

and the International Criminal Court, would currently have jurisdiction to adjudicate such matters, and we are not aware of any other international court or tribunal currently established which would have such jurisdiction.

## (II) UK GOVERNMENT POSITION IN NOVEMBER 2015

4.7. In early November 2015 the UK Government's position in relation to arms exports to Saudi Arabia appears to have changed. Speaking to the BBC on 11 November 2015, the UK Foreign Secretary Philip Hammond stated:

"The Saudis deny that there have been any breaches of international humanitarian law... Obviously that denial alone is not enough. We need to see proper investigations. We need to work with the Saudis to establish that international humanitarian law has been complied with. We have an export licensing system that responds if we find that it is not. We will then find that we cannot licence additional shipments of weapons."<sup>136</sup>

4.8. This appeared to suggest that the UK is no longer taking a firm position that (i) Saudi Arabia has complied with IHL; or (ii) compliance with IHL is not a matter for determination by the UK; or (iii) Saudi State denials and/or assurances are sufficient in the face of mounting evidence of serious breaches of international law. This change appeared to be confirmed by newspaper reports that cite unnamed FCO officials as raising concerns that "*it is, sadly, not at all clear*" that the continuing arms sales to Saudi Arabia are consistent with the UK's international obligations.<sup>137</sup> Those concerns are said to be particularly acute in light of the alleged continuing failure by the FCO "*to carry out any detailed evaluation*" of UK arms used in the conflict.<sup>138</sup>

4.9. However, the most recent response by the Minister of State for the FCO to a parliamentary question on Yemen, provided on 25 November 2015, once again reaffirmed the UK Government's reliance on Saudi "assurances" that "*they are complying with IHL*".<sup>139</sup> The UK Minister "*urge[d]... all sides to investigate... incidents fully*". She continued:

"The Ministry of Defence continues to monitor alleged incidents internally, using available information, which in turn informs our overall assessment of IHL compliance in Yemen. We are offering Saudi Arabia advice and training to

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<sup>136</sup> See e.g., B. Quinn and D. Smith, "Calls for investigation into Saudi Arabia's actions in Yemen", *The Guardian*, 11 November 2015, available at: <http://www.theguardian.com/world/2015/nov/11/calls-for-investigation-into-saudi-arabias-actions-in-yemen>; and M. Atkinson, "UK could freeze arms sales to Saudi Arabia over Yemen strikes", *Middle East Eye*, 11 November 2015, available at: <http://www.middleeasteye.net/news/uk-could-halt-arms-sales-saudi-arabia-over-yemen-strikes-271051017#sthash.OmjzZSOT.dpuf>.

<sup>137</sup> J. Cusick, "UK could be prosecuted for war crimes over missiles sold to Saudi Arabia that were used to kill civilians in Yemen", *The Independent*, 27 November 2015, available at: <http://www.independent.co.uk/news/uk/politics/uk-could-be-prosecuted-for-war-crimes-over-missiles-sold-to-saudi-arabia-that-were-used-to-kill-a6752166.html>.

<sup>138</sup> *Ibid.*

<sup>139</sup> UK Parliament, House of Lords, "Saudi Arabia: Arms Trade: Written question - HL3612", 25 November 2015, available at: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-11-17/HL3612/>.

demonstrate best practice and to help ensure continued compliance with International Humanitarian Law. [... A]ll applications for strategic export control licences... are assessed on a case-by-case basis against the Consolidated EU and National Arms Export Licensing Criteria (the Criteria), in a manner consistent with the UK's international obligations. A licence will not be issued for export of items to any country if to do so would be inconsistent with any mandatory provision of the Criteria, including where we assess there is a clear risk that the items might be used in the commission of a serious violation of IHL. "<sup>140</sup>

4.10. She concluded by confirming, without equivocation, that "[t]he Government is satisfied that extant licences for Saudi Arabia are compliant with the Criteria...".

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<sup>140</sup> *Ibid.*

## 5. THE ARMS TRADE TREATY

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5.1. Having set out the facts available to us, on which this opinion is based, we turn to our analysis of the legal framework governing the export of arms from the UK to Saudi Arabia and of the UK Government's compliance therewith. This section is the first of three sections to consider the UK's international obligations. It assesses the UK's compliance with the Arms Trade Treaty ("ATT"), a multilateral treaty to which the UK is a State party, having ratified the ATT on 2 April 2014. The ATT, which was adopted by the UN General Assembly on 2 April 2013 and which entered into force on 24 December 2014, is intended to regulate the international trade in conventional weapons and to prevent illicit trade and weapons diversion. The UK was one of the State champions of the ATT, responsible for leading efforts to secure its creation. The express purpose of the ATT is to:

"contribut[e...] to international and regional peace, security and stability", to "reduc[e...] human suffering" and to "promot[e...] cooperation, transparency and responsible action by States Parties" (ATT, Article 1).

- 5.2. Pursuant to the UK's EU and National Consolidated Criteria relating to arms exports, exports from the UK are prohibited if they are "inconsistent" with the UK's obligations under the ATT.
- 5.3. **Articles 6 and 7** set out the Treaty's core obligations. We address them at (I) and (II) below, assessing the UK's compliance with them in relation to exports to Saudi Arabia.

### (I) ARTICLE 6 ATT: PROHIBITIONS

5.4. Article 6, entitled "Prohibitions", sets out three bases on which the transfer (defined under ATT, Article 2(2) as the "*export, import, transit, trans-shipment and brokering*") of weapons and related items is prohibited under the ATT. These constitute absolute prohibitions, allowing for no exceptions. We focus in particular on the prohibition under Article 6(3), which provides as follows:

"A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

5.5. Article 6(3) absolutely prohibits the UK from authorising any transfer of conventional arms, ammunitions/munitions or parts or components within the scope of the ATT where it "*has knowledge at the time of authorisation*" that the arms or related items "*would be used*" to commit genocide, crimes against humanity and certain war crimes,



including grave breaches of the Geneva Conventions. In circumstances where the facts of the conflict in Yemen do not give rise to concerns regarding genocide or crimes against humanity, our analysis will focus exclusively on certain violations of IHL capable of falling under the heading of “grave breaches of the Geneva Conventions”, “attacks directed against civilian objects or civilians protected as such”, or “other war crimes”.

#### **(a) Grave breaches of the Geneva Conventions of 1949**

5.6. As noted above, Article 6(3) imposes an absolute obligation on the UK not to authorise transfers where it has knowledge that the weapons or related items in question would be used to commit grave breaches of the Geneva Conventions, as identified in the Conventions.<sup>141</sup> Insofar as the UK Government appears to classify the conflict in Yemen as an IAC, it would be required to assess the factual accounts of the conflict against the “grave breaches” regime. GCI is particularly relevant, given the multiple reports of strikes by the Saudi-led Coalition on hospitals and other medical facilities (see Annex incident viii). Those strikes could constitute grave breaches of GCI, under Article 50 GCI, in conjunction with Article 19 GCI.

#### **(b) Attacks directed against civilian objects or civilians protected as such**

5.7. Article 6(3) imposes an absolute obligation on the UK not to authorise transfers where it has knowledge that the arms or related items in question would be used in attacks directed against civilian objects or civilians protected as such. The prohibition on attacks against civilians and civilian objects is one of the most fundamental principles of IHL.<sup>142</sup> It can properly be understood, in line with the jurisprudence of international criminal tribunals, as referring not only to deliberate attacks on civilians and civilian objects but also to indiscriminate attacks which fail to discriminate between military objectives and civilian objects, which use weapons which are incapable of so discriminating, and/or which are disproportionate in terms of the incidental damage to civilian objects and/or the injury to civilians.<sup>143</sup>

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<sup>141</sup> See GCI, Art. 50, GCII, Art. 51, GCIII, Art. 130 and GCIV, Art. 147.

<sup>142</sup> The expression is similar to APII, Art. 13(2) and API, Art. 51(2), deemed to constitute customary international law in NIACs and IACs respectively, which provide that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack”.

<sup>143</sup> See in this regard the jurisprudence of the International Tribunal for the former Yugoslavia, in particular ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29, Appeals Chamber Judgment, 30 November 2006 (*Galić Appeals Judgment*), §§132-133 and § 57; ICTY, *Prosecutor v. Thomas Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, § 159; ICTY, *Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14, Appeal Chamber Judgment, 17 December 2004, §§ 47, 57 and 105; ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-T, Trial Chamber Judgment, 15 April 2011 (*Gotovina Trial Judgment*), § 1841 (analysis not overturned on appeal).

**(c) Other war crimes as defined by international agreements to which the State is a party**

5.8. Article 6(3) further absolutely prohibits the UK from authorising transfers where it has knowledge that the arms or related items in question would be used in the commission of “*other war crimes as defined by international agreements to which the State is a party*”. This refers to international agreements to which the UK is a party: it is the *authorising State’s* treaty obligations which are in question, not those of the *recipient State*. Thus, in relation to arms exports to Saudi Arabia from the UK, the relevant war crimes include those criminalised in the ICC Statute (see paragraphs 2.32 and 2.33 supra), to which the UK is a State party, notwithstanding the fact that Saudi Arabia is not. Insofar as the UK considers the conflict in Yemen to constitute an IAC, it would have to consider the war crimes regime applicable to IACs as well as NIACs, in particular as it dovetails with the “grave breaches” regime of Additional Protocol I and under the Four Geneva Conventions.

**(d) “Knowledge” that transferred arms or items would be used in attacks directed against civilians/civilian objects or in the commission of other war crimes**

5.9. As set out above, the absolute prohibition on the UK authorising transfers to other States applies if the UK has “*knowledge*” that the arms or items to be transferred “*would be used*” in attacks directed against civilians/civilian objects or in the commission of the war crimes. The ATT contains no further guidance, however, as to how that test is to be interpreted or applied.

5.10. Standards imported from international criminal law are necessarily of limited suitability in assisting States in reaching a decision under Article 6(3). That is principally because international criminal law standards are concerned with the different exercise of establishing a living person’s criminal liability based on their guilty intent (*mens rea*) to commit or assist a war crime. International law does not recognise the criminal liability or guilty intent of a State, and consequently there can be no way of assessing such matters. Secondly, the requisite standard for criminal responsibility as an accomplice under international criminal law is not settled: the test under Article 25(3)(c) of the ICC Statute is not widely recognised as reflecting customary international law,<sup>144</sup> and the case law of the different international tribunals is contradictory.<sup>145</sup>

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<sup>144</sup> See in this regard, e.g., *Brief of Amici Curiae International Law Scholars William Aceves, Philip Alston, M. Cherif Bassiouni, et al, in Support of Petitioners, US Supreme Court, Presbyterian Church of Sudan v Talisman*, 30 April 2010 <http://hrp.law.harvard.edu/wp-content/uploads/2013/07/talisman-amicus-final-filed-4-30-10.pdf>; J. Kyriakakis, “Development in international criminal law and the case of business involvement in international crimes”, Vol. 94, No. 887, *International Review of the Red Cross* 2012, 981 at pp. 998 – 1000.

<sup>145</sup> See, e.g. ICTY, *Prosecutor v. Šainović*, Case No. IT-05-87-A, Appeals Judgment, 23 January 2014; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Appeals Judgment, 28 February 2013; and Special Tribunal for Sierra Leone, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-A, Appeals Judgment, 26 September 2013.

- 5.11. The ILC Articles are also of limited assistance in this regard, insofar as they relate to the prior knowledge of the *UK*, in supplying arms to Saudi Arabia (rather than to the acts of Saudi Arabia in the course of the conflict). That is because, as reflected in the Commentary on the ILC Articles, a State cannot be held internationally responsible for aiding or assisting an act unless (i) its aid or assistance was given “*with a view to facilitating the commission of that act*”, and (ii) its aid or assistance actually facilitated the act.<sup>146</sup> A similar test, which featured at one point in the draft ATT, would have prohibited a State party from authorising a transfer “*for the purpose of facilitating... war crimes...*”<sup>147</sup> but that standard was rejected in the final text of the treaty in favour of a lower standard of “knowledge”, which does not include a purposive element.
- 5.12. In our view, standards imported from the jurisprudence of the ICJ (and other international courts and tribunals dealing with analogous matters) dealing with breaches by States of their international obligations are more relevant, in particular those enunciated by the ICJ in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*. That is because the ICJ was there concerned with assessing one State’s obligations in relation to the prevention of *future* breaches of international law by another State (in that case, breaches of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide). That is more analogous to the exercise required by Article 6(3) of the ATT, which concerns the assessment by one State of the risk of *future* violations of international law by another State or its nationals.
- 5.13. In the *Bosnia v. Serbia* case, the ICJ held that “knowledge” includes “constructive knowledge” of matters of which the State “*should normally have been aware*”, finding that:
- “[A] State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”<sup>148</sup>
- 5.14. On this basis, our view is that the UK would be in breach of Article 6(3) if it transferred weapons or other items to Saudi Arabia in circumstances where it “*was aware, or should normally have been aware*” that they would be used in attacks directed against civilians/civilian objects or in the commission of war crimes.

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<sup>146</sup> ILC Art. 16.

<sup>147</sup> UN Conference on the Arms Trade Treaty, *Draft of the Arms Trade Treaty*, 1 August 2012, UN doc. A/CONF.217/CRP.1, 26 July 2012 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/448/96/PDF/N1244896.pdf?OpenElement>.

<sup>148</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia And Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, §432, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

**(e) Determining whether the weapons “would be used” in the commission of direct attacks against civilians/civilian objects or war crimes**

- 5.15. Having determined that “knowledge” for the purposes of Article 6(3) may be *imputed* to the UK, we turn then to consider the appropriate test for determining whether authorised weapons or items “*would be used*” in attacks against civilians/civilian objects or in the commission of war crimes. Two questions are particularly relevant to this analysis. The first is what information the UK is required to seek out – or, put another way, what information would be deemed to form part of the UK’s imputed knowledge. The second relates to the standard of “proof” applicable to the UK in determining whether or not, in its analysis, the transfer “would be used” to commit serious violations of international law.
- 5.16. For the reasons set out above, the standard to be used is not that of the criminal trial, and it would not be correct to focus on questions of “intent” or *mens rea* (which are relevant in assessing individual criminal responsibility). Rather, the appropriate assessment is more analogous to the assessment, for example, that the UK is required to make in determining whether returning a refugee or asylum-seeker to his or her country of origin would constitute *refoulement* – a determination which turns on whether the person’s life “*would be threatened*” on return.<sup>149</sup>
- 5.17. In situations of potential *refoulement*, the UK is under a similar obligation not to transfer (in this case, not to transfer a person) where there is a certain level of risk of a future event, the likelihood of which it is under an obligation to evaluate. The UK courts have emphasised that in making the assessment of future risk, the decision-maker must:
- “look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence... Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and ... reach his view as a whole on the evidence as a whole”.<sup>150</sup>
- 5.18. The UK Special Immigration Appeals Commission has emphasised “*the value... of NGO reports*”<sup>151</sup> in undertaking such evaluations, with information provided by Amnesty International being given particular consideration.<sup>152</sup> In the UK, the level of proof needed to assess the future risk in refugee and asylum cases is described as “*a*

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<sup>149</sup> 1951 Convention Relating to the Status of Refugees, Art. 33(1).

<sup>150</sup> UK Asylum and Immigration Tribunal, *SM (Section 8: Judge’s process) Iran* [2005] UKAIT 00116, §10.

<sup>151</sup> UK Special Immigration Appeals Commission (“SIAC”) decision in *Y v. Secretary of State for the Home Department* [2006] UKSIAC 36/2004, §326.

<sup>152</sup> *Ibid*, § 205.

