

## United Kingdom, Arms Trade With Saudi Arabia

**INTRODUCTORY TEXT:** *The case deals with the legality of arms transfer to countries engaged in armed conflict under the Arms Trade Treaty (ATT) and the Geneva Conventions, and in particular, the UK's export of arms to the Kingdom of Saudi Arabia. Various NGOs have accused the Kingdom of Saudi-Arabia of committing serious violations of IHL during its intervention in the armed conflict in Yemen. The legality of UK's continued export of arms to the Kingdom of Saudi Arabia has been discussed in front of the UK Parliament and the High Court of Justice.*

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**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

### A. THE ARMS TRADE TREATY

[Source: UN Office for Disarmament Affairs (UNODA), 'The Arms Trade Treaty', 24 December 2014, available at: <https://www.un.org/disarmament/>]

[...]

#### Article 1

##### Object and Purpose

The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;

- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:

- Contributing to international and regional peace, security and stability;

- Reducing human suffering;

- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

## **Article 2**

### **Scope**

1. This Treaty shall apply to all conventional arms within the following categories:

- (a) Battle tanks;
- (b) Armoured combat vehicles;
- (c) Large-calibre artillery systems;
- (d) Combat aircraft;
- (e) Attack helicopters;
- (f) Warships;
- (g) Missiles and missile launchers; and
- (h) Small arms and light weapons.

2. For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as “transfer”.

3. This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State's ownership.

## **Article 3**

### **Ammunitions/Munitions**

Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2(1), and shall apply the provisions of Article 6 and Article 7 prior to authorising the export of such ammunition/munitions.

## **Article 4**

## **Parts and Components**

Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2(1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.

### **Article 6**

#### **Prohibitions**

[...]

3. A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of its items covered under Article 3 or Article 4, if it has knowledge at the time of the authorisation 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.

### **Article 7**

#### **Export and Export Assessment**

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, 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;
- iii. commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
- iv. commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

[...]

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.

## **B. ATT MONITOR CASE STUDY ON THE ARMS SALES TO SAUDI ARABIA**

[Source: ATT Monitor, 'Dealing in Double Standards: How Arms Sales to Saudi Arabia Are Causing Human Suffering in Yemen', 2016, available at: <http://controlarms.org/en/wp-content/uploads/sites/2/2016/02/ATT-Monitor-Case-Study-2-Saudi-Arabia-FINAL.pdf> (footnotes omitted)]

[...]

[1] In March 2015, following heavy fighting, a long-running political crisis in Yemen erupted into a full-blown conflict. In January, Houthi rebel forces seized control of the capital Sana'a, triggering the collapse of the internationally recognised government. After President Hadi requested external military intervention, a coalition of states led by Saudi Arabia began aerial bombing in Yemen, with an aim of restoring the deposed government.

[...]

### **THE CONFLICT IN YEMEN**

[2] Since March 2015, more than 35,000 people have been killed and injured in fighting across Yemen. According to the UN, almost 3,000 killed and over 5,600 injured were civilians. More than 700 children have been killed. The UN Office for the Coordination of Humanitarian Affairs reports that over 2.5 million people are internally displaced.

[3] Repeated efforts to negotiate a ceasefire have failed, and the conflict still rages. Parties often use heavy explosive weapons, including aircraft bombs, rockets and artillery, to carry out attacks in, on and around residential areas and civilian objects. Aerial munitions, frequently dropped in populated areas, including Sana'a, have been responsible for much human suffering.

[4] There is increasing evidence of serious violations of international humanitarian law (IHL) and international human rights law (IHRL) by all parties. The UN Under-Secretary-General for Humanitarian Affairs has condemned coalition airstrikes as being "in clear contravention of international humanitarian law, and unacceptable". The International Committee of the Red Cross (ICRC) has called for fighting to take place in accordance with IHL, as hospitals have endured repeated attack from air strikes and shelling. In January 2016, a report prepared for the UN Security Council by a Panel of experts on Yemen identified 119 coalition air strikes relating to violations of IHL. It states that air strikes have targeted civilians and civilian objects, including residential areas, markets, schools, mosques, factories and food warehouses, and gatherings such

as weddings.

