

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

B E T W E E N :

THE KING
(on the application of
Al-Haq)

Claimant

– and –

SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendant

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

[CB/TAB/page number] refers to the core bundle and [SB/TAB/page number] refers to the supplementary bundle.

INTRODUCTION

1. The Claimant (“C”) applies for judicial review of the Secretary of State for Business and Trade’s (the “SST”) decision to continue granting export licenses and to maintain existing export licences for military and dual-use equipment being exported to Israel either directly or where Israel is the final-destination, following the events of 7 October 2023.
2. The present challenge is brought on three grounds, namely: (i) that, on the premise that the SST has satisfied herself that this decision is compatible with Criteria 1(b), 2(c) and 7(g) of the Strategic Export Licensing Criteria,¹ this conclusion is irrational;² (ii) that the SST has made an error of law when construing the Criteria and related principles of law;³ and (iii) that the SST has failed to carry out the proper procedure in relation to the assessment under those Criteria.⁴
3. The SST has failed to engage with C’s pre-action correspondence and has failed to supply documents and information required under the duty of candour.⁵ She instead sent holding responses which did not indicate when she intends to respond.⁶ C’s first pre-action letter was sent on 16 October 2023, and it was not until 5 December 2023 that the SST indicated (by email)

¹ As set out in the statement of the Secretary of State for International Trade on 8 December 2021 (UIN HCWS449) available at: <https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/hcws449>. These were formerly referred to as the Consolidated Criteria, as set out in the statement of the then Secretary of State for Business Innovation and Skills on 25 March 2014 available at: <https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm>. [CB/C/283-287].

² As explained in §122 below, although C submits that rationality is made out on the facts, it submits that the standard for substantive review in relation to Criteria 1(b) and 7(g) may in fact be less onerous than this. It will ask the Court to determine this threshold point.

³ Although the SST’s non-compliance with the PAP process and the Duty of Candour has disabled C from formulating its grounds in the normal way, one explanation for the apparently irrational decision taken is that the SST has erred in law. C will seek to particularise this ground in due course.

⁴ As with Ground 2, one explanation for the SST’s apparently irrational decision is that she has erred in the procedure adopted. C will seek to particularise this ground in due course.

⁵ C’s pre-action correspondence of 16 October 2023 [SB/A/21-45], 21 October 2023 [SB/A/46-54], and 8 November 2023 [SB/A/65-79].

⁶ D’s emails of 30 October 2023 at exhibit [SB/A/55], 3 November 2023 at exhibit [SB/A/62], and 7 November 2023 at exhibit [SB/A/64], telephone call of 3 November 2023 at exhibit [SB/A/62], letter of 17 November 2023 at exhibit [SB/A/87-88].

that she would be in “*in a position to substantively respond in the week commencing 18 December 2023*”. C is issuing this challenge notwithstanding that indication for the following reasons:

- a. In light of the situation unfolding on the ground in Gaza and the threat to life and limb posed to all Palestinians living there, it is vital that the present challenge proceed with urgency. The facts, as set out in more detail below, are stark. On 6 December 2023, the BBC reported that according to the Ministry of Health in Gaza, 73 people have been killed and 123 people have been injured in the last 24 hours.⁷
 - b. It is also of course important that the challenge proceed in a sufficiently orderly manner to allow for its proper determination. Accordingly, as explained in the cover letter sent to the Court (as per §17.2.5 of the Administrative Court Guide), C is applying for an abridged timetable and a right to reply in section 9 of the Claim Form, which the SST does not object to in principle (as set out in her letter of 17 November 2023). The proposed timetable follows a standard pre-permission procedure, makes provision for replies by the Claimant post-Summary Grounds of Resistance and Detailed Grounds of Resistance, provides for an expeditious permission decision, and expedites the post-permission procedural steps, with provision that a hearing be listed by 7 May 2024.
 - c. This proposed timetable would be unacceptably delayed if C were to wait for the SST’s response, which per the SST’s indication could come during the Christmas vacation (which starts on 22 December 2023, the Friday of the week during which the SST has indicated that she will be in a position to respond).
4. Despite the SST’s failure to engage, as set out in §§6-11 below, C has sufficient factual material to draw a reasonable inference as to the decision taken by the SST to neither stop nor suspend her licensing decisions in respect of Israel. Further, whilst the SST has failed to provide C with any information regarding the reasons for, or procedures followed, in relation to her decision-making after 7 October 2023, C submits that there is no possibility that a reasonable decision-maker, directing herself properly in law and taking necessary steps to obtain and take into account the relevant evidence, would continue to grant, and not suspend, export licences to Israel.
5. The following submissions are structured to set out:
- (i) the basis for the reasonable inference that the SST has not stopped/paused licensing decisions in respect of Israel;
 - (ii) the law in relation to exports of military and dual-use equipment under the Criteria and related legal principles imported through those Criteria;
 - (iii) the relevant factual material demonstrating that Israel is in breach of international humanitarian law; and
 - (iv) the grounds of challenge.

⁷ BBC, “*Hamas-run health ministry says 73 killed in past 24 hours*” 6 December 2023 available at <https://www.bbc.co.uk/news/live/world-middle-east-67633071>

6. As set out in separate submissions, C is also applying for a costs capping order in section 9 of the Claim Form. The SST has confirmed that she does not object in principle to a costs capping order, and on 5 December 2023 the SST confirmed by email that C’s proposed terms of an adverse costs cap of £20,000 and reciprocal costs cap of £70,000 are agreed.

THE SST’S DECISION

7. Despite the SST’s failure to provide any substantive response to C’s correspondence, C submits that the Court should draw the inference that the licensing decisions being taken are materially the same as those known to have been taken prior to 7 October 2023. This is based upon the Government’s own public statements that nothing has changed with respect to arms licencing decisions, as set out below.
8. In *R (British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) at [18] the Court (Singh LJ and Foxton J) confirmed the principle in *R (Olabinjo) v Westminster Magistrates’ Court* [2020] EWHC 1093 (Admin) at [4] and [64] that where a proper inference can be drawn from the available materials, the Administrative Court can make the necessary findings of fact in judicial review proceedings. Fordham J has confirmed that: “*The judicial review court can take the need to resolve disputed facts in its stride*”.⁸
9. From the available evidence it can reasonably be inferred that the SST is continuing to license arms and equipment to Israel. In particular:
 - a. Reuters contacted the Department for Business and Trade in relation to C’s pre-action correspondence concerning this judicial review. Their spokesperson responded that: “*At present there are no immediate plans to stop arms export licences to Israel. All export licences are kept under continual review, with applications assessed on a case-by-case basis against strict criteria.*”⁹ C notes that it might be thought surprising that His Majesty’s Government responds to Reuters in relation to the present proceedings, but refuses to provide the C with any response.
 - b. Similarly, openDemocracy¹⁰ “*asked the Department of Business and Trade if it would suspend and review its export licences for arms to Israel in light of the reported civilian killings. In response, the department said the licences were “under continual review” but there were “no immediate plans to stop arms export licences to Israel”.*”
 - c. The above is in keeping with statements of the Prime Minister, Rishi Sunak, and the then Foreign Secretary, James Cleverly. By way of example, the Prime Minister said on 9 October 2023 that “*We’ve provided in the past the kinds of equipment that [Israel has] used to defend themselves over the past couple of days, ... And as I said to the prime minister [Benjamin Netanyahu], we will continue to provide - whether that’s diplomatic, intelligence or security support - as they need.*”^{11 12}

⁸ *R (Dobson) v Secretary of State for Justice* [2023] EWHC 50 (Admin) at [35].

⁹ Reuters, “Palestinian NGO tells UK to stop arms sales to Israel” 18 October 2023 available at <https://www.reuters.com/world/palestinian-ngo-tells-uk-stop-arms-sales-israel-2023-10-17/>. [CB/C/367-368].

¹⁰ OpenDemocracy, “UK has ‘no plans’ to stop arms sales to Israel despite civilian deaths” 18 October 2023 available at <https://www.opendemocracy.net/en/israel-palestine-hamas-war-arms-exports-uk-government/>. [CB/C/362-366].

¹¹ Sky News, “Rishi Sunak to hold emergency COBRA meeting on Israel-Hamas war” 9 October 2023 available at <https://news.sky.com/story/rishi-sunak-to-hold-emergency-cobra-meeting-on-israel-hamas-war-12980935>. [CB/C/346-351].

¹² Further examples are set out in at §7 of C’s 8 November 2023 letter to HMG [SB/A/65-79].

- d. The UK continues to provide direct military assistance to Israel: the Ministry of Defence confirmed on 13 November 2023 that 12 aircraft which have been deployed to the eastern Mediterranean “*provided surveillance support to Israel*”.¹³
10. To the extent that it is necessary to consider that decision on a licence by licence basis, C invites the Court to infer that the licensing decisions in respect of Israel from 7 October 2023 to the date of this Statement of Facts and Grounds are materially similar to:
- a. those granted to Israel from 1 July 2017 to 30 June 2022, as set out in the First Joint Report of the Committees on Arms Export Controls Session 2022-23 dated January 2023 (**Joint Report**), at pages 25-51;¹⁴ and
 - b. those licensing decisions in relation to exports to other States for which the final destination (whether individually, or combined with other items) is Israel, most obviously (and as is widely reported and known) parts used in the production of F35 aircraft by the United States of America.¹⁵
11. This approach best reflects, and is readily justifiable by reference to, the SST’s apparent position that nothing has changed since 7 October 2023. By way of a letter dated 8 November 2023, C wrote to the SST to inform her that it drew the inferences as set out above, and inviting her to correct the inferences if wrongly drawn.¹⁶ No substantive response has been received.

THE RELEVANT LAW

The Export Regime

12. The SST has the power to control exports under the Export Control Act 2002. Any company wanting to export military or dual-use goods to another State must apply for a licence. These exports are referred to as controlled goods and include not just physical goods but also software and technology. The list of goods which are controlled, and which therefore require a licence for export, is known as the Consolidated List.¹⁷ Article 32(1) of the Export Control Order 2008 provides that the Secretary of State may by notice amend, suspend or revoke a licence.
13. On 7 February 2012 the Secretary of State for Business, Innovation and Skills presented the Government’s reviewed policy on export control licensing to Parliament. The Foreign Secretary stated that the strengthened measures “*will ensure that export licensing policy is more responsive to rapidly changing circumstances overseas*” adding that suspension will be “*triggered when conflict or crisis conditions suddenly increase the level of risk, or make conducting a proper risk assessment difficult.*” Per the Government’s press release on the policy,

¹³ Parliamentary Question for the Ministry of Defence, Military Aircraft: Mediterranean Region, 13 November 2023 available at <https://questions-statements.parliament.uk/written-questions/detail/2023-11-07/48>. [CB/C/402].