*reasonable degree of likelihood*".<sup>153</sup> This is equivalent to "a reasonable likelihood", "a real possibility", or a "real risk".<sup>154</sup> It is much lower than the criminal standard of "beyond reasonable doubt", and it is lower also than the civil standard of "the balance of probabilities" or "more likely than not".

5.19. Another analogous test are those that apply under Article 3 of the European Convention on Human Rights and Article 3 of the 1984 UN Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. These prohibit the UK from transferring a person to another State where there are grounds for believing that s/he would be in danger of being subjected to an international crime (torture). Article 3 UNCAT provides:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

5.20. Article 3 UNCAT underscores that, although the assessment looks to the future, the decision-maker must take into account "*all relevant considerations*", including any past or current pattern of gross violations of international law. As to the standard of proof, the UN Committee on Torture has held that the prohibition on *refoulement* will apply where there is "*a foreseeable, real and personal risk*" of the person being tortured in the country to which it is proposed that they should be returned.<sup>155</sup>

5.21. In our view, the above analyses may be considered as analogous to those with which the UK is required to engage in determining the permissibility of an export pursuant to Article 6(3) ATT. Our opinion is that pursuant to Article 6(3), the UK would have to consider all the evidence in the round in relation to a particular transfer, including any allegations or evidence of war crimes being committed by Saudi Arabia and its associated forces. If, having regard to that evidence, the UK were aware, or should normally have been aware, at the time of authorisation of an arms transfer, of a real risk of the arms or items in question being used in future attacks directed against civilian objects or civilians protected as such, or other war crimes in Yemen, it would be in breach of Article 6(3) if it nevertheless proceeded to authorise the transfer.

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<sup>153</sup> UK Home Office, *Asylum Policy Instruction: Assessing credibility and refugee status*, 6 January 2015, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397778/ASSESSING\\_CREDIBILITY\\_AND\\_REFUGEE\\_STATUS\\_V9\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397778/ASSESSING_CREDIBILITY_AND_REFUGEE_STATUS_V9_0.pdf).

<sup>154</sup> *Ibid.*

<sup>155</sup> UNCAT, *E.A. v. Switzerland*, UN doc. CAT/C/19/D/028/1995, 10 November 1997 at §11.5.

**(f) Reliance on State assurances**

5.22. Consistent with the above, the UK may properly have regard to assurances given by Saudi Arabia in determining whether it is prohibited from transferring a particular item under Article 6(3). However, that does not mean that the UK may give pre-eminence or preference to those assurances, or may accept them at face value without itself assessing whether there have been violations of international law in the past, or whether there is a risk of such violations in the future. Any assurances given by States in relation to behaviour prohibited under international law must be treated with caution. The question of State assurances – in relation to torture – has been considered in detail by the UK courts, including in the context of the protracted litigation relating to the deportation of Abu Qatada to Jordan. The House of Lords underscored in relation thereto that:

“there is an abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by State agents is endemic”.<sup>156</sup>

5.23. Similar scepticism should also apply, in our view, to assurances given by States which are regarded as serious violators of their international obligations, and in relation to whom allegations of serious violations of IHL have been levied by credible and trustworthy international bodies and NGOs. Indeed, the UK has already acknowledged, officially, that assurances given by States in the context of arms transfers are not to be given undue deference and may not be credible. Thus, in *R (on the application of Hasan) v Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin), a case challenging the authorisation of export licences for military equipment to Israel, the Secretary of State confirmed:

“that, due to the misuse of a particular export, the Secretary of State would not rely on assurances about the extent of the intended use given by the Israeli authorities”.<sup>157</sup>

5.24. The European Court of Human Rights (“ECtHR”) has considered the use of assurances in a number of cases, including most recently *Dzhurayev v Russia* (2013) 57 E.H.R.R. 22. In that case, the ECtHR made clear that assurances are not in themselves sufficient to found a conclusion that there is no risk of breaches of international law (in that case, the risk of ill-treatment):

“155 [...] assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.

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<sup>156</sup> *RB and U (Algeria) v. Secretary of State for the Home Department and Secretary of State for the Home Department v OO (Abu Qatada) (Jordan)* [2009] UKHL 10, § 115.

<sup>157</sup> *R (on the application of Hasan) v. Secretary of State for Trade and Industry* [2007] EWHC 2630 (Admin), § 12.

The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.

156. With reference to extradition or deportation, this means that in cases where an applicant provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government, the Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources, such as, for instance, other Contracting or non-contracting States, agencies of the United Nations and reputable non-governmental organisations.”

5.25. In our opinion, the UK is similarly required to ensure that its assessment that Saudi Arabia has complied and continues to comply with the law of armed conflict and with its obligations under IHL and IHRL, based on the latter’s assurances, was sufficiently supported by other materials. This means affording appropriate weight to materials originating from the UN and reputable NGOs, in order for it properly to find that transfers to Saudi Arabia were not prohibited pursuant to Article 6(3).

**(g) Assessment of breach of Article 6(3) ATT**

5.26. **The reports, analyses, statements of concern and resolutions by UN spokespersons, EU bodies, international organisations and NGOs concerning attacks by the Saudi-led Coalition directed against civilians and civilian objects, and providing *prima facie* evidence of war crimes, are numerous and, in our view, credible. They include reports and analyses of the ten incidents we have set out at paragraph 3.7 and in the Annex. The UK Government has stated that it has considered those reports and has taken their contents seriously. We therefore take the view that it has actual knowledge, not just constructive knowledge, of the use by Saudi Arabia of weapons, including UK-supplied weapons, in attacks directed against civilians and civilian objects, in violation of international law.**

5.27. **We are not privy to classified information that may have been made available directly to the UK by the Saudi Arabian authorities about those – and other – incidents. However, we note that the UK has not claimed to have been provided with such information and, insofar as it is available, it does not appear to have been provided to the UN, the EU or any NGOs involved in monitoring the conflict, so as similarly to assuage their concerns. On the contrary, based on the materials available to us, there appears to be a wholesale failure by Saudi Arabia: (i) to provide an explanation for those incidents; (ii) to accept any responsibility for reported attacks directed against civilian objects and/or civilians, including *prima facie* disproportionate attacks; and/or (iii) to conduct any – or any proper – inquiry into any such attacks.**

5.28. **In light of the above, we conclude that it is more likely than not that future transfers by the UK of weapons or items capable of being deployed against**

civilians or civilian objects would be used in a similarly unlawful manner. We are therefore of the view the UK has, or should have, knowledge that weapons would be used in future attacks directed against civilian objects or civilians protected as such, or in the commission of war crimes in Yemen. Consequently, in such circumstances, any authorisations of transfers of weapons or related items capable of being deployed in a similar way almost certainly constitute, in our view, a breach of Article 6(3). More particularly, we view any such authorisations granted on the basis of Saudi assurances alone, or in circumstances in which such assurances are contradicted by credible evidence arising from other reputable sources, as a breach of the UK of Article 6(3).

5.29. It appears that the UK may have misdirected itself as a matter of law and procedure in reaching the opposite conclusion. The UK Government's public statements about its arms transfers to Saudi Arabia suggest a failure to understand the nature and effect of the ATT obligations binding on the UK, and of the requirements of international law more generally. We consider in particular that:

- the UK Government's assertion that the end-use of weapons transferred from the UK is "*an operational matter for the Saudi military authorities*", rather than matter for the UK,<sup>158</sup> is inconsistent with the UK's obligation under Article 6(3) (and Article 7) ATT to ascertain *prior to transfer* the use to which the weapons would be put; and
- the UK Government's stated position that it is not for the UK to adjudge whether or not Saudi Arabian forces have committed war crimes in Yemen, such determinations being better left to international judicial opinion,<sup>159</sup> reflects a fundamental misunderstanding of the obligation of the UK under Article 6(3) (and Article 7) ATT to assess the likelihood of the *future* occurrence of war crimes *prospectively*, rather than to adjudge their occurrence *retroactively*. It also represents a failure on the part of the Minister of State for the FCO to understand the framework for the adjudication of international crimes: there are currently *no* international courts in which war crimes committed in Yemen by Saudi nationals could be tried or otherwise adjudicated. Even if there were such courts, this fact alone could not alter the UK's obligations to prohibit a transfer of weapons where it knows that there is a real risk of them being used to commit such crimes.

5.30. Most significantly, the UK appears to have placed – and to be continuing to place – improper reliance on broad assurances provided by Saudi Arabia that the State itself and/or those planning military operations on its behalf, had no "intention"

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<sup>158</sup> See § 4.5 and Parliamentary question 7824 at fn. 133.

<sup>159</sup> See §4.5 and Parliamentary question HL2723 at fn. 134 *supra*.



to commit war crimes in the past, and has/have no intention of doing so in the future. While the UK has repeatedly asserted that it is continuing to “engage” with Saudi Arabia on those assurances, it has not asserted – as highlighted above – that it has seen the results of any investigation(s) by Saudi Arabia disproving the allegations contained in UN, EU and NGO statements and reports, such as to have been able to properly dismiss them as not “credible”. Rather, the UK’s position appears to be – given that Saudi Arabia has asserted that it and/or those planning military operations on its behalf has/have no “intention” to target civilians directly or to commit war crimes – that the mental element or *mens rea* for behaviour prohibited under Article 6(3) has not been proven, and therefore no crimes would be committed in the future.<sup>160</sup> The apparent flaws in the approach set forth by the UK are as follows:

- (i) Article 6(3) refers to “attacks directed against civilian objects or civilians protected as such” not to *intentional* attacks, rendering questions of intent or “state of mind” inappropriate to an analysis of whether they have occurred. It also covers indiscriminate or disproportionate attacks. This is important in relation *inter alia* to the reported extensive destruction of Yemeni property (see, for example, incidents i, ii, iv, v, vi, and viii), including the area bombardments of Yemeni cities, following their designation as “military targets” (incidents iv and v), and the repeated use of indiscriminate cluster munitions in built up areas (incident ix). These are examples of attacks by Saudi Arabia which were clearly *prima facie* unlawful for their disproportionate and/or indiscriminate impact on civilians, regardless of questions of intent;
- (ii) further, the ATT regime is concerned with the actions and behaviour of States, which are not treated in established international law as being capable of committing war crimes as such. Therefore, any purported evaluations by the UK of the “state of mind” of Saudi Arabia or of its Coalition to commit war crimes is without established legal basis;
- (iii) the appropriate test for assessing the responsibility of Saudi Arabia for acts committed in Yemen is that set out in the ILC Articles: whether they engage Saudi Arabia’s international responsibility depends on whether the acts are violations of international law and whether they can properly be attributed to the State, *i.e.*, whether they were perpetrated by members of its armed forces and/or by persons under its effective control. There is no separate requirement of fault or wrongful intent on behalf of the State;

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<sup>160</sup> Our instructions are that this is one of the key explanations provided by UK Governmental officials as to why they have, to date, dismissed allegations of violations of IHL by the Saudi-led Coalition in Yemen as not “credible”. See fn. 122 *supra*.

- (iv) the UK Government's focus on questions of "intent" has caused it to fail to take proper account of compelling *prima facie* evidence of attacks against civilians and civilian objects and of acts constituting violations of IHL which have been reported on and/or condemned by UN and EU bodies, international organisations and NGOs; and
- (v) instead, the UK is affording unexplained and *prima facie* unreasonable weight to blanket "assurances" from Saudi Arabia, notwithstanding the UK's own recognition of the unreliability of State assurances in the arms transfer context; notwithstanding the fact that those assurances are provided by a State that the UK considers to have a "concerning" history of non-compliance with international law; and notwithstanding the fact that the assurances are contradicted by contrary information from reliable sources;
- (vi) a reliance on State assurances, not backed up by reliable corroborating independent information and data, is insufficient and inadequate in discharging the UK's obligation under Article 6(3); as above, such reliance, in our view, would constitute a breach of Article 6(3) in and of itself.

5.31. For the reasons set out above, we are of the view that in such circumstances, the future authorisation by the UK of transfers of conventional arms or related items, within the scope of the ATT and capable of being deployed in attacks against civilians or civilian objects or in the commission of war crimes in Yemen, would constitute a breach by the UK of its obligations arising under Article 6(3). Further, previous authorisations by the UK of the transfer of such arms or items would have constituted a breach by the UK of its obligations under Article 6(3), at the very least from May 2015, by which date the aerial bombardment of Saada had occurred and a clear pattern of behaviour of the type identified in Article 6(3) had emerged.

## (II) ARTICLE 7 ATT: EXPORT AND EXPORT ASSESSMENT

5.32. Article 6 is not the only provision of the ATT prohibiting arms transfers. Article 7, entitled "Export and Export Assessment", is also key in this regard. Where a proposed export within the scope of the ATT is not absolutely prohibited under Article 6, the UK is required under Article 7 to conduct a risk assessment of the export prior to authorisation. This must occur for any and every export of conventional arms, ammunitions, munitions or parts/components within the scope of the ATT. Article 7 provides in relevant part as follows:

- "1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms..., under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant

factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
  - (b) could be used to:
    - (i) commit or facilitate a serious violation of international humanitarian law;
    - (ii) commit or facilitate a serious violation of international human rights law... .
2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.
  3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export... .
  5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export... .
  7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.”

5.33. We consider below what this obligation requires in practice.

**(a) The Article 7 risk assessment procedure to be conducted by the UK**

5.34. The risk assessment in which the UK must engage pursuant to Article 7(1) can properly be understood as a two-stage test.

- (i) As a first stage, under Article 7(1)(a), the UK is required to assess the potential for the export to contribute to or undermine peace and security – whether international, domestic or pertaining in another State (here, Saudi Arabia or Yemen).
  - If, on balance, and despite any mitigating measures that can be undertaken (pursuant to Article 7(2)), the UK assesses that the export of arms or items “would” undermine peace and security, the request for authorisation must be denied. The use of the word “would” requires a real risk of such a negative impact.
  - Conversely, if, on balance, the UK were to determine that the proposed export of arms or items “would”, overall, contribute to peace and security, or

would have a neutral impact, the UK would then have to consider the second stage of the test.

- (ii) As a second stage, in accordance with Article 7(1)(b), the UK is required to assess the potential that the arms or items “*could*” be used to commit or facilitate a serious violation of IHL or IHRL, or an act of terrorism or transnational organized crime. If the UK were to conclude that, notwithstanding any mitigating measures that could be taken, the risk of possible serious human rights or humanitarian law violations occurring remained “overriding”, pursuant to Article 7(3) it would have to refuse the export. If that risk were not “overriding” (see further below), the export could be authorised.

5.35. Article 7(1) stipulates that the risk assessment must be conducted in “*an objective and non-discriminatory manner*”, “*taking into account relevant factors*” including “*information provided by the importing State*”. Pursuant to Article 8(1), such information may include “*end use... documentation*”, i.e. the information regarding the intended end use of the weapons (the conduct of hostilities in armed conflict, domestic sale, peacekeeping, etc.) and “*end user... information*”, i.e. information relating to the intended end user within Saudi Arabia, including *e.g.*, their record of compliance with IHRL and IHL. The other “relevant factors” or irrelevant factors are not stipulated. However, they would undoubtedly include the nature, type, and quantity of weapons to be exported, their usual and reasonably foreseeable uses, the general situation in Saudi Arabia and its surrounding region, and reports and statements by UN bodies and/or NGOs relating thereto. Thus, the risk assessment under Article 7 is not dissimilar in scope to the determination process in which the UK must engage under Article 6(3).