[5] Coalition naval forces have also imposed a blockade on Yemeni ports. This is believed to have greatly exacerbated the humanitarian crisis, contributing to severe food and fuel shortages. Concerns can be raised that the blockade may also be causing serious violations of IHL and IHRL.

[...]

### **Arms Transfers to Saudi Arabia**

[6] Many countries transferred arms to Saudi Arabia prior to the ATT entering into force. Transfer data made available by the Stockholm International Peace and Research Institute (SIPRI) shows that in 2014, major conventional arms were transferred to Saudi Arabia by: Canada, France, Germany, the Netherlands, South Africa, Spain, Sweden, Switzerland, Turkey, the UK and the US. The United Nations database on international trade (Comtrade) shows that in 2014, 24 states exported arms, ammunition, and parts and components to Saudi Arabia.

[...]

### **The Arms Trade Treaty and Transfers to Saudi Arabia**

[7] The ATT now applies in full to all State Parties to the Treaty for whom it has entered into force. For those countries, the serious violations of IHL and IHRL in Yemen, and continuing transfers to Saudi Arabia and its coalition partners in that context, represent a major test of their willingness to implement their legal obligations.

[8] Several articles of the Treaty apply directly to recent cases of licence approvals and arms transfers to Saudi Arabia.

[...]

[9] Article 6.3 of the ATT imposes an absolute obligation on a State Party not to authorise a transfer if 'it has knowledge at the time of the authorisation 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.' 'Knowledge' here means that the State Party must know (because the circumstances are notorious) or have reasonable suspicions that the arms would be used for such crimes, even if it failed to check widely available credible reports. [...] Given the current situation in Yemen, State Parties to the ATT must adhere to their legal obligation to not authorise any potential export of lethal military equipment that could be used unlawfully in Yemen.

[10] Under ATT Article 7 (Export and Assessment), if an export is not prohibited under Article 6, State Parties must carry out a comprehensive risk assessment prior to authorisation. States must, among other criteria, investigate the likelihood that arms might be used to commit or facilitate a serious violation of IHL [Article

7(1.a)] or IHRL [Article 7(1.b)].

[11] Legal examinations of States Parties' recent risk assessments in this context are now taking place in several countries [...]

[...]

## Conclusion

[12] State Parties must comply with their legal obligations and live up to the Treaty's objective of reducing human suffering. Given the scale of the humanitarian crisis in Yemen and the widely-reported unlawful use of weapons in the conflict raging there, it is inconceivable that legal military equipment can continue to be authorised for export.

[13] The first years of the ATT's entry into force are the time in which a new norm is established against the reckless transfer of arms. If properly implemented, the ATT could have a significant impact in helping end the desperate suffering in Yemen. For that to happen, however, States Parties must ensure that they fulfil their Treaty obligations.

[...]

## C. EUROPEAN PARLIAMENT RESOLUTION ON THE HUMANITARIAN SITUATION IN YEMEN

[Source: European Parliament, 'European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen (2016/2515(RSP))', available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0066+0+DOC+PDF+V0//EN>]

[...]

B. whereas the Saudi-led military intervention in Yemen, requested by Yemen's President Abd Rabbuh Mansur Hadi, [...], has led to a disastrous humanitarian situation that affects the population across the country, has serious implications for the region and constitutes a threat to international peace and security; whereas members of Yemen's civilian population, already affected by dire living conditions, are the first victims of the current military escalation;

[...]

G. whereas there are multiple reports that airstrikes by the Saudi-led military coalition in Yemen have hit civilian targets, including hospitals, schools, markets, grain warehouses, ports and a camp for displaced

persons, severely damaging essential infrastructure for the delivery of aid and contributing to the severe food and fuel shortages in the country; whereas a hospital in northern Yemen supported by Médecins Sans Frontières (Doctors Without Borders) (MSF) was bombed on 10 January 2016, resulting in at least six people being killed, a dozen being injured, including MSF staff, and severe damage to medical facilities; whereas this is the latest in a series of attacks on health facilities; whereas many historic monuments and archaeological sites have also been irreparably damaged or destroyed, including parts of the Old City of Sana'a, a UNESCO World Heritage site;

[...]