¹⁴ First Joint Report of the Committees on Arms Export Controls Session 2022-23 Developments in UK Strategic Export Controls dated January 2023: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1127863/first-joint-report-of-the-committees-on-arms-export-controls-session-2022-to-2023-developments-in-uk-strategic-export-controls-response-of-the-secretaries-of-state-for-dit-mod-fcdo.pdf. [CB/C/288-345].

¹⁵ See §110 below.

¹⁶ [SB/A/65-79].

¹⁷ <https://www.gov.uk/government/publications/uk-strategic-export-control-lists-the-consolidated-list-of-strategic-military-and-dual-use-items-that-require-export-authorisation>. [SB/C/305-389]

“The suspension mechanism will allow for the immediate suspension of pending licence applications to countries experiencing a sharp deterioration in security or stability.”¹⁸

14. The UK, when part of the European Union, developed a common set of eight criteria to assess licence applications, known as the Consolidated Criteria. The Consolidated Criteria were legal guidance provided under Section 9 of the Export Control Act 2002. Following the UK’s departure from the EU, in December 2021, the UK adopted “*Strategic Export Licensing Criteria*”, which replaced the Consolidated Criteria and again constituted relevant statutory guidance. For present purposes the new Criteria are materially similar or identical to the preceding Criteria (save in one respect in which they appear to be broader, set out in §18 below). They reflect, among other things, the UK’s obligations under international law, and the potential for licensed equipment to be used in violation of international humanitarian law (“**IHL**”) and international human rights law (“**IHRL**”).
15. The main source of commentary in relation to the Consolidated Criteria is the User’s Guide to the Council Common Position on Arms Exports 2008/944/CFSP, known as the User’s Guide, which was last updated in 2019.¹⁹ The User’s Guide seeks to set out best practice in relation to each of the Consolidated Criteria. It is understood that it remains informative in relation to the Strategic Export Licensing Criteria and the government’s application thereof.
16. The following set out the Criteria²⁰ which are most relevant to the present judicial review challenge and where appropriate support those criteria with the related commentary.

Criterion 2 and relevant principles of international law

17. **Criterion 2:** Criterion 2 is aimed at protecting obligations arising out of human rights and IHL, it reads:

“Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law”.

18. **Criterion 2(c)** provides that:

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

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

In considering the risk that items might be used to commit or facilitate internal repression, or to commit or facilitate a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit or facilitate gender-based violence or serious acts of violence against women or children”.

¹⁸ Statement of the Department for Business Innovation and 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>. [CB/C/265-266].

¹⁹ User’s Guide to Council Common Position 2008/944/Cfsp (As Amended By Council Decision (CFSP) 2019/1560). The court considered the User’s Guide despite the UK’s withdrawal from the European Union in *R (CAAT) v SSIT* [2023] EWHC 1343 (Admin) at [22]-[24], [50], [56].

²⁰ It should be noted that when making a decision whether to grant an export license, the SST must take into account all of the Consolidated Criteria.

19. In distinction from the preceding Consolidated Criteria, the new Criterion 2(c) adds the word “facilitate”, which broadens the scope of the criterion.

20. As to assessing “clear risk” that items “might be used”, the User’s Guide at para 2.13 states that:

“A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law should include an inquiry into the recipient’s past and present record of respect for international humanitarian law, the recipient’s intentions as expressed through formal commitments and the recipient’s capacity to ensure that the equipment or technology 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”.

21. At §2.7, the User’s Guide contains guidance on the meaning of the combination of ‘clear risk’ and ‘might’, which are clearly applicable in the context of Criterion 2c. It states “*the combination of ‘clear risk’ and ‘might’ in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression*”.

22. The courts have had occasion to consider Criterion 2(c) of the Consolidated Criteria in judicial review challenges brought by the Campaign Against Arms Trade (“CAAT”) in respect of military items exported to Saudi Arabia for use in Yemen. The Court of Appeal in *R (CAAT) v Secretary of State for International Trade* [2019] EWCA Civ 1020 at [138] considered that Criterion 2(c) requires the question of whether there is a historic pattern of breaches of IHL to be faced where it could be “*answered with reasonable confidence*” in respect of some incidents of concern,²¹ and gave the following guidance at [165]:

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

23. In the Court of Appeal, the challenge was to the SST’s ongoing approach to the assessment of criteria for the grant of new licences to Saudi Arabia. The court emphasised the “*point of*

²¹ Similarly, in *R (CAAT) v Secretary of State for International Trade* [2023] EWHC 1343 (Admin) at [124](1) the Divisional Court held “‘Clear’ connotes a concrete risk for which there is evidential support (albeit that it is a nuanced value judgment). It means that the risk must be clear from evidence which forms a meaningful basis for making an assessment of whether a violation might occur in the future.”

principle ... that the present claim for judicial review concerned a process of decision-making which was necessarily ‘iterative’” and that therefore it was appropriate for the Divisional Court to have regard to all relevant material up to the time of the hearing before it (at [60]).

24. C respectfully agrees that, in light of the highly contextual and fact-specific nature of the inquiry, the requirements of each case must turn on its facts. The context of the present proceedings is one of fast-moving and intensive armed conflict, in relation to which authoritative and independent bodies are providing their evidence and evaluative assessments on a rolling basis in response to events on the ground. This must be reflected in the approach taken by the SST when assessing whether the “clear risk” has been met. C submits that the rational minimum requirements of the SST must include the following:
- a. Regular (at least weekly) reviews of the appropriateness of existing licences under which arms continue to be exported, in light of the totality of the available evidence, including: (i) statements from authoritative international organisations such as the United Nations (“UN”) General Assembly and the ICRC;²² and (ii) open source social media content, where it appears *prima facie* to be authentic (see Minogue1/§9-12 [CB/B/85-89]).
 - b. Maintaining a log of Israeli military activities to assess their compliance with IHL in the medium to long-term since the start of their attacks on Gaza on 7 October 2023 to inform future assessments of risk.
 - c. The SST must scrutinise the evidence provided by Israel as to its actions in Gaza and not accept it at face value as being correct. Where incidents cannot be independently verified or where disparities are apparent the evidence should be accorded the appropriate weight. This requires asking Israel for incident-specific information and intelligence about all attacks of concern.
 - d. The SST must expressly consider export licenses where the end-user is stated to be Israel or is likely to be Israel. This includes where a controlled item manufactured in the UK is being sent to a State to be incorporated into a military or dual-use item whose end-user is Israel.
 - e. The SST must not take into account international relations, or commercial or industrial relations when deciding whether to grant, pause or suspend licenses.
 - f. The SST must critically evaluate Israel’s capacity to comply with IHL, along with its attitude to compliance with IHL, as evidenced by its conduct, statements and ratification and recognition of recognised norms.

Principles of international humanitarian law relevant to Criterion 2(c)

²² The Supreme Court has very recently restated that evidence from UN organisations carries the “*greatest weight*” when addressed to matters within their particular remit or where they have special expertise in the subject matter: *R (AAA (Syria) v SSHD* [2023] UKSC 42 at [68]. The Supreme Court’s decision related to the UN High Commissioner for Refugees in the field of refugee law – on the facts of the instant case, the UN organisations with special expertise are OHCHR, OCHA, WHO, UNRWA and UNICEF.

25. The following sets out the legal principles and provisions of the core obligations under IHL which Israel is currently disregarding in the present conflict, as established in the statement of facts below.
26. The law of *jus in bello* is distinct from the law of *jus ad bello*: in other words, IHL is blind to the merits of the conflict, which side started the war and whether they were right to do so. All parties must comply with the same laws of war. The three key principles underpinning IHL are the principles of distinction, proportionality and precaution. While these principles are codified in Additional Protocol 1 to the Geneva Conventions (“**API**”), they are widely recognised to represent binding customary international law.²³ As set out further below, Israel is not a party to API and disputes that a “*considerable number*” of its provisions represent customary international law.²⁴
27. **Principle of distinction:** A core principle of IHL obliges parties to an armed conflict to differentiate at all times between civilians and combatants, and between civilian objects and military objectives and to only direct operations against military targets.²⁵ Attacks shall be strictly limited to military objectives and may not be directed at civilians or civilian objects. Military objectives are limited to objects which: (i) by their nature, location, purpose or use make an effective contribution to military action; and (ii) whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Both limbs of the test must be established on the basis of sufficient evidence and not mere speculation.²⁶ Civilian objects are defined negatively as all objects which are not military objectives and can lose their protection if, and for such time as, they become military objectives meeting the two-part test, for example through altered use or purpose. Where there is doubt as to whether an object that is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.²⁷ The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.²⁸ Likewise, that a number of civilian objects are located side by side with military objectives in a densely packed area does not deprive them of protection: they cannot be intentionally targeted and any damage likely to be caused to them where military objectives are targeted must be considered as part of the proportionality assessment described below.
28. Indiscriminate attacks are prohibited. Indiscriminate attacks are those which are not directed at a specific military objective; which employ a method or means of combat which cannot be directed at a specific military objective; or which employ a method or means of combat the effects of which cannot be limited as required by API; and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction.²⁹ API provides an

²³ ICRC, *Customary International Humanitarian Law*, Vol 1: Rules, Rule 1, Rule 14, Rule 15.

²⁴ Per a statement by the Permanent Mission of Israel to the UN on 20 October 2020 available at https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf, Israel specifically disputes Articles 1(4), 35(3), 55, 43-45, 37(1) and “*a considerable number of other provisions... that we will not elaborate upon here*”. [SB/H/2333-2336].

²⁵ API, Articles 48, 51. [SB/B/214-216]

²⁶ See e.g. Spain’s LOAC Manual (2007): “A target can only be considered a military objective when sufficient information has been obtained to dispel any doubts and establish reasonable certainty about its nature, based on the facts available at that time” Spain, Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7-004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, § 4.4.a, cited by the ICRC in respect of Rule 8: <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule8>.

²⁷ API Article 52. [SB/B/216]

²⁸ API, Article 50. [SB/B/215]

²⁹ API, Article 51. [SB/B/215-216].

example of an indiscriminate attack as “*an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects*” (Art 51(5)(a)).