5.36. Although the risk assessment process under Article 7 is forward-looking, focusing on the likelihood of future behaviour, past conduct by Saudi Arabia will necessarily be a relevant indicator as to the likely future conduct of the State. While the UK may properly have regard to assurances given by receiving States in conducting the Article 7 risk assessment, an assessment which focused on assurances to the exclusion of all other evidence, or gave unreasonable primacy to such assurances against a wealth of contradictory, factual information would not be “objective”, as required under Article 7(1). For the reasons set out at paragraphs 5.22-5.25 *supra*, undue deference to State assurances would be as impermissible in relation to an Article 7 risk assessments as in relation to Article 6(3).

**(b) Potential that the arms export would contribute to or undermine peace and security**

5.37. Pursuant to the first stage of the Article 7 assessment process, an export must be assessed for its potential to contribute to or undermine peace and security. It *must* be refused if there is a real possibility that it “would” undermine peace and security.

5.38. Given that the UK has authorised the transfer of weapons and related items to Saudi Arabia, in the context of the conflict in Yemen, and knowing that those items or weapons could or would be used in that conflict, it must have taken the position that the authorised transfers *would not* undermine peace and security. It appears to have reached that view on the basis that Saudi Arabia is acting in support of the internationally recognised Yemeni Government, to combat an insurgency which itself risks undermining peace and security. It is noteworthy that the UK's position does not appear to have much support in international commentary regarding the conflict, and does not appear to be reflected in the escalating hostilities on the ground. The European Parliament, for example, has noted that the “*developments carry grave risks for the stability of the region, in particular that of the Horn of Africa, the Red Sea and the wider Middle East*”.<sup>161</sup> The European Parliament has unequivocally

“condemn[ed] the air strikes by the Saudi-led coalition and the naval blockade it has imposed on Yemen, which have led to thousands of deaths, have further destabilised Yemen, have created conditions more conducive to the expansion of terrorist and extremist organisations such as ISIS/Da’esh and AQAP, and have exacerbated an already critical humanitarian situation.”<sup>162</sup>

5.39. For those reasons, a conclusion that the transfer of arms to Saudi Arabia, which could be used in the conflict in Yemen, *would not* undermine peace and security is at best highly questionable. We consider that there is a strong argument that transfers should therefore be refused under the first stage of this test.

**(c) Potential that the arms export could be used in the commission or facilitation of serious violations of international humanitarian law**

5.40. Pursuant to the second stage of the Article 7 assessment process, an authorisation for export must be refused by the UK if the export “could be used” in the commission or facilitation by Saudi Arabia of serious violations of IHL (subject to mitigating measures and later considerations of “overriding risk” *infra*). For the purposes of the ATT, “serious violations” of IHL would include: (i) violations of the prohibitions contained in Common Article 3 and APII (applicable in NIACs only), insofar as the latter violations infringe fundamental values or have serious consequences for individual civilians or the civilian population as a whole; (ii) violations of the norms covered by the international war crimes regime, including war crimes listed in Article 8 of the ICC Statute; (iii) grave breaches of the four Geneva Conventions and grave breaches as specified under API (applicable in IACs only); and (iv) other war crimes under customary international law (applicable in both NIACs and IACs). As set out at paragraph 2.18 *supra*, in our view “serious violations” also include deliberate attacks on the civilian population and/or on civilian objects, indiscriminate attacks, disproportionate attacks and attacks launched without sufficient precautions to avoid

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<sup>161</sup> See European Parliament resolution at fn. 100, preambular § D.

<sup>162</sup> *Ibid*, preambular §§ R and S.

or mitigate risks to civilians, when they have serious consequences for individual civilians or for the civilian population.

5.41. Article 7(1) ATT has broader application than Article 6(3), for three reasons: it requires the UK to consider: (i) the risk of any serious violation of international IHL or IHRL, in addition to attacks directed at civilian objects and those war crimes contained in “international agreements” to which the UK is a party; (ii) the potential of arms transfers to be used in the *facilitation* – not merely the commission – of serious violations of international law, and (iii) whether they *could* be used in a serious violation of IHL or IHRL, not whether they *would* be so used; the threshold test is therefore significantly lower. However, there must be a potential causal link between the specific export in question and the risk of a serious violation for an export to be refused on this basis.

**(d) Potential that the arms export could be used in the commission or facilitation of a serious violation of international human rights law**

5.42. Article 7(1)(b) is concerned not only with serious violations of IHL, but also with serious violations of IHRL. The UK must refuse any transfer of weapons or items, which “*could be used*” in the commission or facilitation by Saudi Arabia of such serious violations (subject – also – to mitigating measures and later considerations of “overriding risk” *infra*). As with regards to Article 7(1)(b)(i), there must be a potential causal link between the export in question and the risk of a serious IHRL violation for an export to be refused on this basis.

5.43. Although there is no established or general definition of a serious violation of IHRL, and no consistent usage of the expression,<sup>163</sup> it can be properly understood to refer to violations which are particularly serious by their nature (*e.g.* violations of the prohibition on the arbitrary deprivation of life), by the manner in which they are committed, and/or by the impact of the violation on the potential victims.<sup>164</sup> Arms transfers are capable of affecting the enjoyment of a large number of international human rights, protected under international treaties and under customary international law, including:

- the right to life;
- the right to freedom from torture and other forms of inhuman or degrading treatment;
- the right to security of person; and

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<sup>163</sup> N.B. The UN Security Council appears to use the terms “grave” and “serious” interchangeably in relation to violations of international human rights.

<sup>164</sup> Geneva Academy of International Humanitarian Law and Human Rights, *What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*, Academy Briefing No. 6, August 2014, available at: <http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law%20Academy%20Briefing%20No%206.pdf>

- the rights to health, education, food and housing.

**(e) Mitigation measures**

- 5.44. Having obtained all the necessary evidence to conduct a risk assessment, the UK must then consider if there are any mitigation measures that Saudi Arabia or the UK itself could take to counter any risks identified. Article 7(2) of the ATT refers to “*confidence-building*” measures and “*jointly developed and agreed programmes by the exporting and importing States*” as possible mitigation measures. Other examples might include end-user certificates providing as to the end-use of the item, and/or training of the importing State’s officials and/or troops in human rights and IHL.
- 5.45. In relation to arms exports to Saudi Arabia, we note that the UK Government has stated that it is “*offering Saudi Arabia advice and training... to help ensure continued compliance with International Humanitarian Law*”.<sup>165</sup> This might be characterised as a mitigation measure, even if it is not referred to as such. However, we do not consider that any training provided by the UK to certain members of the Saudi military forces, *while Saudi Arabia is already involved in an armed conflict*, could reasonably be said to be capable of mitigating the immediate, ongoing risk of serious violations of IHL in the conflict.

**(f) Reaching a decision: the “overriding risk” test**

- 5.46. Having conducted a risk assessment and considered possible mitigation measures, the UK is required to come to a determination as to whether to authorise the export based on whether there is an “overriding risk” of any of the negative consequences set out in Article 7(1)(a) and (b) occurring.
- 5.47. The term “overriding risk” contained in Article 7(3) was – and remains – amongst the most contentious provisions of the ATT. The concept of “overriding risk” is not established in international law, nor does it have a clear, precise meaning that is generally understood. The *Oxford English Dictionary* defines “overriding” as “*more important than any other considerations*”. Another interpretation of the term “overriding risk”, advanced *inter alia* by one State party on ratification of the ATT, is that it means a risk “*more likely than not*” to occur.<sup>166</sup>
- 5.48. During the ATT negotiations, frequent attempts were made by a number of States to replace “overriding” by “substantial” or “clear”, in order to create a measurable standard regarding the risks to peace and security and/or the risk of serious violations of international law, which would preclude an export being authorised. The UK itself

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<sup>165</sup> See Cusick at fn. 137 *supra*.

<sup>166</sup> Declaration of Liechtenstein upon ratification of the ATT, 16 December 2014, available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>.

took the view that “substantial risk” was an appropriate test.<sup>167</sup> Its position was that “unless a State is satisfied that a potential transfer would not breach international commitments”, including that it would not be used “in the commission of serious violations of international or human rights law”, the State should be required to refuse permission for the transfer.<sup>168</sup>

5.49. Our view is that the ATT would only permit a State to authorise an export if, having determined, as a first stage, that the export would not undermine peace and security, the State were also to determine, as a second stage, that the possible risk of a serious violation of IHL and/or IHRL would not be so grave as to override any positive contribution the export might make to peace and security.<sup>169</sup>

### **(g) Reviewing the authorisation**

5.50. The prohibition on authorisations of transfers of arms or items under Article 6 concerns the UK’s knowledge “at the time of the authorisation”. Similarly, in relation to Article 7, the assessment of risk takes place *prior to authorisation*, not prior to transfer. Some States had expressed concern at this, given the often significant lapse of time between authorisation and transfer and the consequent potential for intervening information, proposing that the time of transfer was the more appropriate point.<sup>170</sup> However, that concern was not translated into a textual revision. As drafted, the ATT merely “encourage[s]” but does not oblige States parties (including the UK) to reassess an authorisation if they become aware of new information after authorisation but prior to transfer (Article 7(7)). This does not preclude States from instituting stricter domestic procedures *requiring* such reassessment. As set out below at paragraphs 8.4-6.6 *infra*, the policy in the UK is to reassess authorisations.

### **(h) Assessment of breach of Article 7 ATT**

**5.51. We have sought to apply the facts, as publicly available to us, to the two-stage Article 7 assessment process. For the reasons set out at paragraphs 5.38-5.39 above, including the conclusions reached by the European Parliament regarding the negative impact of the conflict in Yemen on peace and security, any determination that the first stage of the Article 7 test has been met, appears to us**

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<sup>167</sup> UN Conference on the Arms Trade Treaty, *Compilation of Views on the Elements of an Arms Trade Treaty: Background Document Prepared by the Secretariat*, 10 May 2012, UN Doc. A/CONF.217/2, p. 108, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/CONF.217/2](http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/2).

<sup>168</sup> UN General Assembly, Sixty-second Session, *Report of the Secretary-General: Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 17 August 2007, UN Doc. A/67/278(Part II), available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/67/278%28Part%20II%29&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/67/278%28Part%20II%29&Lang=E), p229; and UN *Compilation of Views* at fn. 167, p. 108

<sup>169</sup> See also Amnesty International, *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights*, London, 2015, pp. 19–20, at: <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>.

<sup>170</sup> R. Acheson, “News in Brief” in *Arms Trade Treaty Monitor*, No 6.7, 26 March 2013, available at <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor6.7.pdf> and R. Acheson, “News in Brief” in *Arms Trade Treaty Monitor*, No 6.8, 27 March 2013, available at <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor6.8.pdf>.



to be highly questionable. However, in circumstances where the UK appears to have concluded that there would be such a positive – rather than a negative – contribution, we proceed to consider the second stage of the test.

- 5.52. As to the second stage of the Article 7 assessment process, we have had regard to the information in the public domain, including the reports, analyses, statements of concern and resolutions by UN spokespersons, EU bodies, international organisations and NGOs concerning attacks by the Saudi-led Coalition. We have also assessed the ten incidents set out in the Annex to this opinion. Our view is that they constitute *prima facie* evidence of serious violations of IHL and IHRL. In the absence of any evidence of Saudi investigations into those incidents, much less any evidence of steps taken by Saudi Arabia to mitigate the risk of any future violations, we are of the view that there is a real risk that further serious violations could occur.
- 5.53. A consideration of the on-going blockade of Yemeni ports (incident x) is also important to our analysis. The effects of the blockade appear to be giving rise to (i) serious violations of the IHRL right to food, and (ii) serious violations of IHL. This is so in circumstances where the blockade is reported to have prevented and to be preventing the rapid and unimpeded passage of humanitarian relief and damage to the Yemeni population (now said to be on the brink of famine), a consequence that is plainly excessive in relation to any concrete and direct military advantage. Assurances and questions of intent on the part of Saudi Arabia or indeed of those involved in the planning of the blockade have no bearing on those matters. We note: (a) the absence of evidence to support a view that the transfer of arms to facilitate the blockade would contribute to peace and security to such an extent that the risk of such arms contributing to the commission or facilitation of serious violations of international law should not be considered overriding, and (b) that the UK has not sought to make such an assertion.
- 5.54. In circumstances where (i) there is *prima facie* evidence of violations having been – and still being – committed by the Saudi-led Coalition, (ii) there exists a risk that such a violation *could* occur in the future or continue to occur, and (iii) there is no evidence to suggest that UK exported weapons or items *would* make such a contribution to peace and security so as to override that risk, the transfer of weapons and related items by the UK to Saudi Arabia capable of being used in its military campaign in Yemen, including in particular in the enforcement of its blockade on Yemeni ports, constitutes a *prima facie* breach by the UK of Article 7.
- 5.55. In coming to this conclusion, we take the view that training provided by the UK to certain members of the Saudi military forces, *while the conflict is on-going*, is not capable of mitigating the immediate, on-going risk of serious violations of international law. Clear restrictions imposed by the UK on the end-use of weapons supplied to Saudi Arabia, prohibiting their use in Yemen, might be

capable of providing sufficient mitigation, insofar as they were capable of being enforced. However, there is no indication that this has been done or is contemplated, in circumstances where the UK Government has taken the position that the end-use of the weapons it supplies to Saudi Arabia is “*an operational matter for the Saudi military authorities*”, rather than a matter for the UK.<sup>171</sup>

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<sup>171</sup> See § 4.5 and Parliamentary question 7824 at fn. 133.

## 6. THE EUROPEAN UNION'S COMMON POSITION ON ARMS EXPORTS

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- 6.1. The European Union's ("EU") Common Position 2008/944/CFSP of 8 December 2008 (the "EU Common Position"), which replaced the prior EU Code of Conduct on Arms Exports of 1998, is an instrument of the European Council's Committee on Foreign and Security Policy.<sup>172</sup> It provides a detailed legal and policy framework for export controls of conventional arms, which is legally binding on the UK as an EU Member State. The EU Common Position is given domestic legal effect in the UK through the UK's Consolidated EU and National Arms Export Licencing Criteria (see further paragraph 8.18 *infra*).
- 6.2. At the heart of the EU Common Position are eight criteria against which all arms exports within its scope must be assessed on a case-by-case basis, by Member States, including the UK, prior to authorisation. (I) **EU Criterion 2** and (II) **EU Criterion 6**, are particularly relevant to this advice and are considered in turn below.<sup>173</sup> Overarching those criteria is (III) **Article 5 of the EU Common Position**, mandating that "*exports shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination*", which we consider briefly against recent statements by the UK Government.
- 6.1. In considering the EU Common Position criteria, we have had particular regard to the User's Guide to the EU Common Position developed by the EU Council's Working Party on Conventional Arms ("User's Guide"),<sup>174</sup> which, pursuant to Article 13 of the EU Common Position, "*shall serve as guidance for [its] implementation*". It summarises "*agreed guidance for the interpretation of [the eight] criteria*" and is intended for use primarily by export licencing officials.<sup>175</sup> The criteria guidance is intended to share best practice, by identifying factors to be considered when assessing export licences. However, it does not constitute a "set of instructions", and Member States remain "*fully entitled to... apply their own interpretations*" to the criteria.<sup>176</sup>

### (I) EU CRITERION 2: RESPECT FOR HUMAN RIGHTS IN THE COUNTRY OF FINAL DESTINATION AS WELL AS RESPECT BY THAT COUNTRY OF INTERNATIONAL HUMANITARIAN LAW

- 6.2. EU Criterion 2 provides in material part as follows:

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<sup>172</sup> EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, 13 December 2008, Official Journal of the European Union, L 335/99, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>.

<sup>173</sup> *Ibid*, Art. 1.

<sup>174</sup> Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP, Defining Common Rules Governing the Control of Exports of Military Technology and Equipment* ("User's Guide"), 20 July 2015, 10858/15, p. 2, available at: <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>.

<sup>175</sup> *Ibid*, p. 2.