N. whereas some EU Member States have continued to authorise transfers of weapons and related items to Saudi Arabia since the war started; whereas such transfers are in violation of Common Position 2008/944/CFSP on arms export control, which explicitly rules out the authorising of arms licences by Member States if there is a clear risk that the military technology or equipment to be exported might be used to commit serious violations of international humanitarian law and to undermine regional peace, security and stability;

[...]

4. Calls on all sides to comply with international humanitarian law and international human rights law, to ensure the protection of civilians and to refrain from directly targeting civilian infrastructure, in particular medical facilities and water systems; demands an independent investigation into all allegations of abuse, torture, targeted killing of civilians and other violations of international human rights law and international humanitarian law;

5. Reminds all parties that hospitals and medical personnel are explicitly protected under international humanitarian law and that the deliberate targeting of civilians and civilian infrastructure amounts to a war crime; calls for an impartial and independent investigation into all alleged violations of international human rights law and international humanitarian law, including the latest attacks targeting humanitarian infrastructure and personnel; calls on all parties to respect the human rights and freedoms of all Yemeni citizens, and stresses the importance of improving the security of all those working on peace and humanitarian missions in the country, including aid workers, doctors and journalists;

6. Calls for the EU to effectively promote compliance with international humanitarian law, as provided for in the relevant EU guidelines; stresses, in particular, the need for the EU to raise, in its political dialogue with Saudi Arabia, the necessity of complying with international humanitarian law, and, in the event that such dialogue yields no results, to consider other measures in accordance with the EU Guidelines on promoting compliance with international humanitarian law;

7. Calls on the VP/HR [Vice President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy] to launch an initiative aimed at imposing an EU arms embargo against Saudi Arabia, given the serious allegations of breaches of international humanitarian law by Saudi Arabia in Yemen and the fact that the continued licensing of weapons sales to Saudi Arabia would therefore be in breach of Council Common Position 2008/944/CFSP of 8 December 2008;

## D. EU COUNCIL COMMON POSITION ON EXPORTS OF MILITARY TECHNOLOGY AND EQUIPMENT

[Source: Council of the European Union, Common Position 2008/944/CFSP, adopted on 8 December 2008, "Defining Common Rules Governing Control of Exports of Military Technology and Equipment", *Official Journal of the European Union* L 335/99, 13 December 2008, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>]

[...]

THE COUNCIL OF THE EUROPEAN UNION

[...]

HAS ADOPTED THIS COMMON POSITION:

### *Article 1*

1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.

[...]

### *Article 2*

#### **Criteria**

[...]

2. Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

[...]

- 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. Criterion Six: 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.

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

[...]

(b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;

[...]

## E. UK PARLIAMENTARY INQUIRY INTO THE CRISIS IN YEMEN

[Source: UK House of Commons, International Development Committee, *Crisis in Yemen*, Fourth Report of Session 2015-16, 4 May 2016, available at <https://publications.parliament.uk/> (footnotes omitted)]

[...]

### Arms sales to Saudi Arabia

58. The UN Secretary General recently described Yemen as a region “awash with weapons”, stating that “we need States that are party to the Arms Trade Treaty to set an example in fulfilling one of the Treaty’s main purposes: controlling arms flows to actors that may use them in ways that breach international humanitarian law.” The Arms Trade Treaty (ATT), along with UK national arms export criteria and the EU Common Position on arms exports, which regulate the UK trade in arms, say that licences cannot be granted “if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law.” We heard powerful evidence from representatives of humanitarian organisations who said that they had witnessed bombing and targeting of civilians and civilian objects on the ground in Yemen, which suggests that there is more than a clear risk of IHL violations by the Saudi-led coalition. Both Julien Harneis, UNICEF Representative in Yemen, and Grant Pritchard from Save the Children described the bombing they had seen on the ground as “indiscriminate”.