29. **Principle of proportionality:** The principle of proportionality in IHL requires that even when it is lawful to attack a military objective, the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, must not be excessive in relation to the concrete and direct military advantage anticipated from the attack, otherwise the State must refrain from launching the attack.³⁰ For example, in *Prosecutor v Galic, Judgement and opinion, Trial Chamber, 5 December 2003*, the ICTY found (to a criminal standard) that attacking a group of 200 spectators at a football tournament, including women and children but also a “significant” number of soldiers, was indiscriminate in circumstances where 10 people were killed and 100 were injured. The principle requires a judgement-call to be made before each attack to ensure that the potential harm to civilians and civilian infrastructure does not outweigh the expected military gain - where a disproportionate attack has been carried out, it is not a defence that military actions during the conflict as a whole have been “proportionate” to a perceived threat. The State is obliged to have carried out the relevant intelligence gathering and due diligence prior to each specific attack.
30. **Principle of precaution:** The principle of precaution in IHL requires that parties to a conflict must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects. States must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives. States must take all feasible precautions in the choice of means and methods of attack with a view to avoiding/minimising incidental loss of civilian life, injury to civilians and damage to civilian objects. When a choice is possible between several military objectives for obtaining a similar military advantage, States must attack the objective which is expected to cause the least danger to civilian lives and objects.³¹
31. In practice this principle involves enacting a variety of measures to minimise civilian casualties and damage to civilian objects during armed conflicts.³² Examples of this include:
- a. **Verification of Targets:** Before an attack, military forces are required to verify that the targets are military objectives and not protected civilian objects or civilians. This often involves gathering intelligence and conducting reconnaissance to confirm the nature of the target.
 - b. **Choice of Weapons:** The selection of weapons for an attack must be appropriate to the target to avoid unnecessary damage, and using precision-guided weapons to limit collateral damage.
 - c. **Timing of Attacks:** Avoiding times when civilians are likely to be present, such as during school hours or religious services.

³⁰ AP1, Articles 51, 57. [SB/B/215-216, 219-220].

³¹ AP1, Article 57. [SB/B/219-220].

³² UK Joint Service Manual of The Law Of Armed Conflict (2004) at 5.32-5.41.

- d. **Creating Safe Zones:** Establishing safe zones or corridors for the safe passage of civilians away from hostilities.
- e. **Use of Observers or Spotters:** Deploying observers or forward spotters to provide real-time information on the presence of civilians, allowing for the adjustment or cancellation of attacks if necessary.
- f. **Damage Assessments:** Conducting post-attack assessments to determine the effectiveness of the precautions taken and to learn lessons for future operations.
- g. **Warnings to the civilian population prior to attack:** as specifically addressed below.

32. **Protected groups and objects:** IHL grants additional and heightened protection to certain groups and objectives. Protected groups in armed conflict include (i) civilians; (ii) prisoners of war; (iii) wounded and sick individuals; and (iv) medical and religious personnel.³³ Protected objects include (i) hospitals and medical units; (ii) cultural objects and places of worship; (iii) humanitarian relief personnel and objects; and (iv) installations containing dangerous forces.³⁴ These protected groups and objects are subject to a higher threshold before they can be attacked, even if they otherwise fall within the definition of having become military objectives. Even then, protection may cease only after due warning has been given, providing in all appropriate cases a reasonable time limit and after such warning has remained unheeded. Further, any attack thereafter remains subject to the principles of distinction, proportionality, and precaution. If there is doubt about the object's military purposes, it must be presumed to be acting in a humanitarian capacity and, therefore, protected from attack.³⁵

33. **Hospitals and medical staff:** As set out above, hospitals fall within a specially protected group of objects under IHL. Specifically the Fourth Geneva Convention states that “*Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict*”;³⁶ and AP1 states “*Medical units shall be respected and protected at all times and shall not be the object of attack*”.³⁷ Hospitals can only be attacked under very limited circumstances, namely only where they are used to commit, outside their humanitarian function, acts harmful to the enemy. The presence of the enemy within a hospital does not automatically make it a legitimate military target. An enemy soldier receiving medical care is not considered to be committing an act harmful to the adversary. Similarly, the Geneva Conventions and their Additional Protocols expressly provide that acts which do not constitute “*acts harmful to the enemy*” include when the personnel of the unit is armed, when the unit is guarded and when small arms and ammunition taken from the wounded and sick are found in the unit.³⁸

34. **Adequacy of warnings:** Under IHL, there is a clear obligation to warn civilians before launching an attack that may affect them. This is designed to minimise civilian casualties and damage to civilian objects.³⁹ The State is not just obliged to provide a warning but to ensure, to the greatest extent possible, that the warning is in fact effective and does not lead civilians into

³³ Geneva Convention I, Articles 3, 12-15, 24; Geneva Convention II, Article 36; Geneva Convention III.

³⁴ Geneva Convention IV, Articles 18-19, 23 [SB/B/106-109]; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 4; AP1, Article 54-56. [SB/B/217-219].

³⁵ AP1, Articles 12-13. [SB/B/195-196].

³⁶ Geneva Convention IV (1949), Article 18. [SB/B/106]

³⁷ AP1, Article 12. [SB/B/195]

³⁸ First Geneva Convention, Article 22; Fourth Geneva Convention, Article 19; [SB/B/107] AP1, Article 13(2). [SB/B/196]

³⁹ AP1, Article 57. [SB/B/219-220].

danger. Warnings that are incorrect or direct civilians to unsafe places undermine the very purpose of the protection afforded to civilians and constitute a failure to take all feasible precautions to protect the civilian population.⁴⁰ The warning must be clear, specific, and as accurate as possible. Therefore, the State must exercise due diligence to determine and direct a safe route and location for civilians – it is no answer to this obligation that there is *no* safe location to which civilians can be directed, if that state of affairs is created by the State itself. If civilians are *intentionally* directed to an unsafe zone, this could give rise to war crimes. Additionally, it is a war crime under the Rome Statute to undertake “*deportation or forcible transfer of the population*”.⁴¹

35. Further, the issue of the adequacy of warnings engages the prohibition against perfidy. Under IHL, States cannot undertake perfidious acts. These are defined as acts which invite the confidence of an adversary to lead them to believe that they are entitled to protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence. Acts such as feigning an intent to negotiate under a flag of truce or providing warnings directing individuals to safe areas which are then attacked are examples of perfidy.⁴² Notably, Israel does not recognise the prohibition of perfidy.⁴³
36. **Objects indispensable to civilian population:** IHL establishes clearly that starvation of civilians as a method of warfare is prohibited. States cannot attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.⁴⁴
37. The only circumstances in which a State can target objects indispensable to the civilian population are where they are used as sustenance solely for the members of its armed forces; or in direct support of military action, provided, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement. Therefore, objects indispensable cannot be targeted if they are being used by civilians for sustenance, even if they are also being used by military forces for sustenance. Similarly, under the Rome Statute of the International Criminal Court, it is a war crime to intentionally use starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival.⁴⁵
38. **Humanitarian aid/corridor:** Under IHL, States must allow the free passage of all consignments of medical and hospital stores intended only for civilians of another State, even if the latter is its adversary. The State must also permit the free passage of all consignments of essential food stuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.⁴⁶

⁴⁰ API, Article 58. [SB/B/220].

⁴¹ Rome Statute of the International Criminal Court, Articles 7-8.

⁴² API, Article 37. [SB/B/208-209].

⁴³ Statement by the Permanent Mission of Israel to the UN on 20 October 2020 available at: https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf. [SB/H/2333-2336].

⁴⁴ API, Article 54. [SB/B/217]

⁴⁵ Rome Statute of the International Criminal Court, Article 8. This is also a norm of customary international law: ICRC Rule 53.

⁴⁶ Fourth Geneva Convention, Article 23. [SB/B/108-109].

39. If the civilian population is not adequately provided with food and medical supplies, relief actions, which are humanitarian and impartial in character and conducted without any adverse distinction, shall be undertaken, subject to the agreement of the States concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. The State must allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided even if such assistance is destined for the civilian population of the adverse State. States cannot divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned. The State shall protect relief consignments and facilitate their rapid distribution and encourage and facilitate effective international co-ordination of the relief actions.⁴⁷
40. **Siege/Collective punishment:** As set out above, starvation of civilians is prohibited as a method of warfare.⁴⁸ This means causing a population to suffer hunger deliberately, “particularly by depriving it of its sources of food or of supplies”.⁴⁹ IHL prohibits collective punishments, understood in the “broadest sense” as sanctions and harassment of any sort, administrative, by police action or otherwise, against those whose individual responsibility has not been established.⁵⁰

Criterion 1(b) and relevant treaty obligations

41. Criterion 1(b) provides:

“Respect for the UK’s international obligations and relevant commitments, in particular sanctions adopted by the UN Security Council, 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”.

42. The relevant provisions of the Arms Trade Treaty (“ATT”)⁵¹ for the present challenge are:

- a. **Article 6(2) of the ATT:** “*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 the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms”;* and
- b. **Article 6(3) of the ATT:** “*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*

⁴⁷ AP1, Article 70. [SB/B/229-230].

⁴⁸ AP1, Article 54(1). [SB/B/217]

⁴⁹ Commentary of 1987 to Additional Protocol 1, para 2089.

⁵⁰ AP1, Article 75(2)(d); [SB/B/232-233] and Commentary of 1987 to Additional Protocol 1, para 3055; Fourth Geneva Convention, Article 33: “No protected person may be punished for an offence he or she has not personally committed”. [SB/B/111]

⁵¹ For the avoidance of doubt, and as set out in pre-action correspondence [SB/B/27, 46-54], compliance with the UK’s relevant international obligations is also and separately required under Criterion 1 due to the words “inter alia”.

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.”

43. Focussing for present purposes on Art 6(2) ATT, Ct relies on the UK’s relevant international obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (“**Genocide Convention**”). The UK ratified the Genocide Convention on 16 December 1970. Under Article I of the Genocide Convention the UK has a duty “to prevent” acts of genocide. Genocide is defined in Article II of the Genocide Convention as:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group”.

44. In applying Article I of the Genocide Convention, there is no requirement to prove actual knowledge of genocide or that there has been the commission of genocide by an offending State. The duty to prevent is engaged where the State is merely “aware” of a “serious danger” that genocide might occur (per the judgment of the International Court of Justice (“**ICJ**”) in *Bosnia* (2007) at paragraph 432). In *Bosnia* (2007), the ICJ held at paragraph 431 that:

*“This obviously does not mean that the obligation to prevent genocide only comes in to being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit”.*

45. Further, for the UK to breach its duty to prevent, it does not need to be proven that the UK could have prevented the genocide or that its failure to act was causatively linked to the commission of genocide. It is sufficient that it had the means to contribute to this goal and that it manifestly refrained from using them (ICJ *Bosnia* 2007 Judgment, paragraphs 430, 438).