<sup>176</sup> *Ibid*.

<sup>176</sup> *Ibid*, p.13.

“Having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall:

[...]

- (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by 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.”

6.3. As such, EU Criterion 2 has significant cross-over with ATT Article 7 (1)(b)(i) and (ii) (discussed at paragraphs 5.40-5.43 *supra*). We deal below in turn with its relevant provisions regarding (a) violations of IHRL and (b) violations of IHL.

#### **(a) Violations of IHRL**

6.4. EU Criterion 2 sets out a two-stage assessment process in relation to violations of IHRL, which Member States, including the UK, must conduct in respect of all authorisations of relevant transfers to Saudi Arabia.

6.5. First, the UK is required to conduct a broad assessment of the recipient Government’s (in this case, Saudi Arabia’s) attitude to relevant IHRL principles established by IHRL instruments. These include *inter alia* the principles established by the ICCPR, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. As set out in the User’s Guide, they include principles such as the right to a fair trial, freedom of expression and information, freedom of assembly, freedom of thought, conscience and religion, non-discrimination and economic and social rights. The User’s Guide highlights the following indicators as relevant to such assessment:

- the commitment of Saudi Arabia’s government to respect and improve IHRL and bring human rights violators to justice;
- its implementation record of relevant international and regional human rights instruments through national policy and practice; and
- the degree of cooperation of Saudi Arabia with international and regional human rights mechanisms.

6.6. As set out at paragraphs 3.16-3.17 *supra*, Saudi Arabia’s attitude toward human rights is recognised by the UK – and other States and international bodies – to be a matter of special concern.

- 6.7. Second, the UK must consider whether Saudi Arabia has committed “serious violations” of IHRL. The User’s Guide stipulates that relevant factors in the assessment of whether a violation of IHRL is “serious” include the character, nature and consequences of the violation in question and/or its systematic or widespread nature – underscoring that violations do not have to be systematic or widespread to be considered “serious” for the purposes of Criterion 2. The User’s Guide also emphasises that while a finding of a violation of IHRL made by competent bodies of the UN, EU or Council of Europe is to be noted particularly, *“the absence of a decision by these bodies should not preclude the Member States from the possibility of making an independent assessment as to whether serious violations have occurred”*.<sup>177</sup> Furthermore, where there is a finding of violation by one of the above bodies, there is no “prerequisite” that the competent body use the term “serious”: it is sufficient that it find that violations have occurred.<sup>178</sup>
- 6.8. The UK would not be precluded under Criterion 2, paragraph b, from granting a licence for arms exports to Saudi Arabia, notwithstanding its established record regarding IHRL. However, the UK must exercise “special caution” in so doing, taking into account *“the nature of the military technology or equipment”* to be exported. Here, the blockade is of particular concern. In circumstances where military equipment, including fighter jets and bombs, are capable of enforcing the blockade, and thereby impacting on the availability of food to the population in Yemen, “special caution” would need to be applied in relation to the transfer of any such equipment – which would, in any event, as assessed at paragraphs 5.31 and 5.54, constitute a violation of the UK’s obligations under the ATT.

### **(b) Violations of IHL**

- 6.9. Criterion 2, paragraph c, also requires the UK to conduct a two-stage assessment process in relation to violations of IHL. It is a more stringent test than that required under paragraph b in relation to violations of IHRL, requiring authorisation for the export to be denied *“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 IHL.
- 6.10. First, the UK is required to conduct a broad assessment of Saudi Arabia’s attitude towards relevant principles established by instruments of IHL. As specified in the User’s Guide, and as set out at paragraph 2.17 *supra*, the main principles of IHL applicable to the use of weapons in armed conflict are the principle of distinction, the prohibition against indiscriminate attack, the principle of proportionality, the requirement to take reasonable precautions, and the prohibition against means or methods of warfare of a nature to cause superfluous injury or unnecessary suffering.<sup>179</sup> Relevant questions for the UK to consider include whether Saudi Arabia has:

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<sup>177</sup> *Ibid*, p. 46.

<sup>178</sup> *Ibid*, p. 46.

<sup>179</sup> *Ibid*, p. 49.

- ratified the four Geneva Conventions and other key IHL treaties;
- ratified treaties that contain express prohibitions or limitations of certain weapons; and
- adopted national legislation or regulations required by the IHL instruments to which it is a party.<sup>180</sup>

6.11. Only the first question is clearly answerable in the affirmative.

6.12. Second, the UK is required to assess whether there is a “clear risk” that the military technology or equipment to be exported “might be used” in the commission of serious violations of IHL. As specified in the User’s Guide, serious violations of IHL include grave breaches of the four Geneva Conventions and of API and war crimes under Article 8 of the ICC Statute. These are set in paragraphs 2.19-2.24 and 2.31-2.32 *supra*. Serious violations of IHL also include serious violations of the key rules or principles of IHL, set out at paragraph 2.17 *supra*. Questions relevant to this second stage of the assessment include:

- Have violations been committed by members of Saudi Arabia’s armed forces?
- Has Saudi Arabia failed to investigate violations allegedly committed by members of its armed forces?<sup>181</sup>

6.13. It would appear that both questions are to be answered in the affirmative. There is a *prima facie* case that members of the Saudi armed forces, or other forces in the Saudi-led Coalition, have committed serious violations of IHL, which Saudi Arabia appears to have failed to investigate.

6.14. Neither the EU Common Position itself nor the User’s Guide provides guidance as to the meaning of the “clear risk” test which the UK must employ in determining whether military technology or equipment to be exported “might be used” in the commission of serious violations of IHL. The expression is therefore to be given its ordinary meaning. The use of the term “might” underscores that the bar established by Criterion 2, paragraph c, is not high; the possibility of such a risk suffices. In explaining the “clear risk” test, the User’s Guide stipulates that “*a thorough assessment of the risk... should include*” *inter alia* an inquiry into the recipient’s past and present respect for IHL and “*the recipient’s intentions as expressed through formal commitments*”.<sup>182</sup> The User’s Guide underscores that where a pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations of IHL, “*this should give cause for serious concern*”.<sup>183</sup> The User’s Guide recalls, in particular, the UK’s

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<sup>180</sup> *Ibid*, p. 50.

<sup>181</sup> *Ibid*, p. 51.

<sup>182</sup> *Ibid*, p. 54.

<sup>183</sup> *Ibid*, p. 54.

obligations under Common Article 1 of the four Geneva Conventions not to encourage a party to an armed conflict to violate IHL, not to take action that would assist in such violations, and to take appropriate steps to cause such violations to cease. In so doing, it recalls that

“[a]rms 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.”<sup>184</sup>

6.15. The User’s Guide lists 21 “relevant questions” for an assessment as to whether there is a “clear risk” of a violation of IHL, which (adapted to the particular case of potential exports to Saudi Arabia) include:

- Is there national legislation in place in Saudi Arabia prohibiting and punishing violations of IHL?
- Has Saudi Arabia put in place requirements for its military commanders to prevent, suppress and take action against those under their control who have committed violations of IHL?
- Has Saudi Arabia ratified the ICC Statute?
- Has IHL been incorporated in Saudi military doctrine and manuals, rules of engagement, instructions and orders?
- Have mechanisms been put in place to ensure accountability for violations of IHL committed by Saudi armed forces, including disciplinary and penal sanctions?
- Is there an independent and functioning judiciary in Saudi Arabia capable of prosecuting serious violations of IHL?<sup>185</sup>

6.16. As highlighted by the User’s Guide, the UK should have regard to a broad range of information sources in assessing whether there is “*clear risk*” that that the requested material or related technology might be used in the commission of serious violations of IHL. They include a common EU base of information sources available to the UK, as well as information from the UK’s diplomatic missions, from the UN and the ICRC, from international and local NGOs, and other “*reliable sources*”, including civil society.<sup>186</sup>

6.17. From information in the public domain, there are no clear affirmative answers to *any* of the questions posed in the User’s Guide. Indeed, the UK has identified particular concerns regarding the ability of the judiciary in Saudi Arabia fairly to prosecute *any* crimes,<sup>187</sup> much less serious violations of IHL committed by Saudi forces.

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<sup>184</sup> *Ibid*, p. 55.

<sup>185</sup> *Ibid*, pp. 55-58.

<sup>186</sup> *Ibid*, pp. 40-41.

<sup>187</sup> See Quinn and Smith at fn. 136.

**(c) Assessment of breach of EU Criterion 2**

6.18. We have considered the facts, as publicly available, and our analysis of those, against EU Criterion 2. For reasons set out in detail in Section 5 *supra* and in the Annex, we consider that there is a clear risk that military technology or equipment to be exported to Saudi Arabia, which is capable of being used in military attacks on Yemen or in the maintenance of the naval blockade of her ports, might be used in the commission of serious violations of IHL. We therefore conclude on the basis of the information available to us that the UK is required to deny export licences to Saudi Arabia of such military technology or equipment, and that any further authorisations of such licences would constitute a breach by the UK of the EU Common Position. We further conclude that any transfers authorised since May 2015, when there was clear *prima facie* evidence of serious breaches by the Saudi-led Coalition of IHL were also in breach of Criterion 2.

**(II) EU CRITERION 6: BEHAVIOUR OF THE BUYER COUNTRY WITH REGARD TO THE INTERNATIONAL COMMUNITY, AS REGARDS IN PARTICULAR ITS ATTITUDE TO TERRORISM, THE NATURE OF ITS ALLIANCES AND RESPECT FOR INTERNATIONAL LAW**

6.19. EU Criterion 6 provides in material part as follows:

“Member States shall take into account, *inter alia*, the record of the buyer country with regard to:

- (a) its support for or encouragement of terrorism and international organised crime;
- (b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law...”.

**(a) The nature and scope of EU Criterion 6**

6.20. As the wording of Criterion 6 makes clear, this criterion concerns the general behaviour of the buyer country with regard *inter alia* to its international commitments, rather than the impact of any particular export on compliance with such commitments. This is underscored in the User’s Guide, which states:

“Criterion Six has to be considered for buyer countries whose governments exhibit negative behaviours with respect to [international law]; thus, during the assessment the specific identity and the nature of the end-user or the equipment are not the main focus. In fact the focus of the analysis is the **behaviour of the buyer country**, more than any consideration of the risk that a particular transfer might have particular negative consequences.”<sup>188</sup> (emphasis in the original)

6.21. Consequently, in assessing whether to authorise a particular transfer, the UK must consider the general behaviour of Saudi Arabia, including its “*current and past record*”

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<sup>188</sup> User’s Guide at fn.174, p. 106.



with regard to its international commitments.<sup>189</sup> The questions the UK is encouraged to consider in assessing compliance with EU Criterion 6 include:

- Does Saudi Arabia normally infringe international law commitments or treaties, which it has voluntarily signed?
- Does Saudi Arabia have in place the legal, judicial and administrative measures necessary for the repression of serious violations of IHL?
- Has Saudi Arabia failed to take all feasible measures to prevent serious violations of IHL while engaged in armed conflict?
- Are there known or suspected links between Saudi Arabia and terrorist organisations or individual terrorists?
- Does Saudi Arabia criminalise the provision of funds to terrorists?
- Does Saudi Arabia refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts?<sup>190</sup>

6.22. Considerations of “international law” relate *inter alia* to fundamental customary international law provisions, including IHRL rights which have gained customary status. They include the prohibition on torture and the right to a fair trial. As to the international treaties which Saudi Arabia has voluntarily signed, they include the UN Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

6.23. The User’s Guide highlights that relevant “information sources” in assessing compliance of an export with Criterion 2 include a common EU base of information sources available to the UK, as well as information from the UK’s diplomatic missions, from the UN and other regional bodies and agencies, including the OSCE, the ICRC, the International Federation of the Red Cross and Red Crescent Societies, NGOs and other “reliable sources”, including civil society.<sup>191</sup> Information from those sources within the public domain suggests that Saudi Arabia has a particularly poor past and current record with regard *inter alia* to compliance with and enforcement of international commitments under customary and treaty law, including reporting requirements to UN treaty bodies.<sup>192</sup> By way of example, the EU Parliament has issued a resolution in which it:

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<sup>189</sup> *Ibid*, p. 105.

<sup>190</sup> *Ibid*, pp. 107-108 and 110-111.

<sup>191</sup> *Ibid*, pp. 40-41.

<sup>192</sup> See, e.g., UN OCHA, “Saudi Arabia must immediately halt execution of children – UN rights experts urge”, 22 September 2015, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16487&LangID=E>; Committee on the Rights of the Child, Forty-First Session, “Concluding Observations: Saudi Arabia”, 17 March 2006, CRC/C/SAU/CO/2, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SAU/CO/2&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SAU/CO/2&Lang=En;); and UNHRC, Twenty-seventh session, “Report of the Working Group on Arbitrary Detention”, 30 June 2014, UN Doc. A/HRC/27/48, available at: [www.ohchr.org/EN/HRBodies/HRC/.../A\\_HRC\\_27\\_48\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/.../A_HRC_27_48_ENG.doc).

“deplores the fact that, despite ratification of the International Convention against Torture, confessions obtained under duress or as a result of torture are common [... and] expresses its grave consternation at [Saudi Arabia’s] gross violation of a number of international human rights instruments to which [it] is a party”.<sup>193</sup>

6.24. Criterion 6 does not contain the mandatory language of Criterion 2, that a licence “*shall not be*” authorised in the event of breach. Instead, it requires States to “*take into account*” the above considerations. However, the User’s Guide makes clear that the difference in language does not make Criterion 6 any less important. It stipulates clearly that:

“Member States **will not issue a licence** where the general evaluation of the buyer country’s record with reference to Criterion Six is not positive.”<sup>194</sup> (emphasis added)

6.25. This makes clear that Criterion 6 is intended to be strictly enforced by Member States against States demonstrating general negative behaviour *inter alia* towards IHL, IHRL and terrorist activities. In this regard, it is worth recalling that the UK has classified Saudi Arabia as a particular “*country of concern*” due to “*the gravity of the human rights situation in the country, including both the severity of particular abuses and the range of human rights affected*”.<sup>195</sup>

### **(b) Assessment of breach of EU Criterion 6**

6.26. **In light of the above analysis, and the facts available to us and as set out in particular at paragraphs 3.15-3.17 *supra*, evidencing a negative attitude on Saudi Arabia’s part towards its international obligations arising *inter alia* under customary and treaty-based IHRL, authorisations of weapons and related items within the scope of the EU Common Position to Saudi Arabia would also appear to breach EU Criterion 6.**

## **(III) ARTICLE 5: REQUIREMENT OF RELIABLE PRIOR KNOWLEDGE OF END USE**

6.27. Article 5 of the EU Common Position provides in material part as follows:

“Export licences shall be granted only on the basis of **reliable prior knowledge of end use** in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or

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<sup>193</sup> European Parliament Resolution on Saudi Arabia, its Relations with the EU and its Role in Middle East and North Africa, 11 March 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0207&language=EN&ring=A7-2014-0125>.

<sup>194</sup> User’s Guide at fn. 174, p. 115.