59. The ATT Monitor recently concluded that several States Parties appear in direct violation of legally binding Treaty obligations by continuing to supply arms to Saudi Arabia where there is a clear risk that they will be used in breach of international law in Yemen. They described it as “inconceivable that lethal military equipment can continue to be authorised for export”.

60. UK arms sales to Saudi Arabia have significantly increased since the start of the current conflict in Yemen. Department for Business, Innovation and Skills documents report nearly £3 billion in military sales to

Saudi Arabia for the nine months from April to December 2015, that is a little under 40% of total UK arms sales during that period.

61. The Government insists that the UK has the most robust arms export licensing rules in the world. The Prime Minister told the House of Commons in January:

“we have the strictest rules for arms exports of almost any country anywhere in the world...we are not a member of the Saudi-led coalition; we are not directly involved in the Saudi-led coalition’s operations; and British personnel are not involved in carrying out strikes...our arms exports are carefully controlled and we are backing the legitimate Government of the Yemen.”

The Foreign Secretary wrote to us that the Government monitors the situation in Yemen very closely, taking account of relevant information, including UK, US and Saudi reporting and open source reporting by the media and NGOs. He told us that he “is satisfied that all extant UK licences for the export of arms to Saudi Arabia are compliant with the Consolidated EU and National Arms Export Licensing Criteria.” These points were reiterated in recent correspondence with the Foreign Secretary, which is published as an Appendix to this report.

62. We heard that Saferworld and Amnesty International commissioned a legal opinion by eminent law experts Professor Philippe Sands QC and Blinne Ní Ghrálaigh of Matrix Chambers and Professor Andrew Clapham. It concluded that the UK Government is breaking national, EU, and international law by supplying weapons to Saudi Arabia in the context of its military intervention in Yemen where there are clear examples of indiscriminate bombing which are in breach of IHL.

**63. While we recognise that the arms export industry plays an important role in the UK economy and we are clear that the UK is legitimately allowed to sell weapons to allies, the Government should not sell weapons to allies if doing so would breach the UK’s legal obligations under UK arms export criteria, the EU common position on arms exports and the Arms Trade Treaty. Indeed, we suggest that it is in the long-term interest of the arms industry to be able to demonstrate a robust approach that maintains compliance with IHL.**

**64. The growing evidence of indiscriminate bombing by the Saudi-led Coalition in Yemen, in violation of IHL, raises serious questions over the Government’s continued licensing of arms transfers to Saudi Arabia must be answered. If there is a risk that it contravenes the UK’s obligations under the laws which regulate the international arms trade, the UK should not be providing arms to one of the parties to the conflict.**

**65. In light of the strength and credibility of the evidence we have heard, we welcome the Committees on Arms Export Controls (CAEC) inquiry into the use of UK-manufactured arms in Yemen. We recommend that CAEC considers the case for suspending arms sales to Saudi Arabia until such time as there is evidence that there is no “clear risk” that arms exported from the UK “might be used in the commission of a serious violation of IHL”. An independent inquiry would provide credible evidence on whether UK manufactured arms have been used in the commission of violations of IHL, and the UK Government should fully support an independent investigation without delay.**

## F. UK HIGH COURT OF JUSTICE

[Source: UK High Court of Justice *R (on the application of Campaign Against The Arms Trade) v. the Secretary of State for International Trade and Interveners*, EWHC 1726 (QB), CO/1306/2016, 10 July 2017, available at: <https://www.judiciary.uk/judgments/r-on-the-application-of-campaign-against-the-arms-trade-v-the-secretary-of-state-for-international-trade-and-interveners/>]