46. The duty to prevent continues to exist as long as acts of genocide continue to be committed or when there is a real risk of such acts being committed. Further, the duty requires the UK not just to prevent genocide in its strictest sense, but also all acts listed under Article III of the Convention, which includes *attempts* to commit genocide (ICJ *Bosnia* 2007 Judgment, paras 166–167, 431, 461).⁵²

47. Further, the IHL principles detailed above are also imported by Criterion 1(b) by reason of Common Article 1 of the Geneva Conventions. As set out in the User’s Guide at [2.13]:

⁵² These acts are: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. Genocide can be defined as an attempt: *Bosnia* (2007) paras 430-432 and 437-438.

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

Criterion 7(g)

48. **Criterion 7(g)** requires the SST to take into account:

“g) the risk of an undesirable end-use either by the stated end-user or another party”.

49. This Criterion is important in ensuring that the UK complies with its international obligations in circumstances where it is licensing a military component which will then be sent on to a third-country destination. If this were not the case, it would represent a significant lacuna in the regulation of the UK’s arms industry, as arms manufacturers would be able to export their goods to a non-contentious State and from there transfer them to the end-State for a use which would have otherwise been prohibited under the Criteria. It is clear that a serious breach of IHL or international law (e.g. the Genocide Convention) would amount, on any sensible construction, to “an undesirable end-use” of a military export.

THE RELEVANT FACTS

50. As discussed above, the SST has failed to respond to repeated requests for explanation of the approach being taken to assessments under the Criteria in light of the escalation of hostilities in Gaza. It is difficult to anticipate what explanation could be given for a decision not to suspend licences in light of the stark facts as presented below. In C’s submission, these facts plainly and obviously demonstrate (1) that there is a clear risk that the items might be used to commit or facilitate a serious violation of IHL and (2) that granting (or not suspending) licences is inconsistent with the UK’s obligations under the Genocide Convention. There is no other reasonably available conclusion.

51. C’s case is supported by the witness statements of: Tahseen Alayyan (Al-Haq); and first and second witness statements of Dearbhla Katharine Minogue (Bindmans LLP).⁵³ These are referred to in the format of [Surname][number if applicable]/[paragraph]. The factual picture concerns events up to and including Monday 13 November 2023 (although C has updated this to reflect highly material developments where possible, in particular as to the 6-day ceasefire, which has now expired). This reflects a delay in issuing which is due to the serious difficulties that the legal team has experienced in obtaining instructions, as explained in Minogue1/§4-8 [CB/B/83-85]. The majority of C’s employees are based in Palestine, with teams in the West Bank and Gaza who have been personally affected by the hostilities and overwhelmed with the

⁵³ The second witness statement is concerning Youmna el Sayed, an Al Jazeera journalist who the Claimant intended to adduce witness evidence from, but has been unable to due to communication difficulties.

workload required to document them. While C’s legal representatives obtain instructions from an employee based in Ireland, that employee liaises with a team based in Palestine. C will endeavour to discharge its ongoing duty of candour by providing updates of relevant factual material after this date.

52. C has undertaken extensive research to ascertain the Israeli position, both generally as to the operations of the Izz ad-Dine al-Qassam Brigades (the “**Hamas Military Wing**”) and specifically in respect of each strike relied on below. To the extent that the Israeli position is in the public domain, it is detailed below and in witness evidence. This has a number of implications:

- a. As set out in Alayyan/§26-27,122-124 [CB/B/183,225-228], as a result of the sheer volume of issues to be documented and the difficulties faced by its researchers on the ground in Gaza, C has had difficulty carrying out its normal procedures as to documenting Hamas Military Wing activity in relation to specific targets. Where information is known it is set out and no material fact has been omitted, but much about Hamas activity is unknown.
- b. It remains incumbent on the SST to demonstrate to the Court that she has assessed the Israeli position critically, with regard to any other information gathered by intelligence sources, and not simply accepted it at face value – particularly since there have been documented instances of the Israeli State spreading misinformation, as addressed in Alayyan/§72-120 [CB/B/206-224].
- c. In any event, C’s case is that - even if the claims in relation to the activity of the Hamas Military Wing put forward by Israel are taken at face value (or at least at their highest credible level) – the scale of civilian casualties and damage to civilian objects is such that there have been obvious breaches of IHL and that no Secretary of State could rationally have decided otherwise having considered the relevant evidence. Further, and for the avoidance of doubt, when it comes to wrongdoing such as using starvation as a weapon of war, or such as collective punishment, Hamas operations are irrelevant to the assessment in any event.

53. Annex 1 to Alayyan [CB/B/229-247] sets out the factual background to the Israeli-Palestine conflict prior to the recent escalation of hostilities, which is not repeated here. On 7 October 2023 the Hamas Military Wing carried out a horrifying attack in Israel killing approximately 1,200 people.⁵⁴ This section focuses on Israel’s military response following those events.

54. Finally, each of the factual sections below are relied on individually and cumulatively. Further, the statements of intent set out in Section G below, in relation to genocide, are relied on in relation to Israeli intent more broadly.

A. Scale of civilian harm

i. The factual background

⁵⁴ Reuters, “Israel revises Hamas attack death toll to ‘around 1,200’” 10 November 2023 available at <https://www.reuters.com/world/middle-east/israel-revises-death-toll-oct-7-hamas-attack-around-1200-2023-11-10/>. [SB/F/1641].

55. According to the Palestinian Ministry of Health,⁵⁵ as of 20 November 2023, at least 13,000 Palestinians, including 5,500 children, have been killed.⁵⁶ As set out in Alayyan/§50 [CB/B/196], as of 1 November 2023, it was estimated that women, children and the elderly make up over two thirds of those killed by Israeli bombardments in Gaza, such that only a third of the reported deaths were men of fighting age (though there are no statistics as to what percentage of those men were actually combatants). The Norwegian newspaper Verdens Gang has analysed data on deaths between 7 and 25 October 2023 and concluded that the most common age of those killed in Gaza is 5 years old.⁵⁷ There is also evidence that large numbers of journalists have been killed, as detailed in Alayyan/§44-46 [CB/B/194-195] and Minogue2/15-20 [CB/B/254-257]. These numbers far outweigh the scale of civilian casualties resulting from other modern aerial bombardments: per Alayyan/§52 [CB/B/197], “*For example, Russian military action killed 554 children in the first 563 days of its war in Ukraine, whereas Israel has killed 3,648 children in the first 25 days in Gaza*”.

56. Minogue1/§160-213 [CB/B/145-168] sets out many expressions of condemnation of Israel’s indiscriminate targeting of civilians in Gaza from the international community, including:

- a. On 15 November 2023, the UN Security Council adopted a resolution calling for “*urgent and extended humanitarian corridors throughout the enclave to safe and protect civilian lives*”, and calling “*on all parties to refrain from depriving the civilian population in Gaza of basic services and aid indispensable to their survival, consistent with international humanitarian law*”.⁵⁸ In response, Israel has refused to comply – the full statement of the Israeli ambassador is set out below at §106.
- b. On 28 October 2023, the International Committee of the Red Cross (“**ICRC**”) published a statement on the hostilities. By way of essential context, the ICRC has been established as a “*specifically neutral and independent*” institution by its founding statutes.⁵⁹ Under its own guidelines, the ICRC only issues public condemnation where (i) violations are major and repeated or likely to be repeated; (ii) ICRC delegates have witnessed the violations with their own eyes or violations have been established by reliable and verifiable sources; (iii) bilateral representations and humanitarian efforts have failed to put an end to the violations; and (iv) the publicity is in the interests of the affected population.⁶⁰

“I am shocked by the intolerable level of human suffering and urge the parties to the conflict to deescalate now. The tragic loss of so many civilian lives is deplorable. It is unacceptable that civilians have no safe place to go in Gaza amid the massive bombardments, and with a military siege in place there is also no adequate

⁵⁵ As explained in Alayyan/§23-25 [CB/B/181-183], this data is considered reliable despite the Ministry of Health (and all other public institutions in Gaza) being operated by Hamas’s political wing.

⁵⁶ Reuters, “Israel-Hamas hostage deal edges closer despite fierce fighting in Gaza” 20 November 2020 available at <https://www.reuters.com/world/middle-east/israel-renews-call-gazans-flee-key-southern-city-2023-11-17/>. [SB/F/1704-1706].

⁵⁷ Verden Gang, “Dødslisten fra Gaza: Flest femåringer drept” (“The death list from Gaza: Most five-year-olds killed”) 8 November 2023 available at <https://www.vg.no/nyheter/utenriks/i/JQ9qWj/doesdlisten-fra-gaza-flest-femaaringer-drept> [SB/F/1580-1589].

⁵⁸ UN Security Council, *Resolution 2712 (2023)*, adopted on 15 November 2023, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/359/02/PDF/N2335902.pdf?OpenElement>. [SB/H/2653-2658].

⁵⁹ Article 5, paras 2(d) and 3, of the Statutes of the International Red Cross and Red Crescent Movement; see also Article 3 common to the four Geneva Conventions of 1949, describing ICRC as “*an impartial humanitarian body*”. [SB/H/2703-2705]

⁶⁰ ICRC “Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence” June 2005 available at https://www.icrc.org/en/doc/assets/files/other/irrc_858_violations_ihl.pdf These guidelines have since been “reviewed and supplemented” but C has not been able to obtain the updated version: see <https://www.icrc.org/en/publication/0893-action-international-committee-red-cross-event-violations-international> [SB/H/2279-2280].

humanitarian response currently possible. This is a catastrophic failing that the world must not tolerate,' said Mirjana Spoljaric, the president of the ICRC.

Under international humanitarian law, the parties are obligated to spare civilians from the effects of military operations at all times, to distinguish between civilians and military targets, and to never use human shields to prevent military objectives from being attacked. They must also ensure that the basic needs of the population are met".⁶¹

- c. On 27 October 2023, the UN General Assembly adopted a resolution (the “**UNGA Resolution**”) “*deploring ... the heavy civilian casualties and widespread destruction*” and calling for the “*immediate, durable and sustained humanitarian truce leading to a cessation of hostilities*”, demanding “*that all parties immediately and fully comply with their obligations under international law, including international humanitarian law and international human rights law, particularly in regard to the protection of civilians and civilian objects*”.⁶²
- d. The UN Secretary General made a number of statements setting out his deep concern about the “*crisis of humanity*” in Gaza and the “*clear violations of international humanitarian law that we are witnessing*”.⁶³ That language is of course very similar to that used in Criterion 2(c). He said the following on 31 October 2023:

“I condemn the killing of civilians in Gaza and I am dismayed by reports that two-thirds of those who have been killed are women and children...

International humanitarian law establishes clear rules that cannot be ignored. It is not an a la carte menu and cannot be applied selectively. All parties must abide by it, including the principles of distinction, proportionality, and precaution.