<sup>195</sup> UK FCO, *Human Rights and Democracy Report 2014*, 12 March 2014, available at <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014>, Chapter XII.

some form of official authorisation issued by the country of final destination.”  
(emphasis added)

6.28. In assessing the compliance by the UK with Article 5, we have had particular regard to the recent response by the Secretary of State for Defence to a parliamentary question requesting information held by the MoD on “*whether any British-licensed weaponry has been used by Saudi Arabia to bomb Saada province in Yemen*”<sup>196</sup>. The response provided was as follows:

“The use of equipment and weapons supplied to the Saudis is an operational matter for the Saudi military authorities. The Saudis have assured us that British-supplied munitions will be used in compliance with international humanitarian law and we continue to engage with them on these assurances.”<sup>197</sup>

6.29. In our view the response suggests that the Secretary of State has failed properly to understand and give effect to the obligations binding on the UK pursuant to Article 5 of the EU Common Position. **Insofar as the response accurately reflects UK policy and practice, and on the basis that that the UK does not in practice seek to ascertain the end-use to which the requested weapons are to be put (relying instead on broad assurances from Saudi Arabia), such practice would appear to breach the UK’s obligations under Article 5 of the EU Common Position.**

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<sup>196</sup> See § 4.5 and Parliamentary question 7824 at fn. 133.

<sup>197</sup> *Ibid.*

## 7. THE OSCE PRINCIPLES GOVERNING CONVENTIONAL ARMS TRANSFERS

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- 7.1. As a member of the Organisation for Security and Cooperation in Europe (“OSCE”), the UK is also required to adhere to the OSCE Principles Governing Conventional Arms Transfers (“the OSCE Principles”) in its arms export decisions. The OSCE principles are given domestic legal effect in the UK through the UK’s Consolidated EU and National Arms Export Licencing Criteria (see further paragraph 8.17-8.18 *infra*), which prohibit the UK from granting an arms export licence if to do so would be “inconsistent” with the OSCE Principles. As such, adherence to the OSCE Principles is mandatory as a matter of UK domestic law and policy.
- 7.2. Principle 4 of the OSCE Principles requires States to “*promote and, by means of an effective national control mechanism, exercise due restraint in the transfer of conventional arms and related technology*”. In order to give effect to that principle, States (I) “**will take into account**” a number of factors in considering any proposed arms exports. They **are then required to avoid any transfers which breach any or all of the OSCE criteria** contained within the OSCE Principles (II). We deal with each of those propositions in turn below.

### (I) FACTORS STATES MUST TAKE INTO ACCOUNT

- 7.3. Pursuant to Principle 4(a), the factors the UK must “*take into account*” in considering proposed transfers are as follows:
- “(i) the respect for human rights and fundamental freedoms in the recipient country;
  - (ii) the internal and regional situation in and around the recipient country, in the light of existing tensions or armed conflicts;
  - (iii) the record of compliance of the recipient country with regard to international commitments, in particular on the non-use of force, and in the field of non-proliferation, or in other areas of arms control and disarmament;
  - (iv) the nature and cost of the arms to be transferred in relation to the circumstances of the recipient country, including its legitimate security and defence needs and the objective of the least diversion for armaments of human and economic resources;
  - (v) the requirements of the recipient country to enable it to exercise its right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations;
  - (vi) whether the transfers would contribute to an appropriate and proportionate response by the recipient country to the military and security threats confronting it;
  - (vii) the legitimate domestic security needs of the recipient country;
  - (viii) the requirements of the recipient country to enable it to participate in peacekeeping or other measures in accordance with decisions of the United Nations or the Conference on Security and Co-operation in Europe.”

7.4. Factors (i), (ii), (iii) and (v) are particularly relevant in relation to arms exports to Saudi Arabia in the context of the conflict in Yemen, in light of the matters set out in Sections 1-4 *supra*.

## **(II) CRITERIA ON WHICH TRANSFERS MUST BE REFUSED**

7.5. Pursuant to Principle 4(b), the UK “*will avoid transfers which would be likely to*”:

- “(i) be used for the violation or suppression of human rights and fundamental freedoms;
- (ii) threaten the national security of other States and of territories whose external relations are the internationally acknowledged responsibility of another State;
- (iii) contravene its international commitments, in particular in relation to sanctions adopted by the Security Council of the United Nations, or to decisions taken by the CSCE Council, or agreements on non-proliferation, or other arms control and disarmament agreements;
- (iv) prolong or aggravate an existing armed conflict, taking into account the legitimate requirement for self-defence;
- (v) endanger peace, introduce destabilizing military capabilities into a region, or otherwise contribute to regional instability;
- (vi) be diverted within the recipient country or re-exported for purposes contrary to the aims of this document;
- (vii) be used for the purpose of repression;
- (viii) support or encourage terrorism;
- (ix) be used other than for the legitimate defence and security needs of the recipient country.”

7.6. The test to be applied by the UK in avoiding transfers is whether they “*would be likely to*” have any of the above effects. The expression “*would be likely to*” does not have a precise legal definition, and is afforded – sometimes significantly – different meanings in UK domestic case law. However, in circumstances where the Oxford English Dictionary defines “*likely*” as “*such as well might happen*”, the OSCE test can properly be seen as establishing a lower threshold for the refusal of arms transfers than the “*overriding risk*” of the ATT and/or the “*clear risk*” of the EU Common Position. Similarly, however, the requirement on OSCE States to “*avoid*” transfers may arguably constitute a lesser restriction than the prohibitions contained in ATT Articles 6(3) and 7 and in the EU Common Position.

## **(III) ASSESSMENT OF ANY BREACH BY THE UK OF ITS OBLIGATIONS PURSUANT TO THE OSCE PRINCIPLES**

7.7. OSCE Criterion 1 concerning the violation of human rights, Criterion 3 regarding the UK’s international commitments, Criterion 4 regarding the prolongation and/or aggravation of an existing armed conflict, and Criterion 9 regarding the legitimate defence and security needs of *the recipient country* are particularly relevant to our analysis. **For the reasons set out below, on the basis of the evidence available to**

us, we conclude that any transfer by the UK to Saudi Arabia of conventional weapons, capable of being used by the latter State in its military engagement in Yemen, including in support of its blockade of Yemeni ports, would constitute a breach of its obligations under OSCE Criteria 1 and 3.

**(a) OSCE Criterion 1: “likely” violation by Saudi Arabia of human rights**

7.8. The test for refusal or “avoidance” of a transfer under OSCE Criterion 1 relating to human rights establishes a much lower bar for breach than equivalent provisions in the ATT or the EU Common Position. A transfer “*will be avoided*” if it “*would be likely to be used for the violation or suppression of human rights*”. **It is clear that the transfer of any arms from the UK to Saudi Arabia, capable of being used *inter alia* in the enforcement and/or facilitation of the blockade on Yemeni ports, would be likely to be used in the violation of the right to food of the Yemeni population.**

**(b) OSCE Criterion 3: “likely” violation by the UK of its international commitments**

7.9. For the reasons set out in detail in Sections 5 and 6 *supra*, we have concluded that **transfers by the UK of conventional arms to Saudi Arabia, capable of being used in the conflict in Yemen, would violate the UK’s international commitments under the ATT and the EU Common Position. Any such transfer would also, therefore, be inconsistent with OSCE Criterion 3.**

**(c) OSCE Criterion 4: “likely” prolongation or aggravation of the armed conflict in Yemen**

7.10. From the publicly available information, it would appear that arms exports to Saudi Arabia from the UK are indeed likely to “prolong” or “aggravate” the armed conflict in Yemen. However, the UK Government appears to have taken a different view, and a detailed analysis of this question is beyond the scope of this opinion. **Suffice to say that this is a factor, which the UK would have to consider – and in respect of which it would need to justify its position – in relation to each export authorisation for arms to Saudi Arabia, capable of being used in Yemen. Transfer notwithstanding the “likely” risk of such prolongation or aggravation would be inconsistent with OSCE Criterion 4.**

**(d) OSCE Criterion 9: “likely” use other than for the legitimate self-defence and security needs of Saudi Arabia**

7.11. In contrast, the analysis in relation to OSCE Criterion 9 is straightforward: it requires the UK to avoid transfers of arms to Saudi Arabia which would be likely to be used other than for the legitimate self-defence or security needs of *Saudi Arabia* itself.

7.12. **Although the OSCE Principles require transferring States to take into account in the consideration of proposed transfers “*the requirements of the recipient*”**

***country to enable it to exercise its right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations” (Factor (v)), they do not permit transfers for use by the recipient State in the defence of another State (Criterion 9). Therefore, transfers by the UK to Saudi Arabia of weapons to be used in the defence of Yemen would be inconsistent with OSCE Principles and contrary to the UK’s Consolidated EU and National Arms Export Licencing Criteria. However, transfers by the UK to Saudi Arabia of weapons to meet the security needs of Saudi Arabia itself against the Houthis, who have carried out attacks on Saudi Arabian territory, would be consistent with Criterion 9, although we have not seen any statements by UK officials suggesting that weapons transfers are being authorised on that basis.***

## 8. THE UK DOMESTIC FRAMEWORK GOVERNING ARMS EXPORTS

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8.1. This section sets out the primary legislative and policy provisions governing arms exports from the UK, consisting of (I) the **Export Control Act and Export Control Order 2008** and (II) the **Consolidated European Union and National Arms Export Licensing Criteria** (“the Consolidated Criteria”). Pursuant to the Consolidated Criteria, all transfers of weapons which breach the ATT, the EU Common Position and/or the OSCE Principles are prohibited. As such, the Consolidated Criteria serve to render those international legal instruments legally applicable as a matter of UK law and policy, and their breach challengeable in UK courts.

### (I) EXPORT CONTROL ACT 2002 AND EXPORT CONTROL ORDER 2008

8.2. The basic domestic statutory framework for export controls is set out in the Export Control Act 2002, which is administered by the Secretary of State for Business, Innovation and Skills (“Secretary of State”). The Act empowers the Secretary of State *inter alia* to impose controls on weapons exports from the UK and to impose controls on the provision of related technical assistance overseas. These powers are exercised through the Export Control Order 2008 (SI. 2008/3231), which constitutes the principal domestic export control legislation. It regulates export and transfer (Part 2), technical assistance (Part 3) and trade controls (Part 4), detailing clear licencing provisions (Part 5) and enforcement mechanisms (Part 6).

#### (a) Procedure for the grant or refusal of arms export licences

8.3. All licence applications for transfers of arms, military equipment and/or dual-use goods and technology must be submitted to the Export Control Organisation, which forms part of the Department for Business, Innovation and Skills. The formal decision to grant or refuse, or to suspend or revoke, a licence is taken by the Export Control Organisation, on behalf of the Secretary of State, in accordance with announced policy – primarily the Consolidated Criteria – and on advice received from other relevant Government Departments, principally the FCO and Ministry of Defence.<sup>198</sup>

#### (b) Amendment, suspension or revocation of licences

8.4. Section 32 of the Export Control Order empowers the Secretary of State to “*amend, suspend or revoke a licence*” previously authorised. The UK Government has clarified that circumstances giving rise to amendment, suspension and/or revocation include:

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<sup>198</sup> UK Parliament, House of Commons, *Consolidated EU and National Arms Export Licensing Criteria* (“Consolidated Criteria”), 25 March 2014, available at: <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm#14032566000018>; see also J. Lunn, “UK arms export control policy” House of Commons Library, Briefing Paper N. 02729, 8 May 2015, available at: <http://www.parliament.uk/briefing-papers/sn02729.pdf>.



- (i) “[w]here there has been a change in circumstances in the destination country or region such that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies”; and
- (ii) “[w]here new information has come to light about a particular export which indicates that the proposed export is no longer consistent with the Consolidated Criteria or with other relevant, announced, policies”.<sup>199</sup>

8.5. Following the uprisings of the Arab Spring in 2011, and their subsequent repression, the Government also announced the creation of a specific “*suspension mechanism*” to be used in relation “*to countries experiencing a sharp deterioration in security or stability*” for a defined period, based on advice *inter alia* from UK diplomatic posts.<sup>200</sup> There is little information published on this new “mechanism”. Pursuant to government policy,

“[s]uspension will not be invoked automatically or lightly, but triggered when conflict or crisis conditions suddenly increase the level of risk, or make conducting a proper risk assessment difficult. We will conduct these assessments on a case by case basis, in the same way that we do whenever issuing a licence.”<sup>201</sup>

8.6. The suspension mechanism has reportedly since been applied by the Government in relation both to pending licence applications and to extant licences, “suspending” any resulting transfer for a defined period of time. To date, the test employed by the Government in making suspension decisions has been whether the equipment “*might be used*” for internal repression.<sup>202</sup>

## **(II) CONSOLIDATED EUROPEAN UNION AND NATIONAL ARMS EXPORT LICENSING CRITERIA**

8.7. Article 9 of the Export Control Act empowers the Secretary of State to “*give guidance about any matter relating to the exercise of any licencing power*”. Article 9(5) of the Act further provides that

“[a]ny person exercising a licencing power or other function to which this section applies shall have regard to any guidance which relates to that power or other function”.

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<sup>199</sup> UK Parliamentary Committee on Arms Exports Controls, *Scrutiny of Arms Exports and Arms Controls (2015)* Volume II, 9 March 2015, available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608ii.pdf>, p. 177.

<sup>200</sup> UK Parliamentary Committee on Arms Exports Controls, *Scrutiny of Arms Exports and Arms Control (2013)*, Section 9 - Arms Export Control Policies, 17 July 2013, available at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmquad/205/205ii11.htm>.

<sup>201</sup> Department for Business, Innovation & Skills, “Government to strengthen measures on export licensing”, 7 February 2012, available at: <https://www.gov.uk/government/news/government-to-strengthen-measures-on-export-licensing>.

<sup>202</sup> J. Lunn, *UK Arms Export Control Policy*, House of Commons Library, Briefing Paper N. 02729, 8 May 2015, p. 9, § 2.1, available at: <http://www.parliament.uk/briefing-papers/sn02729.pdf>.

- 8.8. The Consolidated Criteria provide the primary guidance pursuant to the Export Control Act, section 9, to which those persons responsible for assessing requests for arms export licences must have regard. The Consolidated Criteria were amended in March 2014, in order to bring them “*fully into line*” with the UK’s international obligations,<sup>203</sup> including those arising under the ATT and the EU Common Position.
- 8.9. The Consolidated Criteria consist of eight distinct criteria against which all applications for export licences from the UK for weapons and related items on the EU Common Military List must be assessed on a “*case-by-case basis*”. We assess below compliance of weapons exports to Saudi Arabia against the four criteria most relevant to this advice, namely:
- UK Criterion 1, concerning the UK’s international commitments;
  - UK Criterion 2(c), concerning the respect for IHRL *in the country of final destination* and the respect for IHL by it;
  - UK Criterion 5, concerning the impact of any transfer on the national security of the UK or allies; and
  - UK Criterion 6, concerning the attitude to terrorism or respect of international law in the receiving State.
- 8.10. There is a distinction between UK Criteria 1 and 2(c), on the one hand, and Criteria 4 and 5 on the other. The first two are expressed in mandatory terms, emphasising that a licence “*will not*” be granted if the requirements set out in the criteria are not met. In contrast, Criteria 5 and 6 are framed as matters, which must be “*take[n] into account*”. This suggests that the former criteria set out substantive requirements for arms exports, whereas the latter constitute merely procedural requirements, which must be considered by the decision-maker in making their assessment but which need not automatically lead to a refusal of a transfer authorisation. We note, however, that Governmental guidance does not identify a distinction between the criteria or suggest any kind of hierarchy amongst them.
- 8.11. A grant of an export licence by the Secretary of State for the Department for Business, Innovation and Skills, in breach of one or more of the Consolidated Criteria, could give rise to a successful legal challenge by persons with a sufficient interest in the breach. This could include groups campaigning on the topic of arms controls or individuals affected by the unlawful breach. A failure to review a previously authorised transfer could also be open to legal challenge on a similar basis.

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<sup>203</sup> *Ibid*, p.13.