### INTRODUCTION

1. The issue in this claim for judicial review is whether the Secretary of State for International Trade, who since July 2016 has had responsibility for licensing the export of arms, is obliged by law to suspend extant export licences to the Kingdom of Saudi Arabia and cease granting new licences, to conform with Government policy to deny such licences where there is “a clear risk that the arms might be used in the commission of a serious violation of International Humanitarian Law”. The claim springs from the conflict in Yemen and the border areas of Saudi Arabia. It focusses on airstrikes conducted by a coalition led by Saudi Arabia (“the Coalition”) in support of the legitimate government of Yemen against the Houthi rebellion. The Claimant submits that the body of evidence available in the public domain, in particular from respected human rights organisations and international monitoring agencies, not only suggests but dictates the conclusion that such a clear risk exists. Since no other conclusion was rationally open to the Secretary of State, it is no longer lawful to license the sale of arms to Saudi Arabia.
2. The Secretary of State resists the Claimant’s case with the aid of open evidence and argument. [...]

### THE LEGAL FRAMEWORK

#### Domestic and EU regime governing arms sales

[...]

*User’s guide*

[...]

13. The Claimant’s arguments focused, in particular, on two paragraphs in the section of the User’s Guide relating to the best practices for the interpretation of Criterion 2 [EU Council Common Position on Exports of Military Technology and Equipment]. Those paragraphs deal with “clear risk”:

“2.13 *Clear risk*. A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of a serious violation of international humanitarian law should include an inquiry into the recipient’s past and present record of respect for international humanitarian law,

the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law. Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern."

[...]

### **International Humanitarian Law**

[...]

16. [...] The term "serious violation" is a general term in International Humanitarian Law which *includes* "grave breaches" and "war crimes" as defined, in particular, in the four Geneva Conventions, Additional Protocol 1 and in Article 8 of the Rome Statute of the International Criminal Court ("ICC").

[...]

### **CHALLENGE**

49. By these judicial review proceedings, the Claimant challenges (a) the continuing failure of the Secretary of State to suspend export licences for the sale or transfer of arms and military equipment to Saudi Arabia for possible use in the conflict in Yemen and (b) the decision communicated on 9th December 2015 to continue to grant new licences of this nature.

[...]

### **THE ISSUE**

59. The central issue is whether the Secretary of State was entitled to conclude on the evidence and advice available to him, both open and closed, that there was no "clear risk that the [UK licensed] items might be used in the commission of a serious violation of international humanitarian law" in Yemen. [...]

### **GROUND OF CHALLENGE**

[...]

## *General observations*

201. In our view, the following general matters are clear from the evidence.

i) The process of governmental decision-making as to arms export licencing is a highly sophisticated, structured and a multi-faceted process, involving, as Mr Eadie QC [the council for the defendant] submitted, multiple Government departments, all levels within Government including those at the very top of Government, judgement by officials at many levels of seniority with particular expertise to make those judgements, and judgements which are prospective and predictive.

ii) There is a significant *qualitative* difference between the risk analysis which the government agencies involved in the decision-making process are able to carry out, on the one hand, and the reports of the NGOs and press as to incidents in Yemen, on the other. The government system involves drawing upon, and drawing together, a large number of significant strands and sources of information, including evidence and intelligence not available to the public, NGOs or press, including through close contacts with the Saudi military. By contrast, the reports of the NGOs and press of incidents suffer from a number of other relative weaknesses. These include, that such organisations often have not visited and conducted investigations in Yemen, and are necessarily reliant on second-hand information. Moreover, ground witnesses may draw conclusions about airstrikes without knowledge of all the circumstances.

iii) There were gaps in the analysis of the Foreign Office and MoD of the situation. The UK is a bystander in this volatile conflict, is not a member of the Coalition, and the MoD is not involved in identifying targets and does not have access to the operational intelligence. But the Government's knowledge and experience of Saudi Arabia, borne of its close contacts, place it well to make the necessary assessment for the purpose of Criterion 2c [of the EU Common Position –above, Document D].