*With too many Israeli and Palestinian lives already lost, this escalation only increases the immense suffering of civilians”.*⁶⁴

- e. On 10 November 2023, the UN High Commissioner for Human Rights called for an investigation into Israel’s “*indiscriminate bombardment and shelling*” in densely populated areas in the Gaza Strip, stating that “*We have very serious concerns that these amount to disproportionate attacks in breach of international humanitarian law*”.⁶⁵

ii. Submissions

57. The sheer scale of civilian casualties is compelling evidence that the IHL principles of distinction, proportionality and precaution are being violated by Israel⁶⁶ (particularly when those casualties are considered in light of Israel’s statements of intent, set out in Section G below).

⁶¹ ICRC, “Israel and the occupied territories: Deescalate now to prevent further human suffering” 28 October 2023, available at <https://www.icrc.org/en/document/israel-and-occupied-territories-deescalate-now-prevent-further-human-suffering> [SB/H/2380-2381]

⁶² 27 October 2023, 120 states in favour: Minogue1/§171-174 [CB/B/150-152].

⁶³ 6 November 2023, Minogue1/§181 [CB/B/155].

⁶⁴ Minogue1/§179 [CB/B/154].

⁶⁵ Minogue1/§200 [CB/B/162].

⁶⁶ The mere fact of civilian casualties or damage to civilian objects does not necessarily mean that civilians or civilian objects were improperly targeted, or that attack was disproportionate to the military advantage, or that precautions were not taken. However, mass civilian casualties in a specific factual context may be evidence sufficient to base an inference to that effect. For example, in *ICTY Prosecutor v Perisic*, Judgment of the Trial Chamber, 6 September 2011 at §549, the ICTY inferred the intention to target civilians from a widespread campaign of shelling and sniping and the scale of civilian casualties.

This has been accepted by many UN bodies and international organisations. Even if every single male of fighting age killed was a Hamas Military Wing combatant (which is plainly impossible), the majority of deaths are of women and children. By itself, or taken together with the further evidence set out below (not least in relation to specific strikes on civilian objects), the extraordinary toll of civilian deaths, with its focus on children and women, demonstrates a clear risk of weapons provided to Israel being used to commit further IHL breaches.

58. For its part, Israel has claimed that these attacks always target an identified military objective and are not disproportionate:: on 12 November 2023, President Herzog stated that Israel was conducting its operations in Gaza “*according to the rules of international humanitarian law*” and it warned civilians of strikes in advance.⁶⁷ Israel’s purported warnings are set out in Section C below, however, evacuation orders cover mass areas of Gaza (rather than specific targets), give impossible deadlines for evacuation, and lead civilians to unsafe places by unsafe routes. These warnings are plainly not effective, particularly in a situation where the population is blockaded and unable to leave Gaza for safety. Further and in any event, the densely populated nature of Gaza must be reflected in Israel’s approach to striking legitimate military targets in heavily populated civilian areas. The sheer number of civilian deaths and the frequency of fatal attacks shows that this is not the case. Those numbers are out of all proportion with any purported military advantage being gained by Israel, even on the facts of its own case.

B. Civilian objects

59. Civilian objects have been indiscriminately and disproportionately damaged by Israeli forces. This section considers damage to (i) hospitals and medical facilities, (ii) schools, and (iii) refugee camps and civilian residences. The facts are addressed first, following which C sets out its submissions.
60. As further addressed in Alayyan/§124 [CB/B/226-228], it is claimed that the Hamas Military Wing has built a labyrinth of tunnels beneath Gaza, which could be underneath most of Gaza if its claims that the tunnels stretch 500km are true.⁶⁸ Israel claims that entrances to this underground network are often located in civilian infrastructure, however, this generalised claim alone does not permit such indiscriminate military action against civilian objects. Indeed, if it did, the civilians of Gaza would be without any practical protection under IHL.

i. Hospitals and medical facilities

61. As of 13 November 2023, according to the World Health Organisation (“**WHO**”), 36 health facilities including 22 hospitals have been struck since the escalation of hostilities and only a few remain operational.⁶⁹ WHO reports that half of the Gaza Strip’s 36 hospitals are not functioning at all, and that the remaining ones are operating way beyond their capacities.⁷⁰ According to the BBC, “*Reports that Israeli forces in Gaza were surrounding several hospitals*

⁶⁷ BBC, “Isaac Herzog challenged on air strikes and says Mein Kampf found on Hamas fighter” 12 November 2023 available at <https://www.bbc.co.uk/news/av/world-67396773>. [SB/F/1676].

⁶⁸ BBC, “Israel targets Hamas’s labyrinth of tunnels under Gaza” 13 October 2023 available at <https://www.bbc.co.uk/news/world-middle-east-67097124> [SB/F/1416-1424].

⁶⁹ BBC, “Gaza hospitals caught on front line of Israel-Hamas war” 13 November 2023 <https://www.bbc.co.uk/news/world-middle-east-67401064> [SB/F/1682-1689].

⁷⁰ BBC, “Israeli forces surround north Gaza hospitals” 11 November 2023 available at <https://www.bbc.co.uk/news/world-middle-east-67385617> [SB/F/1663-1667].

*in Gaza City began to emerge early on Friday morning.*⁷¹ The Israeli military claims that the Hamas Military Wing is using medical facilities for terror purposes.⁷²

62. The following hospitals are known to have been damaged by Israel, as further detailed in Minogue1/§119-148 [CB/B/128-139]:
- a. Al-Shifa hospital is Gaza's largest hospital,⁷³ and has been hosting tens of thousands of displaced civilians.⁷⁴ It has been continually damaged in attacks in recent weeks and has lost power, oxygen and water. Israel has claimed responsibility for some strikes on the hospital, and has blamed others on the Hamas Military Wing –the Israeli military initially claimed that , there is a Hamas Military Wing command centre underneath the hospital, but since having taken control of the hospital, little evidence of this has been produced. There have been many civilian deaths, including babies after the incubators shut off when the electricity ran out, and nurses killed by bombing and armed clashes within the hospital premises.⁷⁵ There have been reports that civilians were shot while trying to flee the hospital.⁷⁶ A number of organisations have condemned the attacks on the hospital,⁷⁷ including Doctors Without Borders (whose staff were affected) and WHO.⁷⁸ WHO has described the hospital as a “death zone”, having observed a mass grave of 80 people at its entrance.⁷⁹
 - b. The second largest hospital on the Gaza Strip is Al-Quds Hospital, which has suffered serious damage during the escalation of hostilities, detailed at Minogue1/§131-138 [CB/B/133-135]. The hospital was directly attacked by Israeli forces on 10 November 2023,⁸⁰ and as of 12 November 2023 is out of service due to depletion of fuel.⁸¹ Israel claims there were Hamas Military Wing combatants embedded at this hospital.⁸²
 - c. There are reports of damage by airstrikes and gunfire at two children's hospitals – Rantisi hospital and Al Nasr hospital.⁸³ Both have been evacuated as of Friday 10

⁷¹ *Ibid.*

⁷² Times of Israel, “IDF releases new intel detailing Hamas use of Gaza hospitals for terror purposes” 5 November 2023 available at <https://www.timesofisrael.com/idf-releases-new-intel-detailing-hamas-use-of-gaza-hospitals-for-terror-purposes/> [SB/F/1332-1335].

⁷³ OHCHR “Hospitals statement”, 12 November 2023 available at <https://reliefweb.int/report/occupied-palestinian-territory/statement-un-office-human-rights-hospitals-gaza-strip> [SB/H/2608].

⁷⁴ UNOCHA, Flash Update #28, 2 November 2023, available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-28> [SB/H/2460-2468].

⁷⁵ OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #37, 12 November 2023, available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-37>. [SB/H/2597-2607].

⁷⁶ *Ibid.*

⁷⁷ Doctors Without Borders (MSF), “Patients and medical staff in Gaza trapped in hospitals under fire – attacks must stop now”, 11 November 2023, available at: <https://www.msf.org/gaza-patients-and-medical-staff-trapped-hospitals-under-fire>. [SB/G/2243-3345].

⁷⁸ WHO, “Attacks on health care in Gaza Strip unacceptable, says WHO”, 4 November 2023, available at: <https://www.emro.who.int/media/news/attacks-on-health-care-in-gaza-strip-unacceptable-says-who.html>. [SB/H/2483].

⁷⁹ World Health Organization, *WHO leads very high-risk joint humanitarian mission to Al-Shifa Hospital in Gaza*, 18 November 2023, available at: <https://www.emro.who.int/media/news/who-leads-very-high-risk-joint-humanitarian-mission-to-al-shifa-hospital-in-gaza.html?format=html>. [SB/H/2678-2679]

⁸⁰ Palestine Red Crescent Society, “The Palestine Red Crescent condemns the targeting of Al-Quds Hospital by the Israeli occupying forces and calls on the international community to provide urgent protection for the hospital”, 10 November 2023, available at: <https://www.palestinercs.org/public/files/image/2023/News/112023/PRCS%20statement%2010112023.pdf>. [SB/G/2242].

⁸¹ Palestine Red Crescent Society, “The Palestine Red Crescent announces Al-Quds Hospital out of service”, 12 November 2023, available at: <https://www.palestinercs.org/public/files/image/2023/News/112023/Alquds%20Hospital%20is%20out%20of%20service.pdf>.

⁸² Times of Israel, “Gallant: Hamas has lost control in Gaza; gunmen who fired from hospital entrance killed”, 13 November 2023, available at: <https://www.timesofisrael.com/gallant-hamas-has-lost-control-in-gaza-troops-kill-gunmen-who-fired-from-hospital/> [SB/F/1677-1681].

⁸³ See, for example, OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #34”, 9 November 2023, available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-34>. [SB/H/2246-2555].; See also OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #35”, 10 November 2023, available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-35>.

November 2023,⁸⁴ but sustained damage prior to that. Medecins Sans Frontieres staff are witnessing “people being shot at as they attempt to flee the al-Shifa hospital”.⁸⁵ Israel claims there was a Hamas Military Wing command centre which had held hostages underneath Rantisi hospital.⁸⁶

63. Other healthcare facilities have also suffered damage. A UN Press Release states: “Over the past 36 days, WHO has recorded at least 137 attacks on healthcare in Gaza, resulting in 521 deaths and 686 injuries, including 16 deaths and 38 injuries of health workers”.⁸⁷ According to Euro-Med, 51 clinics and 41 ambulances have been targeted.⁸⁸ The UN Office for the Coordination of Humanitarian Affairs (“OCHA”) reports that only nine out of 22 UNRWA health centres providing care for post-natal and high risk pregnant women remain operational in the south of Gaza.⁸⁹ ICRC has reported that its own humanitarian convoy came under fire when carrying “lifesaving medical supplies to health facilities, including Al Quds hospital.”⁹⁰ Euro-Med puts the total number of health staff targeted at 402, with 210 injured.⁹¹

64. These attacks have been addressed by the international community, detailed in Minogue1/§149-154 [CB/B/139-143]. In particular:

- a. On 10 November 2023, ICRC released a statement calling for international norms on the protection of hospital facilities and medical workers to be respected:

“The International Committee of the Red Cross (ICRC) is urgently calling for the respect and protection of medical facilities, patients and healthcare workers in Gaza.