### **(a) Other factors for consideration**

8.12. The Consolidated Criteria provide that, in the consideration of a licence application, “full weight” must also be given to other factors affecting “the UK’s national interest”,<sup>204</sup> including:

- “(a) the potential effect on the UK’s economic, financial and commercial interests, including our long-term interests in having stable, democratic trading partners;
- (b) the potential effect on the UK’s international relations;
- (c) the potential effect on any collaborative defence production or procurement project with allies or EU partners;
- (d) the protection of the UK’s essential strategic industrial base.”<sup>205</sup>

8.13. However, these factors cannot overcome a failure to meet one or more of the eight criteria: insofar as there is a breach of any one of the criteria, a licence cannot be granted. This is made clear in governmental guidance, stipulating that:

“if the proposed export fails to meet one or more of the criteria..., then a licence will be refused”.<sup>206</sup>

### **(b) The assessment process**

8.14. Pursuant to established governmental policy, each application for an export licence is to be assessed against the Consolidated Criteria on a case-by-case basis taking into account “all relevant information available at the time the licence application is assessed”.<sup>207</sup> The guidance further stipulates that “in the application of the... criteria, account will be taken of reliable evidence, including for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations.”<sup>208</sup> While “all relevant information available” would necessarily include information provided by the recipient State, it is noteworthy that State assurances are *not* listed in the guidance as an example of “reliable evidence”.

8.15. UK Government guidance stipulates that, in assessing whether one or more of the criteria has been breached, it will apply the following standard:

“While the Government recognise that there are situations where transfers must not take place, as set out in the following criteria, we will not refuse a licence on

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<sup>204</sup> *Consolidated Criteria* at fn. 198, Column 13WS.

<sup>205</sup> *Ibid.*

<sup>206</sup> Department for Business, Innovation & Skills and Export Control Organisation, *Assessment of Export Licence Applications: Criteria and Policy*, 10 September 2012, available at: <https://www.gov.uk/guidance/assessment-of-export-licence-applications-criteria-and-policy>.

<sup>207</sup> *Consolidated Criteria* at fn. 198, Column 10WS.

<sup>208</sup> *Ibid.*, Column 14WS.

the grounds of a purely theoretical risk of a breach of one or more of those criteria.”<sup>209</sup>

8.16. This suggests that in circumstances in which anything more than a “*purely theoretical risk of a breach*” exists, in principal a basis arises that offers grounds for a transfer refusal.

**(c) UK Criterion 1: respect for the UK’s international obligations and commitments**

8.17. Criterion 1 provides in material part as follows:

*“Respect for the UK’s international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations. The Government will not grant a licence if to do so would be inconsistent with, inter alia:...*

[...]

(b) the UK’s obligations under the United Nations arms trade treaty;

[...]

(d) the UK’s obligations under the United Nations convention on certain conventional weapons, the convention on cluster munitions (the Oslo convention), the Cluster Munitions (Prohibitions) Act 2010, and the convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (the Ottawa convention) and the Land Mines Act 1998;

[...]

(f) the OSCE principles governing conventional arms transfers and the European Union common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.”

**8.18. In prohibiting relevant exports which would be inconsistent with (i) the ATT, (ii) the EU Common Position and (iii) the OSCE Guidelines, Criteria 1 serves to give legal effect to those instruments in domestic law and policy. For reasons set out in Sections 5, 6 and 7 *supra*, we have concluded that transfers by the UK to Saudi Arabia of arms capable of being used in its military operations in Yemen, including in relation to its blockade of Yemeni ports, have been and would be inconsistent with the UK’s obligations under all three instruments. On that basis, we further conclude that any such transfers would constitute (and have constituted) a breach of UK Criterion 1, open to legal challenge.**

**(d) UK Criterion 2: respect for IHL and IHRL by the recipient State**

8.19. UK Criterion 2 provides in material part as follows:

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<sup>209</sup> *Ibid*, Column 10WS.

*“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 attitude towards relevant principles established by international human rights instruments, the Government will:*

[...]

- (b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union;
- (c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law”.

**8.20. UK Criterion 2 mirrors exactly EU Criterion 2, dealt with at paragraphs 6.2-6.18 *supra*. For the reasons set out in that paragraph, we find that any authorisation by the UK of exports of weapons or related items, governed by the Export Control Act and Order, to Saudi Arabia, capable of being used in its military activities in Yemen, including in support of its blockade of Yemeni ports, which imposes no restrictions on their end-use, would also constitute (and has constituted) a breach of UK Criterion 2, open to legal challenge.**

**(e) UK Criterion 5: national security of the UK and friendly countries**

8.21. UK Criterion 5 provides in material part as follows:

*“The national security of the UK... as well as that of friendly and allied countries.*

The Government will take into account:

- (a) the potential effect of the proposed transfer on the UK’s defence and security interests or on those of other... countries as described above, while recognising that this factor cannot affect consideration of the criteria on respect of human rights...;
- [...]”.

**8.22. The UK Government may seek to assert that transfers of weapons to Saudi Arabia, including for use in Yemen, are capable of having a potential positive effect on the UK’s defence and security interests, or those of Saudi Arabia and Yemen. However, in circumstances where (i) transfer authorisations which do not meet *all* of the eight criteria must be refused, (ii) Criterion 5 itself recalls this in relation to IHRL considerations, and (iii) Criterion 5 is expressed as criterion, an assertion of a potential positive effect under UK Criterion 5 would not be sufficient to legitimise a transfer to Saudi Arabia of weapons capable of being used in its military campaign in Yemen.**

**(f) UK Criterion 6: respect by the buyer country for international law**

8.23. UK Criterion 6 provides as follows:

*“The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law.*

The Government will take into account, inter alia, the record of the buyer country with regard to:

- (a) its support for or encouragement of terrorism and international organised crime;
- (b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
- (c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament instruments referred to in criterion one.”

**8.24. UK Criterion 6 mirrors EU Criterion 6, dealt with at paragraphs 6.19-6.26 *supra*. As noted in relation to EU Criterion 6, the assessment to be conducted under this criterion is decoupled from the anticipated risk of a particular export being used to commit international law violations. Rather, it is an assessment of the general behaviour of the buyer-country, with regard to international law.**

**8.25. On the basis set out in relation to EU Criterion 6, we find that any authorisation by the UK of weapons exports to Saudi Arabia capable of being used in its military activities in Yemen, including in support of its blockade of Yemeni ports, would also be likely to constitute (and to have constituted) a breach of UK Criterion 6, open to legal challenge.**

**8.26. We reach that conclusion, notwithstanding the fact that Criterion 6 is expressed in non-mandatory terms: it is difficult to see how a decision-maker, properly taking into account Saudi Arabia’s record of non-compliance with relevant international commitments – including the UK’s own determination that the State is a country of major human rights concern, could reasonably or rationally grant a licence to Saudi Arabia pursuant to this criterion. In reaching that conclusion, we recall that, while decision makers must also give “*full weight*” to other factors affecting “*the UK’s national interest*”,<sup>210</sup> such factors cannot outweigh a breach of any one of the eight criteria, requiring the export to be refused.<sup>211</sup>**

**8.27. Any other interpretation of the criterion would undermine its meaning or effectiveness. It would also run contrary to the European Council guidance set out in the User’s Guide to the EU Common Position, which – although not binding on States – reflects “*agreed guidance for the interpretation of the criteria*”,**

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<sup>210</sup> See § 8.12 *supra*.

<sup>211</sup> See § 8.13 *supra*.

**intended for use by licencing officials.<sup>212</sup> The User's Guide indicates clearly that Criterion 6 should be interpreted in mandatory terms.<sup>213</sup>**

8.28. We are aware that the Joint Committee on Arms Exports Controls has raised with the Government the inherent contradiction in Saudi Arabia being listed by the UK Government's BIS as a "priority market" for arms exports, while simultaneously being listed by the FCO as a country of major human rights concern. We note that the Government in its response denied any contradiction, citing the capacity of the export licencing system to "*distinguish between exports for legitimate defence and security purposes and those that breach the Criterion 2 threshold: a clear risk that they might be used for internal repression, violation of human rights or gender-based violence*".<sup>214</sup> We further note that reference to compliance with UK Criterion 6 is conspicuous in its absence. This is a matter on which the Government should be asked to provide further clarification and explanation.

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<sup>212</sup> See § 6.1 *supra*.

<sup>213</sup> See §§ 6.24-6.45 *supra*.

<sup>214</sup> House of Commons, Committee on Arms Exports Controls, *Scrutiny of Arms Exports and Arms Controls (2015)* Vol. II, 9 March 2015, available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608ii.pdf>, § 125.

## CONCLUSION AND RECOMMENDATIONS

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- 9.1 As set out in this advice, the UK Government has misdirected itself in law and fact in continuing to grant authorisations for the transfer of weapons and related items to Saudi Arabia, capable of being used in the conflict in Yemen, including in support of the Coalition's blockade of Yemeni ports.
- 9.2. For the reasons set out in this opinion, on the basis of the evidence available to us, any authorisation by the UK of the transfer of weapons or other items (within the scope of the legal frameworks we have analysed) to Saudi Arabia, in circumstances where such weapons are capable of being used in the conflict in Yemen, including to support the Saudi-led Coalition's blockade of Yemeni territory, and in circumstances where their end-use is not restricted, would constitute a breach by the UK of its obligations under domestic, European and international law.
- 9.3. In the current circumstances we can be clear in concluding what the UK is required to do to bring itself into full compliance with its legal obligations: it should halt with immediate effect all authorisations and transfers of relevant weapons and items to Saudi Arabia, pending proper and credible enquiries into the allegations of serious violations of IHL and IHRL that have arisen and that could arise in the future, as addressed in this opinion and the sources here referred to.



## ANNEX

This Annex analyses an indicative sample of ten reported incidents, said to have involved Saudi-led Coalition forces, which have given cause for serious concern. They are intended to illustrate the nature of the attacks that have raised international concerns; however, our advice does not turn on them specifically.

### (i) AIRSTRIKES ON THE AL-MAZRAQ CAMP FOR THE INTERNALLY DISPLACED

#### REPORTED FACTS

Coalition airstrikes are reported to have hit the Al-Mazraq camp for internally displaced persons in Harad, which was hosting more than 300 displaced families, on 30 March 2015.<sup>215</sup> At least 19 civilians are said to have been killed and as many as 200 injured.<sup>216</sup> The UN Office for the High Commission of Human Rights (“UN OHCHR”) did not identify any military objectives in the area.<sup>217</sup> The UN Humanitarian Coordinator for Yemen confirmed that all the structures hit – which included a medical facility and the camp management office<sup>218</sup> – were “civilian infrastructure” and that all casualties appeared to be civilians.<sup>219</sup> An eyewitness report suggested that the target might have been camp guards near the gate to the camp.<sup>220</sup> Yemen’s Foreign Minister attributed the attack to Houthi forces, whereas a spokesperson for the Saudi-led Coalition suggested that the aircraft may have been returning fire on anti-aircraft weapons placed in civilian areas.<sup>221</sup> A number of NGOs, including Human Rights Watch (“HRW”) and the European Centre for Democracy and Human Rights, raised concerns about violations of international law.<sup>222</sup>

<sup>215</sup> See UNHRC report at fn. 40, § 44.

<sup>216</sup> *Ibid.* See also, A al-Mujahed and H Naylor, “Dozens killed in airstrike at refugee camp in Yemen”, *Washington Post*, 30 March 2015, available at [https://www.washingtonpost.com/world/saudi-led-airstrikes-shake-sanaa-for-fifth-day-as-rebels-push-towards-aden/2015/03/30/0f3b3b76-d6bf-11e4-8103-fa84725dbf9d\\_story.html](https://www.washingtonpost.com/world/saudi-led-airstrikes-shake-sanaa-for-fifth-day-as-rebels-push-towards-aden/2015/03/30/0f3b3b76-d6bf-11e4-8103-fa84725dbf9d_story.html).

<sup>217</sup> *Ibid.*

<sup>218</sup> K Shaheen, “Airstrike on Yemeni refugee camp by Saudi-led coalition kills at least 40”, *The Guardian*, 30 March 2015, available at <http://www.theguardian.com/world/2015/mar/30/air-strike-refugee-camp-houthi-controlled-northern-yemen-kills-at-least-21>.

<sup>219</sup> “Statement of the Yemen Humanitarian Coordinator, Mr Johannes van der Klaauw”, 31 March 2015, available at <http://reliefweb.int/report/yemen/statement-yemen-humanitarian-coordinator-mr-johannes-van-der-klaauw-0>. See also Human Rights Watch, *Yemen: Air Strike on Camp Raises Grave Concerns*, 1 April 2015, available at <https://www.hrw.org/news/2015/04/01/yemen-airstrike-camp-raises-grave-concerns>. Later reports suggested that the dead included several camp guards: see e.g. K Shaheen, “Airstrike on Yemeni refugee camp by Saudi-led coalition kills at least 40”, *The Guardian*, 30 March 2015, available at <http://www.theguardian.com/world/2015/mar/30/air-strike-refugee-camp-houthi-controlled-northern-yemen-kills-at-least-21>.

<sup>220</sup> L Dearden, “Saudi Arabia accused of killing 40 including children in air strike on Yemen refugee camp”, *The Independent*, 31 March 2015, available at <http://www.independent.co.uk/news/world/middle-east/saudi-arabia-accused-of-killing-40-including-children-in-air-strike-on-yemen-refugee-camp-10145294.html>.

<sup>221</sup> K Shaheen, “Witness to air strike on Yemen refugee camp: women and children burned beyond recognition”, 31 March 2015, *The Guardian*, available at <http://www.theguardian.com/world/2015/mar/31/yemen-in-crisis-air-strike-leaves-40-civilians-dead-at-camp>.

<sup>222</sup> See e.g., Human Rights Watch report at fn 219; and Americans for Democracy and Human Rights in Bahrain, “ADHRB joins letter to Saudi-led coalition on IHL violations in Yemen”, 24 April 2015, available at <http://www.adhrb.org/2015/05/adhrb-joins-letter-to-saudi-led-coalition-on-ihl-violations-in-yemen/>.

## APPLICABLE LAW

On the basis of the information available to us, the strikes on the al-Mazraq camp appear to have constituted (at the very least) an indiscriminate attack in serious violation of customary IHL, if not (at worst) a direct attack against civilians and/or civilian objects in serious violation of both customary IHL and Article 13 APII (applicable in NIACs) or Article 51 API (applicable in IACs). Importantly, even if the report regarding Houthi guards were to be verified, repeated strikes on a location containing such a large number of civilians is likely to have constituted a serious violation of the customary principles of proportionality, in that a reasonable commander would have been aware that the levels of civilian loss, injury and damage were likely to be excessive in relation to the anticipated military advantage involved in eliminating a small number of combatants. Questions would also arise regarding compliance with the customary IHL obligation to take precautions, including with regard to the choice of methods and means of combat. Insofar as the attacks were committed by members of the Saudi armed forces and/or other individuals over whom Saudi is exercising control, they entail the international responsibility of Saudi Arabia. In parallel, if committed with the requisite intent, the attacks may also constitute a war crime giving rise to individual criminal responsibility *inter alia* for war crimes defined in the ICC Statute on the part of the individual(s) involved in committing, ordering, soliciting, inducing, facilitating them or otherwise contributing to their commission pursuant to Articles 8(2)(e)(i) (attacks against civilians/the civilian population) and/or 8(2)(e)(xii) (destruction of property), applicable in NIACs, or 8(2)(b)(i) (attacks against civilians/the civilian population), 8(2)(b)(ii) (attacks against civilian objects), 8(2)(b)(iv) (disproportionate attacks) and/or 8(2)(b)(xiii) (destruction of property), applicable in IACs.