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

## *Claimant's overarching argument*

205. The Claimant's overarching argument is that the third party reports - in particular (i) the reports of United Nations agencies (including the United Nations Panel of Experts), (ii) the reports of the European Parliament, (iii) the reports of UK Parliamentary Committees, (iv) the reports of NGOs, (v) the reports of the Claimants and Intervenor and (vi) press and other media reports - raising allegations of numerous breaches of International Humanitarian Law by the Coalition in Yemen, raised a presumption of a "clear risk" under Criterion 2c of "serious violations" of International Humanitarian Law which could not rationally be rebutted, *i.e.* they create an presumption of irrationality on the part of the Secretary of State.

206. The Claimant also argued that the third party report cast a burden upon the Secretary of State to analyse and explain why he rejects their findings before himself concluding that there is no clear risk for the purposes of Criterion 2c of serious violations of International Humanitarian Law.

### *Discussion*

207. The Claimant and the Intervenors naturally place heavy reliance on the numerous third-party reports in 2016 of civilian casualties and allegations of breaches of International Humanitarian Law by the Coalition in Yemen. However, in our view, the third party reports do not raise any legal presumption that Criterion 2c is triggered, although, as the Secretary of State accepts, their content must be properly considered in the overall evaluation.

208. The following points are pertinent:

i) The fact that civilian casualties have occurred does not without more mean that a breach of International Humanitarian Law has taken place, still less a serious breach. Customary international law and International Humanitarian Law have long recognised that civilian casualties in military conflicts will occur. The 'Principle of Distinction' prohibits intentional attacks against civilians; and the 'Principle of Proportionality' prohibits attacks which anticipate excessive civilian casualties.

ii) The question of whether a breach of International Humanitarian Law has in fact taken place following civilian casualties is often necessarily a complex and fact-sensitive question requiring careful investigation.

iii) Even if isolated incidents of International Humanitarian Law violations by a recipient country are considered likely to have taken place, that does not automatically trigger Criterion 2c. It does not mean that there should be a finding that there is a clear risk that licensed items might be used in the commission of serious violations of International Humanitarian Law. [...]

(4) It is clear from the evidence that the third party reports upon which the Claimant relies were taken into account by the Secretary of State at each stage when considering his decision under Criterion 2c, together with all the other information and analyses available to him. The reports were often directed at broader considerations than International Humanitarian Law violations.

[...]

(6) It is clear the Secretary of State and his advisers treated the allegations drawn to their attention in the third-party reports seriously and as a matter of concern. [...] It was concluded that the additional allegations were concerning but they did not warrant a change in the overall analysis of the risk of future non-compliance with International Humanitarian Law by the Saudi authorities. [...]

[...]

(8) It is clear why the Secretary of State took the view that he did that Criterion 2c was not triggered, notwithstanding the various third party reports that came to his, and his advisers', attention. His assessment of all the material in the light of the advice tendered by officials and fellow ministers was that the necessary risk was not established. We should add that it was not legally necessary for him to engage directly with everything that has been said by others on the topic.

#### *"Finely balanced" decision*

209. In our view, the fact that senior officials were advising the Secretary of State that the decision was "finely balanced", and the Secretary of State himself expressly acknowledged that this was the case, is instructive. It points to the anxious scrutiny - indeed at what seems like anguished scrutiny at some stages - given to the matter and the essential rationality and rigour of the process in which the Secretary of State was engaged. The picture was acknowledged to be far from a black and white. The decision involved balancing a series of complex and competing factors. Such self-evidently finely balanced judgements are paradigm matters for evaluation and decision by the Executive in conformity with the scheme established by Parliament. They are, of course, subject to scrutiny in the High Court, but with a suitable recognition of the institutional competence of those charged with the decision-making process. So it is in this case. The Claimant appeared at one stage to suggest that because the Government themselves considered the decision to be finely balanced that would enable a Court more readily to interfere. On the contrary, in an area where the Court is not possessed of the institutional expertise to make the judgments in question, it should be especially cautious before interfering with a finely balanced decision reached after careful and anxious consideration by those who do have the relevant expertise to make the necessary judgements.

#### **CONCLUSION**

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

[...]