...

Over the past days, ICRC teams distributing critical supplies to medical structures across Gaza, have witnessed horrendous images that have now gotten worse due to sharpened hostilities. This is severely affecting hospitals and ambulances, and taking a heavy toll on civilians, patients and medical staff.

Children’s hospitals have not been spared from the violence, including Al Nasser Hospital, heavily damaged by the hostilities, and Al Rantisi Hospital, which has had to cease its operations. ...

Al Shifa Medical Complex, the largest referral hospital in the Gaza Strip, already overwhelmed with patients, now hosts thousands of displaced families who lost their homes over the last month due to the conflict. Any military operation around hospitals

⁸⁴ BBC, “Gaza hospitals caught on front line of Israel-Hamas war” 14 November 2023, available at: <https://www.bbc.co.uk/news/world-middle-east-67401064>. [SB/F/1682-1689].

⁸⁵ MSF, “Patients and medical staff in Gaza trapped in hospitals under fire – attacks must stop now” 11 November 2023 available at <https://www.msf.org/gaza-patients-and-medical-staff-trapped-hospitals-under-fire> [SB/G/2251-2253]. [SB/G/2243-2245].

⁸⁶ Times of Israel, “Gallant: Hamas has lost control in Gaza; gunmen who fired from hospital entrance killed” 13 November 2023 available at <https://www.timesofisrael.com/gallant-hamas-has-lost-control-in-gaza-troops-kill-gunmen-who-fired-from-hospital/> [SB/F/1677-1681].

⁸⁷ UN, “Gaza: UN agencies make plea for international action to end hospital attacks” 12 November 2023 available at <https://news.un.org/en/story/2023/11/1143492>. [SB/H/2611-2614].

⁸⁸ Euro-Med Human Rights Monitor has published an infographic available at https://www.instagram.com/p/CzhGNufMptq/?utm_source=ig_web_copy_link&igshid=MzRIODBiNWFIZA. [SB/G/927].

⁸⁹ OCHA Flash Update #34. [SB/H/2246-2555].

⁹⁰ ICRC, “Israel and the Occupied Territories: ICRC decries the shooting of its humanitarian convoy in Gaza” 7 November 2023 available at https://www.icrc.org/en/document/israel-and-occupied-territories-icrc-decries-shooting-its-humanitarian-convoy-gaza?utm_source=twitter&utm_medium=social&linkId=100000225445490 [SB/H/2503-2504]

⁹¹ Euro-Med Human Rights Monitor has published an infographic available at https://www.instagram.com/p/CzhGNufMptq/?utm_source=ig_web_copy_link&igshid=MzRIODBiNWFIZA. [SB/G/927].

must consider the presence of civilians, who are protected under international humanitarian law.

Attacks on medical facilities and personnel deal a heavy blow to the healthcare system in Gaza, which is severely weakened after more than one month of heavy fighting

*The rules of war are clear. Hospitals are specially protected facilities under international humanitarian law. The ICRC urgently calls for the immediate protection of all civilians, including humanitarian workers and medical personnel. This protection is not only a legal obligation but a moral imperative to preserve human life in these terrible times”.*⁹²

65. Israel has issued orders to evacuate 22 hospitals treating more than 2,000 patients in northern Gaza. WHO has described these orders as a “*death sentence for the sick and injured*”, noting that many health workers face the impossible choice of whether to abandon their patients amid bombing or put their own lives at risk.⁹³

66. As detailed in Minogue1/§125 [CB/B/130-131], Médecins Sans Frontières have been particularly vocal and made a number of statements condemning attacks on hospitals. For example, on 11 November 2023:

“Over the past 24 hours, hospitals in Gaza, Palestine, have been under relentless bombardment. Al-Shifa hospital, the biggest health facility where staff from Médecins Sans Frontières (MSF) are still working, has been hit several times, including the maternity and outpatient departments, resulting in multiple deaths and injuries.

*The hostilities around the hospital have not stopped. MSF teams and hundreds of patients are still inside Al-Shifa hospital. We urgently reiterate our calls to stop the attacks against hospitals, for an immediate ceasefire and for the protection of medical facilities, medical staff and patients”.*⁹⁴

ii. *Schools and centres of education*

67. Another civilian object which has been routinely damaged are schools and centres of education. Specific strikes on schools are detailed in Minogue1/§155-157 [CB/B/143-144].

68. As of 2 November 2023, UNRWA Commissioner General Philippe Lazzarini reported that nearly 50 UNRWA buildings and assets have been impacted, with some being directly hit – many of these UNRWA schools are used as shelters.⁹⁵ As at 11 November 2023, Euro-Med states that 214 schools have been damaged.⁹⁶ The Times of Israel reports that as early as 12 October 2023, 11 UNRWA staff and 30 UNRWA students had been killed, with another 8 students

⁹² ICRC, “ICRC demands protection of patients, healthcare workers, medical facilities in Gaza amid escalating attacks” 10 November 2023 available at <https://www.icrc.org/en/document/israel-and-occupied-territories-icrc-demands-protection-patients-healthcare-workers-medical-facilities-in-gaza> [SB/H/2564-2567].

⁹³ WHO, *Evacuation orders by Israel to hospitals in northern Gaza are a death sentence for the sick and injured*, 14 October 2023, available at: <https://www.who.int/news/item/14-10-2023-evacuation-orders-by-israel-to-hospitals-in-northern-gaza-are-a-death-sentence-for-the-sick-and-injured> [SB/E/1287-1288].

⁹⁴ Doctors without Borders, “Patients and medical staff in Gaza trapped in hospitals under fire – attacks must stop now”, 11 November 2023, available at: <https://www.msf.org/gaza-patients-and-medical-staff-trapped-hospitals-under-fire>. [SB/G/2243-3345].

⁹⁵ UNRWA, “The Gaza Strip: four UNRWA shelters damaged in less than 24 hours” 2 November 2023 available at <https://www.unrwa.org/newsroom/official-statements/gaza-strip-four-unrwa-shelters-damaged-less-24-hours> [SB/H/2455]

⁹⁶ Euro-Med Human Rights Monitor has published an infographic available at https://www.instagram.com/p/CzhGNufMPTq/?utm_source=ig_web_copy_link&igshid=MzRIODBiNWFIZA. [SB/G/927].

injured.⁹⁷ All UNRWA schools across the Gaza Strip are now closed, but are being used to shelter displaced families – an UNRWA spokesperson reportedly told Al Jazeera that Palestinians seek shelter in schools “*as they believe that they are the safest places in the Gaza Strip because they are affiliated with the United Nations*”.⁹⁸

69. The Israeli military has claimed that access passages to the Hamas Military Wing underground network are located nearby civilian infrastructure, including schools.⁹⁹

iii. Refugee camps and civilian residences

70. Third, refugee camps and other civilian residences have suffered severe damage during the escalation of hostilities.

71. Damage to refugee camps is detailed at Minogue1/§61-74 [CB/B/105-109]. The starkest example is that, between 31 October and 1 November, Israel conducted a sustained airstrike campaign in Jabalia Refugee Camp, northern Gaza. Jabalia Refugee Camp is one of the most densely populated places on earth: 116,011 refugees are registered with UNRWA, within an area of only 1.4 square kilometres.¹⁰⁰ The Guardian reports that, on 31 October 2023 alone, at least six airstrikes hit residential areas in the Camp, killing more than 50 people and injuring a further 150.¹⁰¹ Video footage of the attacks shows multiple huge craters, and rescue workers pulling bodies out of the wreckage with their hands.¹⁰² The following day, the airstrikes continued – the nearby Indonesian Hospital reported 400 casualties including 120 dead.¹⁰³ The biggest crater at the site was estimated to be 40ft (12 metres).¹⁰⁴ The New York Times’ Visual Investigations Unit, after analysing the online audio-visual content, concluded that “*the Israeli military dropped at least two 2,000-pound bombs on the site*”.¹⁰⁵

72. Doctors Without Borders have condemned the strike as the “*latest episode of senseless violence*”.¹⁰⁶ On 2 November 2023, a group of UN Special Rapporteurs warned that “*time is running out to prevent genocide and humanitarian catastrophe in Gaza*” and stated:

*“The Israeli airstrike on a residential complex in the Jabalia refugee camp is a brazen violation of international law – and a war crime. Attacking a camp sheltering civilians including women and children is a complete breach of the rules of proportionality and distinction between combatants and civilians.”*¹⁰⁷

⁹⁷ The Times of Israel, “11 UN staff, 30 pupils at UN schools, killed in Gaza, says spokesperson” 12 October 2023 available at <https://www.timesofisrael.com/11-un-staff-30-pupils-at-un-schools-killed-in-gaza-says-spokesperson/> [SB/F/1409-1411].

⁹⁸ Al Jazeera, “Thousands of Gaza residents take refuge in UN schools from Israel air raids” 9 October 2023 available at <https://www.aljazeera.com/news/2023/10/9/thousands-of-gaza-residents-take-refuge-in-un-schools-from-israel-air-raids> [SB/F/1383-1391].

⁹⁹ FDD, “Israel Widens Anti-Tunnel War in Gaza” 8 November 2023 available at <https://www.fdd.org/analysis/2023/11/08/israel-widens-anti-tunnel-war-in-gaza/> [SB/F/1579].

¹⁰⁰ UNRWA, “Jabalia Camp”, available at: <https://www.unrwa.org/where-we-work/gaza-strip/jabalia-camp>. [SB/H/2289-2290].

¹⁰¹ The Guardian, “Dozens killed after Israeli airstrikes on Gaza refugee camp”, 31 October 2023, available at: <https://www.theguardian.com/world/2023/oct/31/dozens-killed-after-israeli-airstrikes-on-gaza-refugee-camp>.

¹⁰² *Ibid.*

¹⁰³ The Guardian, “Cratered ground and destroyed lives: piecing together the Jabalia camp airstrike” 1 November 2023 available at <https://www.theguardian.com/world/2023/nov/01/jabalia-camp-airstrike-gaza> [SB/F/2173-2181]. [SB/G/2167-2178].

¹⁰⁴ *Ibid.*

¹⁰⁵ New York Times, “Israel Used 2,000-Pound Bombs in Strike on Jabaliya, Analysis Shows” 3 November 2023 available at <https://www.nytimes.com/2023/11/03/world/middleeast/israel-bomb-jabaliya.html> [SB/BF/1515-1517].