### (ii) AIRSTRIKE ON AN OXFAM STORAGE FACILITY

#### REPORTED FACTS

On 18 April 2015, Coalition aircraft are reported to have hit an Oxfam humanitarian storage facility in Saada governorate, containing humanitarian supplies.<sup>223</sup> It appears that erroneous co-ordinates for the facility may have been provided, and it is not clear that the Coalition ever received the coordinates from the UN.<sup>224</sup> However, no explanation has been provided by the Coalition for the strike. Oxfam's country director in Yemen confirmed that the warehouse contained only humanitarian supplies,<sup>225</sup> and two local residents – one of whom lived a mere 70 metres from the facility – said they were unaware of any mobile or

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<sup>223</sup> Oxfam, "Oxfam condemns coalition bombing of a warehouse containing vital humanitarian aid", 19 April 2015, available at <http://reliefweb.int/report/yemen/oxfam-condemns-coalition-bombing-warehouse-containing-vital-humanitarian-aid>. See also Amnesty International, *Bombs Fall from the Sky Day and Night: Civilians under Fire in Northern Yemen*, 6 October 2015, available at <https://www.amnesty.org/en/documents/mde31/2548/2015/en/>, p 30.

<sup>224</sup> Human Rights Watch, "Yemen: Warehouse strike threatens aid delivery", 22 April 2015, available at <https://www.hrw.org/news/2015/04/22/yemen-warehouse-strike-threatens-aid-delivery>

<sup>225</sup> See Oxfam statement at fn. 223 *supra*.

static military targets in the vicinity.<sup>226</sup> HRW described the attack as “*an apparent violation of the laws of war*”.<sup>227</sup>

## **APPLICABLE LAW**

Here too, the evidence points to either a direct attack on civilians and/or a civilian object, in serious violation of the customary IHL principle of distinction and/or an indiscriminate attack, applicable in both NIACs and IACs, and/or of Article 13 (attacks against civilians/the civilian population), applicable in NIACs, or Article 51 API (attacks against civilians/indiscriminate attacks), applicable in IACs, and/or an attack in serious violation of the special customary and treaty protections afforded to humanitarian objects, including or Article 14 APII (destruction of foodstuffs indispensable to the civilian population), applicable in NIACs. Insofar as the attack was perpetrated by members of the Saudi armed forces and/or other individuals over whom Saudi Arabia is exercising control, they entail the international responsibility of Saudi Arabia. In parallel, if perpetrated with the requisite intent, the attack may also, considered alone or in conjunction with other attacks, constitute a war crime *inter alia* as defined in the ICC Statute, giving rise to the individual criminal responsibility of the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to its commission, pursuant to Articles 8(2)(e)(i) (attacks against civilians/the civilian population) or 8(2)(e)(iii) (attacks against humanitarian installations), applicable in NIACs, or 8(2)(b)(i) (attacks against civilians/the civilian population), 8(2)(b)(ii) (attacks against civilian objects) or 8(2)(b)(iii) (attacks against humanitarian installations), applicable in IACS.

## **(iii) DESIGNATION OF THE ENTIRE CITIES OF SAADA AND MARRAN AS MILITARY TARGETS AND SUBSEQUENT AIRSTRIKES**

### **REPORTED FACTS**

On 8 May 2015, the military spokesman for the Saudi-led Coalition announced that the Coalition had designated the entire cities of Saada and Marran as “military targets”, and that Coalition military operations would consequently “*cover the whole area of these two cities*”.<sup>228</sup> The Coalition gave civilians just a few hours to leave their homes before the attacks began.<sup>229</sup> However, as reported by the UN OHCHR, the limited availability of fuel in Saada, the challenging terrain, and the “*barely operable*” telecommunications services prevented tens of thousands of civilians from fleeing.<sup>230</sup> The ensuing aerial bombardment of Saada has been described by residents as “*relentless*”,<sup>231</sup> and the resulting destruction as

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<sup>226</sup> Human Rights Watch report at fn. 224.

<sup>227</sup> *Ibid.*

<sup>228</sup> Amnesty International report at fn. 223, pp. 10-11.

<sup>229</sup> *Ibid.*

<sup>230</sup> UNHRC report at fn. 40, § 49.

<sup>231</sup> “Uglier by the Day”, *The Economist*, 9 April 2015, available at <http://www.economist.com/news/middle-east-and-africa/21650901-aid-agencies-fear-large-scale-deaths-sunni-coalition-bombs-shia-rebel-stronghold?fsrc=scn%2Ftw%2Fte%2Fbl%2Fed%2Fyemendeaths>.

“overwhelming”.<sup>232</sup> By June 2015, satellite imagery obtained by HRW showed over 210 distinct impact locations in built-up areas of the city consistent with aerial bombardment.<sup>233</sup>

## APPLICABLE LAW

Customary IHL prohibits attacks that treat as a single military objective a number of “clearly separated and distinct military objects located in a city... containing a similar concentration of civilians or civilian objects”.<sup>234</sup> As a result, any attacks purporting to target either Saada or Marran *per se*, and resulting in civilian casualties, constitute serious violations of IHL, including the prohibition on indiscriminate attacks, particularly the prohibition on aerial bombardments, and the prohibition on attacks directed against the civilian population. They are also likely to constitute a serious violation of the customary principles of proportionality. Importantly, the issuing of advance warnings – although independently required by IHL – does *not*, even if the warnings are effective (which, for the reasons given above, they were not), render an otherwise indiscriminate or disproportionate attack lawful; nor does it cause civilians who fail to evacuate to lose their protected status.<sup>235</sup> The attacks also may constitute a breach of Articles 13 and/or 17 APII or Article 51 API (attacks on civilians and indiscriminate attacks), applicable in NIACs and IACs respectively. Given that the warnings were given and the attacks were committed by members of the Saudi armed forces and/or other individuals over whom Saudi Arabia is exercising effective control, they entail the international responsibility of Saudi Arabia. In parallel, if perpetrated with the requisite intent, the attacks are also likely to constitute war crimes *inter alia* as defined in the ICC Statute, perpetrated by the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to its commission, contrary to Articles 8(2)(e)(i) (attacks against civilians/civilian objects) and/or 8(2)(e)(xii) (destruction of property), applicable in NIACs, or Articles 8(2)(b)(i) (attacks against civilians), 8(2)(b)(ii) (attacks against civilian objects), 8(2)(b)(iv) (disproportionate attacks) and/or 8(2)(b)(xiii) (destruction of property), applicable in IACs.

### (iv) MULTIPLE AIRSTRIKES IN SAADA GOVERNORATE IN APRIL-JULY 2015

#### REPORTED FACTS

To the extent that the Coalition attacks on the city of Saada purported to target it *per se*, they are indiscriminate and hence unlawful under IHL. Furthermore, even assessed individually, there is evidence that many of the attacks on Saada city (both before and after 8 May 2015), as well as attacks in the Saada governorate more broadly, have violated the fundamental rules of IHL. NGOs have documented multiple air strikes by Coalition aircraft on residential

<sup>232</sup> A Al-Majuhed and H Naylor, “Yemeni rebels persist even as their heartland is destroyed by war”, *The Washington Post*, 21 June 2015, available at [https://www.washingtonpost.com/world/middle-east/yemeni-rebels-persist-even-as-their-home-region-is-destroyed-in-war/2015/06/20/4b0c90cc-1144-11e5-a0fe-dccfea4653ee\\_story.html](https://www.washingtonpost.com/world/middle-east/yemeni-rebels-persist-even-as-their-home-region-is-destroyed-in-war/2015/06/20/4b0c90cc-1144-11e5-a0fe-dccfea4653ee_story.html).

<sup>233</sup> See *Targeting Saada* at fn. 10.

<sup>234</sup> CIHL Study at fn. 69, Vol. I, Rules 12 and 13.

<sup>235</sup> A similar conclusion was reached in the *Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1 - Human rights situation in Palestine and other occupied Arab territories*, 24 June 2015, UN Doc. A/HRC/20/52, § 56.

houses, markets and schools<sup>236</sup> not known to have been used for military activity, killing dozens of civilians and wounding many more,<sup>237</sup> including many women and children.<sup>238</sup> Notably, in at least five of the attacks on residential houses, Coalition munitions struck the same location more than once – strongly suggesting that it was deliberately targeted.<sup>239</sup> One of these attacks, involving four consecutive strikes on a remote cluster of houses in al-Maghsal area in Maiz (northwest of Saada city), killed 11 civilians and injured three – all women and children; another, on a cluster of nine houses on the eastern side of al-Eram, killed at least 55 people and injured nine more.<sup>240</sup> When discussing military operations in Saada, the Coalition has blamed the Houthis for establishing a military presence amongst the civilian population and has insisted that precautions to spare civilian lives are taken.<sup>241</sup>

## APPLICABLE LAW

Each of these incidents constitutes an apparent serious violation of the customary IHL principle of distinction,<sup>242</sup> the resulting prohibition on direct attacks against civilians or civilian objects,<sup>243</sup> and/or the prohibition on indiscriminate attacks.<sup>244</sup> Indeed, the UN Humanitarian Coordinator for Yemen has publicly stated that the attacks on Saada appear to have involved the indiscriminate bombing of populated areas in serious violation of IHL.<sup>245</sup> Even if in some cases Houthi fighters were present in the relevant location – a matter on which there is presently no evidence – conducting multiple airstrikes in populated areas, resulting in multiple civilian casualties and widespread destruction, raises serious questions in relation to the customary IHL principle of proportionality.<sup>246</sup> It also raises questions regarding the customary IHL obligation to take precautions, particularly in relation to target verification and to the choice of means and methods of warfare.<sup>247</sup> With regard to the latter, a number of organisations have expressed serious concerns regarding the effects of the use of explosive weapons in populated areas in the conflict in Yemen,<sup>248</sup> questioning whether their use can ever properly be said to be ‘targeted’. The attacks may constitute a breach of Article 13 (prohibition on attacks on the civilian population and civilians) and/or 17 (prohibition on forced movement of civilians) APII (applicable in NIACs) or Article 51 API (applicable in IACs). Given that the warnings were given and the attacks were committed by members of the Saudi armed forces and/or other individuals over whom Saudi is exercising effective control, they constitute internationally wrongful acts, for which Saudi Arabia is

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<sup>236</sup> See *Targeting Saada* at fn. 10.; and UNHRC report at fn. 40 *supra*, § 50.

<sup>237</sup> Amnesty International report at fn. 224, p. 23.

<sup>238</sup> *Ibid*, p. 22.

<sup>239</sup> *Ibid*, p. 13 and *Targeting Saada* at fn 10 *supra*.

<sup>240</sup> See fn. 238 *supra*, p. 23.

<sup>241</sup> Al-Majuhed and Naylor, at fn. 233 *supra*.

<sup>242</sup> See CIHL Study at fn. 69, Vol. I, Rules 1 and 7.

<sup>243</sup> *Ibid*.

<sup>244</sup> *Ibid*, Rules 12 and 13.

<sup>245</sup> See *e.g.*, UN Humanitarian Coordinator, Johannes van der Klaauw, “Statement on Yemen”, 9 May 2015, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/HC%20Statement%20on%20Yemen%209%20May%202015.pdf>.

<sup>246</sup> See CIHL Study at fn. 69, Vol. I, Rule 14.

<sup>247</sup> *Ibid*, Vol. I, Rules 15-17.

<sup>248</sup> See *e.g.*, fn. 32 *supra* and H Bryce, “Stopping the use of explosive weapons in populated areas”, Chatham House, 5 November 2015, available at <https://www.chathamhouse.org/expert/comment/stopping-use-explosive-weapons-populated-areas>.

responsible. In parallel, if perpetrated with the requisite intent, the attacks are also likely to constitute war crimes *inter alia* defined in the ICC Statute, perpetrated by the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to its commission, contrary to Articles 8(2)(e)(i) (attacks against civilians/the civilian population) and/or 8(2)(e)(xii) (destruction of property), applicable in NIACs, or Articles 8(2)(b)(i) (attacks against civilians/the civilian population), 8(2)(b)(ii) (attacks against civilian objects), 8(2)(b)(iv) (indiscriminate attacks) and/or 8(2)(b)(xiii) (destruction of property), applicable in IACs).

## **(v) MULTIPLE AIR STRIKES ON RESIDENTIAL COMPOUNDS IN THE PORT CITY OF MOKHA**

### **REPORTED FACTS**

On 24 July 2015, Coalition aircraft are alleged to have repeatedly struck two residential compounds located near a steam power plant in the port city of Mokha, housing plant workers and their families – a total of over 1,300 civilians.<sup>249</sup> Witnesses said that up to nine bombs were dropped at intervals of a few minutes.<sup>250</sup> At least 65 civilians were killed,<sup>251</sup> including rescue workers who were killed in a second round of strikes,<sup>252</sup> and over 40 civilians were wounded.<sup>253</sup> There was reportedly no evidence of any military presence at, or use of, the site.<sup>254</sup> A Coalition spokesperson acknowledged that Coalition forces had been active in the area, but said they had targeted Houthi fighters preparing for military operations and not civilian houses.<sup>255</sup> HRW characterised the attack as an “*apparent war crime*.”<sup>256</sup>

### **APPLICABLE LAW**

Once again, these airstrikes appear to have constituted either an indiscriminate attack or a direct attack on civilians and/or civilian objects in violation of customary IHL and/or Article 13 APII or Article 51 API, applicable in NIACs and IACs respectively, which would all constitute serious violation of IHL under customary international law. Insofar as the airstrikes were perpetrated by members of the Saudi armed forces and/or other individuals over whom Saudi Arabia is exercising effective control, they entail the international responsibility of Saudi Arabia. In parallel, the airstrikes may also, considered alone or in conjunction with other attacks, constitute a war crime *inter alia* as defined in the ICC Statute,

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<sup>249</sup> See *e.g.*, Human Rights Watch, “Yemen: Coalition strikes on residence apparent war crime”, 27 July 2015, available at <https://www.hrw.org/news/2015/07/27/yemen-coalition-strikes-residence-apparent-war-crime>; S Almosawa and K Fahim, “Saudi forces agree to halt in Yemen war”, *New York Times*, 25 July 2015, available at <http://www.nytimes.com/2015/07/26/world/middleeast/saudi-forces-agree-to-halt-in-yemen-war.html? r=0>.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> See *e.g.*, Almosawa *supra* at fn. 249.

<sup>253</sup> See Human Rights Watch statement at fn. 249 *supra*.

<sup>254</sup> *Ibid.*

<sup>255</sup> As reported in Reuters, “Saudi-led raid on Yemen plant appears unlawful: Rights Watch”, 28 July 2015, available at <http://uk.reuters.com/article/2015/07/28/uk-yemen-security-hrw-idUKKCN0Q21AM20150728>.

<sup>256</sup> Human Rights Watch report at fn. 249 *supra*.

giving rise to the individual criminal responsibility of the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to its commission, pursuant to Articles 8(2)(e)(i) (attacks on civilians/the civilian population) and/or 8(2)(e)(xii) (destruction of property), applicable in NIACs, or Articles 8(2)(b)(i) (attacks against civilians/the civilian population), 8(2)(b)(ii) (attacks against civilian objects), 8(2)(b)(iv) (disproportionate attacks) and/or 8(2)(b)(xiii) (destruction of property), applicable in IACs. As set out above, breaches of Article 8(2)(e)(xii) and 8(2)(b)(xiii) are committed if the individual(s) involved destroyed property, where the destruction was not imperatively demanded by the necessities of the conflict. It is sufficient that the individual(s) were aware of the factual circumstances that established that the property was protected from destruction under the rules of IHL.