## RESULT

[...]

214. In the result, the Claimant's claim for judicial review is dismissed.

## Discussion

### I. Classification of the Conflict and Applicable Law:

#### 1. (*Document B, para. [1]*)

- a. How would you qualify the situation in Yemen? Which rules of IHL apply? (GC I-IV, Art. 3; P II, Art. 1)
- b. Does the military intervention of the coalition led by Saudi Arabia influence the nature of the conflict? Is it an internationalised armed conflict? What does this expression imply?
- c. Would the nature of the conflict change if the Yemeni President had not consented to the coalition's intervention? Can he still be considered the President if his government was "deposed"? If the Houthi armed group was considered the legitimate government, how would this influence the qualification of the conflict?
- d. Does the classification of the conflict matter for the determination whether the conduct described in Document B, paras [2]-[5]; Document C, para. G; Document E, para. 58, violates IHL?
- e. Does the classification of the conflict matter for the evaluation of the UK arms exports to Saudi Arabia arising in this case?

### II. The Arms Trade Treaty:

#### 2. (*Document A*)

- a. What is the object and purpose of the ATT? What arms does the treaty cover? What is required for a transfer of arms to be prohibited under the ATT? If the export of arms is not prohibited under Article 6, can a State Party automatically authorise an export? What issues does it have to consider prior to an authorisation? What is meant by an "overriding risk" under Article 7? How is international humanitarian law taken into account in the ATT? (ATT, Arts 6, 7)
- b. Which rules of the ATT could be deduced from previously existing IHL? In particular from rules on the responsibility of states for internationally unlawful acts, combined with IHL? From Art. 1 common to the four

c. (*Document E, para. 65*) Does IHL require the UK to facilitate an independent investigation into its arms transfers to Saudi Arabia? If you conclude positively, what legal provision do you use to support your answer?

3. (*Document B, paras [6]-[12]; Document E, paras [58]-[65]; Document F, paras. 207-209*) Could one argue that the UK has “knowledge” that its arms may be used to conduct attacks directed against civilians and civilian objects? If the UK Government does not have such knowledge, what obligations must it comply with before authorising an export to Saudi Arabia? Is there an “overriding risk” that the arms transferred by the UK government to Saudi Arabia will be used in violation of IHL? Does the transfer of arms by the UK to Saudi Arabia violate the ATT? According to the ATT Monitor? According to the UK Government? What is your opinion? What if the UK has “knowledge” of the risk but has taken measures to ensure that the arms will not be used in violation of IHL? Would it still violate the ATT? IHL? (GCI-IV, Art. 1; ATT, Arts 6, 7)

4. (*Document B, paras [6]-[12], Document E, paras [58]-[65], Document F, paras 201-210*) How does the Court determine the measures taken by the Secretary of State? How do you compare it to the positions of the Parliamentary Committee and the ATT Monitor? What do you think is the main point of departure, if any? Do you agree with the Court's determination? Why/Why not?

5. (*Document F, paras 13, 16, 201-210*) Does the existence of a pattern of violations rise a presumption under the definition of ‘clear risk’ in the User's Guide? Is the ‘third-party reports’ enough to give rise to such a presumption? What do you make of the Court's definition of serious violations of IHL in light of the ATT?

6. (*Document F, paras 201(iii) and 208*) If the facts mentioned in Documents B, paras [2]-[5], and Document C, para. G, are correct, what information could the government have had allowing it to conclude that there were no serious violations of IHL (and therefore no serious risk of violations of IHL? How could which facts be explained without IHL having been violated? Which of the reported facts, if any, would necessarily indicate that IHL has been violated?

7. (*Document C; Document D; Document F, paras 201-210*) In addition to the ATT, what other international instruments prohibit the transfer of arms where there is a likelihood that they will be used in violation of IHL? Is the UK in breach of those instruments? Do you think that an arms embargo to Saudi Arabia could enhance compliance with IHL? Is the Court's determination in line with the EU Common position? (EU Council Common Position, Arts 1 and 2)