¹⁰⁶ Doctors Without Borders, “MSF response to the deadly Israeli attack on Jabalia camp” 31 October 2023 available at <https://reliefweb.int/report/occupied-palestinian-territory/msf-response-deadly-israeli-attack-jabalia-camp> [SB/G/2148].

¹⁰⁷ Minogue1/§186 [CB/B/157-158].

73. Israel has defended the strike on Jabalia, stating that eliminating Hamas Military Wing commander Ibrahim Biari justified the bombing. Biari is said to have helped lead combat operations in the region and been a key part of planning the 7 October attacks. According to the Israeli military, Biari was in “*a vast underground tunnel complex from where he was directing operations*”, and the strike killed him and dozens of other Hamas combatants.¹⁰⁸
74. Civilian residences are addressed in Minogue1/§90-95 [CB/B/116-119]. Entire neighbourhoods have been destroyed: there are reports that 45% of housing units are either moderately damaged or entirely destroyed as of 23 October 2023.¹⁰⁹ In cases documented by Amnesty International, it found that “*the Israeli military had either not warned civilians at all, or issued warnings which were inadequate*”.¹¹⁰
75. Israel claims that the Hamas Military Wing has placed rocket launchers in civilian areas, such as 30 metres from residential homes in northern Gaza and in a children’s playground.¹¹¹

v. *International response*

76. The international community has called for the protection of civilian objects from attack:

- a. The UNGA Resolution calls for:

*“respect and protection, consistent with international humanitarian law, of all civilian and humanitarian facilities, including hospitals and other medical facilities, as well as their means of transport and equipment, schools, places of worship and United Nations facilities, as well as all of humanitarian and medical personnel and journalists, media professionals and associated personnel, in armed conflict in the region”.*¹¹²

- b. On 30 October 2023, the Prosecutor of the International Criminal Court (“ICC”), Karim A. A. Khan made a statement calling on Israel to abide by international law:

“They will need to demonstrate that any attack, any attack that impacts innocent civilians or protected objects, must be conducted in accordance with the laws and customs of war; in accordance with the laws of armed conflict.

They need to demonstrate the proper application of the principles of distinction, precaution and of proportionality. And I want to be quite clear so there's no misunderstanding: In relation to every dwelling house, in relation to any school, any hospital, any church, any mosque – those places are protected, unless the protective status has been lost. And I want to be equally clear that the burden of

¹⁰⁸ Independent, “Israel defends strike on Jabalia refugee camp thought to have killed dozens” 1 November 2023 available at <https://www.independent.co.uk/news/world/middle-east/jabalia-refugee-camp-gaza-israel-b2439530.html> [SB/F/1488-1492].

¹⁰⁹ OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #18”, 24 October 2023, available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-18>. [SB/H/2345-2356].

¹¹⁰ Amnesty International, “Damning evidence of war crimes as Israeli attacks wipe out entire families in Gaza” 20 October 2023, available at <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/#:~:text=Whole%20families%20wiped%20out,attack%2C%20seven%20of%20them%20children>. [SB/G/2066-2074].

¹¹¹ Times of Israel, “IDF releases new intel detailing Hamas use of Gaza hospitals for terror purposes” 5 November 2023, available at: <https://www.timesofisrael.com/idf-releases-new-intel-detailing-hamas-use-of-gaza-hospitals-for-terror-purposes/>. [SB/F/1332-1335]

¹¹² Minogue1/§174 [CB/B/151-152].

proving that the protective status is lost rests with those who fire the gun, the missile, or the rocket in question.”¹¹³

Submissions as to specific breaches based on damage to civilian objects

77. As set out above, hospitals and civilian objects such as schools and residences are granted special protection under IHL. As to some of these objects (Al-Shifa, Al-Quds and Rantisi hospitals and Jabalia camp in particular), Israel has relied on Hamas Military Wing operations on the site to justify the damage caused. For many other objects, there is simply no explanation in the public domain, other than generalised statements of Hamas hiding under civilian infrastructure and using civilians as human shields.
78. However, even presuming that the Hamas Military Wing has used each and every object described above for a military purpose, such that these objects can be lawfully targeted, that does not rid Israel of its responsibility to conduct its operations in accordance with the principles of distinction, proportionality and precaution. Where there are likely to be mass civilian casualties and damage from a strike, the strike can only be justified by a countervailing massive military advantage relative to the loss of civilian life caused; and even in such an instance, Israel must take all feasible precautions to further avoid and minimise civilian death, injury and damage.
79. Israel’s position in some statements has been that it has made serious efforts to avoid civilian casualties and that its war is with Hamas, not Palestinian civilians (though this is contradicted by other statements, as set out below in Section G). In any event, this is not borne out on the facts. There is nothing in the evidence to demonstrate that Israel has complied with these obligations. Instead, all the evidence points in the other direction.
- a. Firstly, it is profoundly implausible that the destruction of each target could be sufficiently valuable from a military perspective. Such advantage should – in order conceivably to justify an attack on a hospital – be of the most acute kind, in absolutely exceptional circumstances. That Israel has attacked so many hospitals demonstrates that such a standard is manifestly not being applied.
 - b. Secondly, it is apparent that Israel has not minimised civilian harm. It has not given effective warnings; and it has not evacuated, or facilitated the evacuation of, civilians from those sites (most obviously needed in relation to the vulnerable, sick, young, elderly, pregnant, or those of limited mobility). The ineffectiveness of any warning is furthered by Israel’s targeting of safe zones and evacuation routes (as to which see Section C below) and the fact that Gaza is sealed such that civilians are in effect trapped in.
 - c. Thirdly, as supported by the sheer numerosity of the attacks and volume of explosives dropped on such a densely populated and small surface area,¹¹⁴ as well as by the overall toll of civilian casualties and by the statements of intent set out below at Section G, it

¹¹³ ICC, “Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the situation in the State of Palestine and Israel” 30 October 2023 available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel> [SB/H/1128-1131].

¹¹⁴ Euro-Med estimates that the explosive capacity dropped on Gaza is equivalent to the nuclear bombs dropped on Hiroshima and Nagasaki in 1945: Euro-Med, “Israel hits Gaza Strip with the equivalent of two nuclear bombs”, 2 November 2023, available at: <https://euromedmonitor.org/en/article/5908/Israel-hits-Gaza-Strip-with-the-equivalent-of-two-nuclear-bombs> [SB/D/1147-1151]

is obvious that Israel's approach is one of deploying overwhelming military force. Accordingly, there is plainly a clear risk that these attacks breach IHL.

C. **The targeting of safe zones and evacuation routes**

i. *Factual background*

80. Alayyan/§57,59,62-63 [CB/B/199-201] and Minogue2/3-14 [CB/B/250-254] set out the evacuation notices issued by Israel to civilians living in Gaza. For example, on 21 October 2023 Israeli fighter jets dropped leaflets containing the following message:

*“An urgent warning to the residents of the Gaza Strip. Your presence in the north of Wadi Gaza puts your lives at risk. Those who choose not to evacuate from the North of the Strip to south of Wadi Gaza, could potentially be identified as accomplices in a terrorist organization”.*¹¹⁵

81. After repeatedly instructing civilians to relocate to southern Gaza in order to avoid hostilities, the Israeli military continued to bomb southern areas that civilians had fled to. The BBC has investigated four specific instances of airstrikes in southern Gaza, and verified reports that airstrikes took place in Khan Younis on 10 October 2023, Rafah on 11 October 2023, Khan Younis on 19 October 2023 and refugee camps in central Gaza on 17, 18 and 25 October 2023.¹¹⁶ Other reports of such cases and personal examples of those affected are detailed in Alayyan/§57-71 [CB/B/199-206] and Minogue2/3-14 [CB/B/250-254].

82. As well as continuing to conduct airstrikes in areas in which it has asked civilians to evacuate to, there are reports that Israel is targeting the “safe routes” it has encouraged civilians to take. These are described at Alayyan/§67 [CB/B/202-203]. Israel claims that fighting along the safe routes was due to the Hamas Military Wing launching a ground attack on the Israeli forces.

83. In previous years, the Israeli military has used a tactic referred to as “knocking on the roof”, where it dropped a small, non-explosive munition on the roof before a larger strike is executed to warn civilians to evacuate. However, since 7 October 2023, it is reported that the Israeli military has not been using this strategy,¹¹⁷ and the Israeli military itself has stated that the policy is no longer the norm.¹¹⁸

84. That the evacuation orders are in violation of international law is supported by statements of respected international organisations:

- a. The ICRC has clearly stated its view that the evacuation orders breach international law:

“The instructions issued by the Israeli authorities for the population of Gaza City to immediately leave their homes, coupled with the complete siege

¹¹⁵ Alayyan/§62 [CB/B/201].

¹¹⁶ BBC, “Strikes on south Gaza: BBC verifies attacks in areas of ‘safety’” <https://www.bbc.co.uk/news/world-middle-east-67264703> [SB/F/1324-1331].

¹¹⁷ CNN, “Israel seemingly stops “knock on the roof” military tactic. Here’s what it means and why it matters” 11 October 2023 available at https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-10-11-23/h_b213ec9e2882bc819f20cb6a96bccc92.

¹¹⁸ Times of Israel, “Senior Israeli source: Gaza will not be Hamastan; ‘roof knocking’ policy no longer norm” 9 October 2023 available at https://www.timesofisrael.com/liveblog_entry/senior-israeli-source-gaza-will-not-be-hamastan-roof-knocking-policy-no-longer-norm/.

explicitly denying them food, water, and electricity, are not compatible with international humanitarian law.

When military powers order people to leave their homes, all possible measures must be taken to ensure the population has access to basic necessities like food and water and that members of the same family are not separated.

Gaza is a closed area of limited size and resources. People have nowhere safe to go and many, including the disabled, elderly, and sick, will not be able to leave their homes. International humanitarian law protects all civilians, including those who remain. Today, it is impossible for Gazans to know which areas will next face attack”¹¹⁹.