## **(vi) ATTACK ON A CERAMICS FACTORY IN SANA'A GOVERNORATE**

### **REPORTED FACTS**

On 23 September 2015, Coalition forces reportedly bombed a factory in a residential area in the Sana'a governorate, killing one civilian and injuring two others.<sup>257</sup> The attack is particularly significant on account of debris from a UK-made PGM-500 Hakim missile being found in the rubble.<sup>258</sup> Amnesty International, which conducted an on-site investigation, did not observe anything to indicate that the factory had been used for a military purpose. The organisation observed that the area directly surrounding the factory compound appeared to be residential and that it was next to a hospital, which was itself reportedly hit by Coalition forces on 26 September 2015.<sup>259</sup>

### **APPLICABLE LAW**

The same analysis applies as in relation to incident (v) *supra*.

## **(vii) AIRSTRIKES ON WEDDING PARTIES**

### **REPORTED FACTS**

Coalition forces are reported to have conducted airstrikes against a number of wedding parties, including on 28 September 2015 in Wahija, south of Mokha, and on 8 October 2015 in Sanban, south of Sana'a. According to the UN and local medics, the attacks resulted in the deaths of 130<sup>260</sup> and 45<sup>261</sup> people respectively. Witnesses to the first bombing reported that

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<sup>257</sup> Amnesty International UK, "UK-made missile used in airstrike on ceramics factory in Yemen" 25 November 2015, available at: <http://www.amnesty.org.uk/press-releases/uk-made-missile-used-airstrike-ceramics-factory-yemen>.

<sup>258</sup> "United Arab Emirates employ British Hakim A series precision guided munitions in Yemen", *Armament Research*, 26 November 2015, available at: <http://armamentresearch.com/united-arab-emirates-employ-british-hakim-a-series-precision-guided-munitions-in-yemen/>.

<sup>259</sup> *Ibid*.

<sup>260</sup> BBC, "Yemen: Wedding attack death toll rises to 130", 29 September 2015, available at <http://www.bbc.co.uk/news/world-middle-east-34388463>.

the wedding tents were pitched in a remote stretch of desert, far from any military sites or personnel.<sup>262</sup> The Saudi-led Coalition's military spokesperson denied both incidents, describing reports of first attack as "*false news*".<sup>263</sup> In contrast, Yemeni security sources confirmed the first strike, with a senior government official characterising it as a "*mistake*".<sup>264</sup> The first attack was condemned by the UN Secretary-General, who called for a prompt, effective, independent and impartial investigation into all violations of international law.<sup>265</sup> The UN Under-Secretary General for Humanitarian Affairs described himself as "*deeply disturbed*" by the second incident and called for a "*swift, transparent and impartial investigation*".<sup>266</sup> There is no indication that any such investigations have been undertaken by Saudi Arabia to date.

## APPLICABLE LAW

The same analysis applies as in relation to incident (v) *supra*.

## (viii) MULTIPLE AIRSTRIKES ON A MÉDECINS SANS FRONTIÈRES HOSPITAL

### REPORTED FACTS

On 27 October 2015, Coalition forces are reported to have repeatedly struck a MSF hospital in Saada governate,<sup>267</sup> resulting in multiple casualties<sup>268</sup> and the destruction of the hospital.<sup>269</sup> The facility was hit up to six times, which suggests that it was deliberately targeted.<sup>270</sup> Furthermore, the Coalition is said to have been provided with the coordinates of the hospital two weeks beforehand.<sup>271</sup> The MSF hospital is one of over 50 hospitals and health facilities to have been damaged or partially destroyed as a result of attacks, which

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<sup>261</sup> BBC, "Yemen conflict: Deadly attack on wedding party", 8 October 2015, available at <http://www.bbc.co.uk/news/world-middle-east-34471968>.

<sup>262</sup> S Almosawa and K Fahim, "Airstrikes in Yemen hit wedding party, killing dozens", *New York Times*, 28 September 2015, available at <http://www.nytimes.com/2015/09/29/world/middleeast/airstrikes-in-yemen-hit-wedding-party-killing-dozens.html>; Al-Jazeera, "UN chief condemns deadly air strike on Yemen wedding", 30 September 2015, available at <http://www.aljazeera.com/news/2015/09/chief-condemns-deadly-air-strike-yemen-150929064109880.html>.

<sup>263</sup> See *e.g.*, S Almosawa and K Fahim at fn. 262 *supra*. See also G Mezzofiore, "13 die at wedding party in second alleged Saudi coalition airstrike", *International Business Times*, 8 October 2015, available at <http://www.ibtimes.co.uk/yemen-13-die-wedding-party-second-alleged-saudi-coalition-air-strike-1523096>.

<sup>264</sup> See fn. 261 *supra*.

<sup>265</sup> "Yemen: Ban condemns airstrikes that reportedly struck wedding party and killed over 100", *UN News Centre*, 28 September 2015, available at: <http://www.un.org/apps/news/story.asp?NewsID=52023#.VnFhyRFLHzI>.

<sup>266</sup> "Civilians killed by air strikes at Yemeni wedding party 'deeply disturbing,' says UN humanitarian chief", *UN News Centre*, 9 October 2015, available at: <http://www.un.org/apps/news/story.asp?NewsID=52208#.VnFkBBFLHzI>.

<sup>267</sup> "Statement attributable to the Spokesman for the Secretary-General on Yemen", *UN News Centre*, 27 October 2015, available at <http://www.un.org/sg/statements/index.asp?nid=9187>.

<sup>268</sup> See *e.g.*, N Khomami, "Airstrikes hit Médecins sans Frontières hospital in Yemen", *The Guardian*, 27 October 2015, available at <http://www.theguardian.com/world/2015/oct/27/yemen-hospital-hit-by-saudi-led-airstrikes>.

<sup>269</sup> *Ibid*.

<sup>270</sup> See *e.g.*, Khomami at fn. 268; and Al-Jazeera, "MSF hospital in Yemen hit by Arab-coalition airstrikes", 27 October 2015, available at <http://www.aljazeera.com/news/2015/10/yemen-msf-hospital-hit-arab-coalition-air-strikes-151027105128567.html>.

<sup>271</sup> See Khomami at fn. 268.



also injured and killed staff and patients.<sup>272</sup> Both the UN Secretary-General and the World Health Organisation condemned the attack as a violation of IHL.<sup>273</sup> A Coalition spokesperson confirmed that Coalition aircraft had been in operating in the area but denied that they had hit the hospital.<sup>274</sup>

## **APPLICABLE LAW**

This too appears to have constituted either an indiscriminate attack or a direct attack on civilians and/or civilian objects in serious violation of customary IHL, applicable in both NIACs and IACs, and/or Article 13 APII, applicable in NIACs, or Article 12 and/or 51 API, applicable in IACs. They also appear to have constituted a breach of the special protections afforded to medical facilities, which would also constitute a serious violation of customary IHL in NIACs and IACs and/or of Articles 9 and 11 APII, applicable in NIACs, or Articles 12 or 15 API, and/or Article 19 of GC I, applicable in IACs. Insofar as the attack was perpetrated by members of the Saudi armed forces and/or other individuals over whom Saudi is exercising effective control, they entail the international responsibility of Saudi Arabia. In parallel, the attack may also, considered alone or in conjunction with other attacks, constitute a war crime *inter alia* as defined in the ICC Statute, giving rise to the individual criminal responsibility of the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to its commission, pursuant to Articles 8(2)(e)(i) (attacks on civilians) and/or 8(2)(e)(iv) (attacks on hospitals) of the ICC Statute, applicable in NIACs, or Articles 8(2)(a)(iv) (destruction of protected property), 8(2)(b)(ii) (attacks on civilians/the civilian population), 8(2)(b)(iii) (attacks on civilian objects), 8(2)(b)(ix) (attacks on hospitals) and/or 8(2)(b)(xiii) (destruction of property), applicable in IACs.

## **(ix) REPEATED USE OF CLUSTER MUNITIONS IN BUILT-UP AREAS**

### **REPORTED FACTS**

The repeated use by the Saudi-led Coalition of cluster munitions, including in built up areas,<sup>275</sup> has been confirmed by the Cluster Munitions Monitor.<sup>276</sup> At least two cases involved the use of US-made and supplied weapons, which Saudi Arabia acknowledges having used in the conflict.<sup>277</sup> Most recently, in November 2015, Amnesty received reports that cluster munitions had been used in a residential neighbourhood of Ahma, in Saada

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<sup>272</sup> OCHA, *Humanitarian Bulletin Yemen*, 15 October 2015, available at [https://www.humanitarianresponse.info/en/system/files/documents/files/yemen\\_humanitarian\\_bulletin-15\\_october\\_2015\\_1.pdf](https://www.humanitarianresponse.info/en/system/files/documents/files/yemen_humanitarian_bulletin-15_october_2015_1.pdf).

<sup>273</sup> See Khomami at fn. 268 *supra*, and WHO, “WHO condemns attacks on MSF hospital in Yemen”, 28 October 2015, available at <http://www.who.int/mediacentre/news/statements/2015/msf-hospital-yemen/en/>.

<sup>274</sup> BBC, “Yemen conflict: MSF hospital destroyed by airstrikes”, 27 October 2015, available at <http://www.bbc.co.uk/news/world-middle-east-34645469>.

<sup>275</sup> Amnesty International report at fn. 224 *supra*, p. 27. See also International Campaign to Ban Landmines – Cluster Munition Coalition, *Cluster Munitions Monitor 2015*, August 2015, available at [http://www.the-monitor.org/media/2135498/2015\\_ClusterMunitionMonitor.pdf](http://www.the-monitor.org/media/2135498/2015_ClusterMunitionMonitor.pdf), p. 16.

<sup>276</sup> International Campaign to Ban Landmines report at fn 275 *supra*, pp. 1, 2, 5, 9, 11, 16.

<sup>277</sup> *Ibid*, p. 16.

governorate, a location 10km away from the nearest known military objective.<sup>278</sup> At least four people were wounded in this attack.<sup>279</sup>

## **APPLICABLE LAW**

Although Saudi Arabia is not a State party to the Cluster Munitions Convention, the use of these weapons in populated areas constitutes in most if not all cases a violation of the customary IHL prohibitions on indiscriminate and/or disproportionate attacks.<sup>280</sup> In particular, the wide area impact of cluster munitions and the high failure rate of submunitions – which can kill and injure civilians many years after their deployment – render the lawfulness of their use highly questionable. Their use constitutes a serious violation of customary IHL, applicable in NIACs and IACs, where they engender serious consequences for individual civilians or for the civilian population, and/or of Article 13 APII or Article 51 API, applicable in NIACs and IACs respectively. Insofar as the attack was perpetrated by members of the Saudi armed forces and/or other individuals over whom Saudi Arabia is exercising effective control, they entail the international responsibility of Saudi Arabia. In parallel, the attack may also, considered alone or in conjunction with other attacks, constitute a war crime as defined *inter alia* in the ICC Statute, giving rise to the individual criminal responsibility of the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to its commission, pursuant to Articles 8(2)(e)(i) or 8(2)(b)(i) (attacks on the civilian population), applicable in NIACs and IACs respectively. The deployment of cluster munitions in Yemen has been noted and condemned by at least a dozen States<sup>281</sup> and by the European Parliament.<sup>282</sup> Importantly, the UK is a State Party to the Cluster Munitions Convention, and the FCO's 2014 report on human rights and democracy reflects the Government's intention to "*pursue the goal of a world free of the suffering and casualties caused by anti-personnel mines and cluster munitions, by encouraging all states to refrain from the use of such weapons.*"<sup>283</sup>

## **(x) ONGOING BLOCKADE ON YEMENI PORTS AND AIRPORTS:**

### **REPORTED FACTS**

The Saudi-led Coalition is enforcing a naval blockade of Yemeni ports. The intensity of the blockade has reportedly varied over time. Whereas it originally consisted of a full blockade of Yemeni ports, prohibiting all but a limited number of aid shipments, restrictions have since been somewhat reduced: vessels must now reportedly be approved and inspected by

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<sup>278</sup> Human Rights Watch, "Yemen: Brazilian cluster munitions suspected in Saudi Arabia-led coalition attack", 3 November 2015, available at <https://www.amnesty.org.nz/yemen-brazilian-cluster-munitions-suspected-saudi-arabia-led-coalition-attack>.

<sup>279</sup> *Ibid.*

<sup>280</sup> See CIHL Study at fn. 69, Vol. I, Rules 12-14.

<sup>281</sup> See International Campaign to Ban Landmines report at fn. 275, p. 17.

<sup>282</sup> See European Parliament Resolution at fn. 100 fn, preambular § E.

<sup>283</sup> UK FCO, *Human Rights and Democracy Report 2014*, 12 March 2014, available at <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014>.

Coalition forces in order to enter Yemen's territorial waters.<sup>284</sup> The blockade is reported to have had a significant impact on the availability of food and fuel in Yemen, by precluding the entry of all but a very small number of aid shipments, and hampering their distribution around the country.<sup>285</sup> The consequences for Yemeni civilians are significant: in August 2015 the UN World Food Programme described Yemen as being but "one step away" from famine.<sup>286</sup>

## APPLICABLE LAW

This gives rise to a number of international law concerns, the first being whether the use of military blockades is permitted at all.<sup>287</sup> There is only limited support in international legal scholarship for the legality of blockades outside of IACs. A detailed analysis of the matter is outside the scope of this opinion; however, it is a matter on which the UK Government would need to have taken a view in continuing to supply arms to Saudi Arabia that might be used to enforce the blockade. More importantly, there are significant concerns as to whether Saudi Arabia can properly be said to be complying with the customary IHL and/or Article 18(2) APII requirements to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.<sup>288</sup> To the extent that the blockade is preventing this form of relief, or that the damage to the civilian population is excessive in relation to the concrete and direct military advantage anticipated from the blockade, it is unlawful (pursuant, in particular to Rule 102(b) of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which reflects customary IHL on this matter).<sup>289</sup> It can also be said to constitute a breach of the IHRL requirement to respect, protect and fulfil the right to food of the civilian population, which is itself closely linked to the right to life, in situations of famine or near famine. IHRL obligations remain fully binding on Yemen and any States that assist it, including Saudi Arabia, notwithstanding the existence of an armed conflict. Consequently, the effects of the blockade constitute a serious violation of both IHL and IHRL, and an internationally wrongful act for which Saudi Arabia bears responsibility. In parallel, the blockade may also constitute a war crime *inter alia* as defined in the under the ICC Statute, giving rise to the individual criminal responsibility of the individual(s) involved in committing, ordering, soliciting, inducing, facilitating it or otherwise contributing to it, pursuant to Article 8(2)(b)(xxv) applicable in IAC, insofar as relief supplies are being wilfully impeded.

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<sup>284</sup> See *NORTH P & I Club News* at fn. 88 *supra*.

<sup>285</sup> See UNHRC at fn. 40 *supra*.

<sup>286</sup> "WFP Warns of Food Crisis in Yemen Amid Challenges in Reaching People and Shortage Of Funding", *World Food Programme News*, 19 August 2015, available at <http://www.wfp.org/news/news-release/wfp-head-warns-growing-food-crisis-yemen-amid-challenges-reaching-people-and-short>, and UN World Food Programme, *Yemen Emergency*, available at: <https://www.wfp.org/emergencies/yemen>; see also S El Taraboulsi, "Saudi blockade threatens famine in Yemen", *Open Democracy*, 6 November 2015, available at <https://www.opendemocracy.net/arab-awakening/sherine-el-taraboulsi/saudi-blockade-threatens-famine-in-yemen>.

<sup>287</sup> See § 2.27 and fn. 85 *supra*.

<sup>288</sup> CIHL Study, at fn. 69, Rule 55. APII, Art. 18(2) requires relief actions to be undertaken if the civilian population is "suffering undue hardship owing to a lack of the supplies essential for its survival".

<sup>289</sup> See, in particular, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Rule 102(b).