- b. Similarly, Amnesty has stated that the orders to evacuate “*may amount to forced displacement of the civilian population - which is a violation of international humanitarian law*”.¹²⁰ Amnesty considers that declaring a whole city or region a military target “*flies in the face of IHL*”, that the messages in the leaflets cannot be considered an effective warning to civilians, and Israel cannot hold “*hundreds of thousands of civilians responsible for acts they did not commit, based solely on the fact that they are staying in their homes when they have nowhere safe to go amid a relentless campaign of Israeli bombardment across the entire Gaza Strip*”.¹²¹ Amnesty reported that an Israeli army spokesperson has admitted that the evacuation would not be possible within the 24 hour period provided.¹²²

ii. Submissions

85. Israel’s evacuation orders are not effective warnings – they order civilians to leave *en masse* through unsafe routes to unsafe destinations in impossible timeframes and are not limited to specific targets but cover large areas of northern Gaza. They constitute breaches of international law by: (i) forcibly displacing the entire population of the area targeted; (ii) disregarding the safety of civilians who are unable to leave in violation of the three principles of distinction, proportionality and precaution; and (iii) stating that those remaining will be considered complicit in the crimes of Hamas, thus breaching the principle of distinction and making plain that Israel’s intention is one of collective punishment. Israel is clearly taking insufficient steps to verify that the areas it is targeting are not still densely populated by civilians. Under the rules of IHL it is not sufficient to simply proclaim to large sections of the civilian population that there will be an indiscriminate bombing of their *residential neighbourhoods* and that they must leave or suffer the consequences. Further still, Israel is attacking the very areas that it is asking civilians to flee to. In such circumstances Israel’s tokenistic warnings to the civilian population

¹¹⁹ ICRC, “Israel and the occupied territories: Evacuation order of Gaza triggers catastrophic humanitarian consequences” 13 October 2023 available at <https://www.icrc.org/en/document/israel-and-occupied-territories-evacuation-order-of-gaza-triggers-catastrophic-humanitarian-consequences> [SB/H/2304-2306].

¹²⁰ Amnesty, “Israel/OPT: Israel must immediately rescind its ‘impossible’ ultimatum over northern Gaza”, 13 October 2023, available at: <https://www.amnesty.org.uk/press-releases/israelopt-israel-must-immediately-rescind-its-impossible-ultimatum-over-northern>. [SB/E/1282-1285].

¹²¹ Amnesty, “Israel/OPT: Israeli army threats ordering residents of Northern Gaza to leave may amount to war crimes” 25 October 2023 available at <https://www.amnesty.org.uk/press-releases/israelopt-israeli-army-threats-ordering-residents-northern-gaza-leave-may-amount-war> SB/G/2103-2104. [SB/G/2099-2100].

¹²² Amnesty, “Israel/OPT: Israel must immediately rescind its ‘impossible’ ultimatum over northern Gaza”, 13 October 2023, available at: <https://www.amnesty.org.uk/press-releases/israelopt-israel-must-immediately-rescind-its-impossible-ultimatum-over-northern>. [SB/E/1282-1285].

in Gaza, designed to give the impression that it is complying with international law, are properly and unavoidably to be characterised as flagrant violations of IHL.

D. Expulsions and deaths in the West Bank

i. Factual background

86. There have been thousands of Palestinian casualties in the West Bank since 7 October 2023.¹²³ As the Israeli authorities and forces continue to administratively and punitively demolish Palestinian homes and other civilian structures, another “*at least 143 Palestinian households comprising 1,014 people, including 388 children, have been displaced amid settler violence and access restrictions*”, according to OCHA.¹²⁴

87. This displacement and killing, injuring, and arbitrarily detaining of Palestinian civilians should be viewed in light of the Israeli government’s stated intention (discussed further below at Section G) to repeat the Nakba.¹²⁵ This intention has also been condemned by the international community:

- a. The UNGA Resolution “[f]irmly rejects any attempts at the forced transfer of the Palestinian civilian population”.
- b. On 14 October 2023, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 warned that: “*Again, in the name of self-defence, Israel is seeking to justify what would amount to ethnic cleansing. Any continued military operations by Israel have gone well beyond the limits of international law. The international community must stop these egregious violations of international law now, before tragic history is repeated.*”¹²⁶

88. Israeli intelligence officials reportedly told the Guardian on 10 November 2023 that operations of the Israeli forces in the West Bank were necessary to stop further terrorist attacks and that many of those arrested were Hamas Military Wing operatives.¹²⁷

ii. Submissions

89. The displacement of people in the West Bank amounts to unlawful forced transfer, and the mass civilian deaths and injuries are further evidence of indiscriminate and disproportionate targeting.

E. Deprivation of essential resources

i. Factual background

¹²³ Al Jazeera, “Israeli raids kill 3 more Palestinians in West Bank, health officials say” 12 November 2023 <https://www.aljazeera.com/news/2023/11/12/israeli-raids-kill-3-more-palestinians-in-west-bank-health-officials-say> [SB/F/1668-1671].

¹²⁴ OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #50”, 25 November 2023, available at: https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-50?_gl=1*396157*_ga*MTYzNDA1MjA3Ni4xNjk2NzAyNDQy*_ga_E60ZNX2F68*MTcwMDk2NjY4Mi4zNy4wLjE3MDA5NjY2ODIuNjAuMC4 [SB/H/2694-2702].

¹²⁵ The Nakba is the term used by Palestinians to describe their violent and permanent expulsion in 1948 from their native lands: see Alayyan/§127 in Annex 1 [CB/B/229-230].

¹²⁶ Minogue1/§184 [CB/B/156].

¹²⁷ The Guardian, “‘Our wish is to be martyred’: defiant Hamas fighters count their losses in West Bank” available at <https://www.theguardian.com/world/2023/nov/10/funerals-for-west-bank-dead-jenin-israel-hamas-war> [SB/F/1778-1871]

90. Israel’s deliberate policy has been to lay a siege on Gaza and prevent essential supplies of food, water and fuel from entering the area. As Yoav Gallant, the Israeli Defence Minister, explained on 9 October 2023: “*We are imposing a complete siege on [Gaza]. No electricity, no food, no water, no fuel – everything is closed. We are fighting human animals, and we act accordingly*”.¹²⁸

91. This has had devastating effects on the civilian population. First, as to food supplies: as further detailed at Minogue1/§96-113 [CB/B/119-126] and Alayyan/§10-39 [CB/B/178-192], Oxfam estimates that just one truck containing food is allowed to enter Gaza every three hours, as compared to one truck every 14 minutes prior to current hostilities, leaving 2.2 million people in urgent need of food.¹²⁹ Further, in addition to preventing aid from entering, Israel has targeted sources of food by airstrikes. As of 6 November 2023, 11 bakeries had been “*hit and destroyed*”.¹³⁰ The specifics of known attacks are described in detail in Exhibit DM2. For example, the largest bakery in Gaza (al Nuseirat Bakery located in the al Nuseirat Refugee Camp), estimated to have been a source of food (together with one other bakery) for 200,000 people,¹³¹ was destroyed by Israeli airstrikes on 18 October 2023.¹³² Airstrikes beside Sharq Bakery took place while approximately 300 people were waiting in line to buy food.¹³³ As of 9 November 2023, no bakeries were active in northern Gaza.¹³⁴ According to OCHA, the last functioning wheat mill in Gaza was hit and destroyed on 15 November 2023.¹³⁵

92. Second, as to clean water, per Oxfam:

“Clean water has now virtually run out. It’s estimated that only three litres of clean water is now available per person – the UN said that a minimum of 15 litres a day is essential for people in the most acute humanitarian emergencies as a bare minimum. Bottled water stocks are running low and the cost of bottled water has already surged beyond the reach of an average Gaza family, with prices spiking fivefold in some places. A spokesperson for the UN Agency for Palestinian Refugees (UNWRA) pointed out that some of the food aid allowed in - rice and lentils - is useless, because people do not have clean water or fuel to prepare them”.¹³⁶

93. Gaza’s water reserves have been damaged by airstrikes: as reported by AA, on 4 November 2023, Israel bombed the main water reserves in the south of Gaza.¹³⁷ ActionAid Palestine reports that on 5 November 2023, a water tank in Tal al Zaatar in northern Gaza was targeted, which led to water flooding out onto the streets.¹³⁸ A water desalination plant and the Israeli water

¹²⁸ See Minogue1/§20 [CB/B/91].

¹²⁹ Oxfam, “Starvation as weapon of war being used against Gaza civilians,” 25 October 2023, available at <https://www.oxfam.org/en/press-releases/starvation-weapon-war-being-used-against-gaza-civilians-oxfam#:~:text=Just%20%20percent%20of%20usual,to%20be%20allowed%20to%20enter>. [SB/G/2089-2093].

¹³⁰ OCHA Flash Update #34. [SB/H/2246-2555].

¹³¹ Palestine Chronicle, “Two remaining bakeries before it was targeted served 200,000 people,” 18 October 2023, available at <https://www.palestinechronicle.com/why-did-israel-bomb-the-electric-bakery-of-nuseirat-killing-three-workers/>.

¹³² Exhibit DM1 at [SB/D/1250-1254]

¹³³ Exhibit DM1at [SB/D/1262-1264]

¹³⁴ OCHA Flash Update #34. [SB/H/2246-2555].

¹³⁵ OCHA, “Today’s top news: Occupied Palestinian Territory, Afghanistan”, 16 November 2023, available at: <https://www.unocha.org/news/todays-top-news-occupied-palestinian-territory-afghanistan-1>.

¹³⁶ Oxfam, “Starvation as weapon of war being used against Gaza civilians,” 25 October 2023, available at <https://www.oxfam.org/en/press-releases/starvation-weapon-war-being-used-against-gaza-civilians-oxfam#:~:text=Just%20%20percent%20of%20usual,to%20be%20allowed%20to%20enter>. [SB/G/2089-2093].

¹³⁷ AA, “Israeli airstrike hits Gaza water reservoir supplying Rafah neighborhoods” 4 November 2023 available at <https://www.aa.com.tr/en/middle-east/israeli-airstrike-hits-gaza-water-reservoir-supplying-rafah-neighborhoods/3043167>. [SB/F/1553-1554].

¹³⁸ ActionAid Palestine, “Half a million people in Gaza on brink of starvation” <https://www.actionaid.org.uk/latest-news/half-million-people-gaza-brink-starvation> [SB/G/2198-2200].

pipeline have been rendered inoperational.¹³⁹ OCHA reports a 92% reduction in water consumption.¹⁴⁰ On 8 November 2023, WHO warned that the risk of disease spread was soaring in Gaza as health facilities, water and sanitation systems have been disrupted.¹⁴¹ There are anecdotal reports of people using seawater to wash or for domestic consumption, which carries serious health risks due to a high level of seawater pollution.¹⁴²

94. Thirdly, as to energy: OCHA reports that “*Gaza remains under a full electricity blackout since 11 October, following Israel’s halt of its power and fuel supply, which triggered the shutdown of Gaza’s sole power plant.*”¹⁴³ The fuel shortage has led to the shutdown of essential facilities, such as bakeries and hospitals, as detailed above in relation to civilian objects. Amnesty reports that on 12 October 2023, an Israeli minister stated that “*that the authorities will not restore power or allow water or fuel to enter Gaza until Hamas releases its hostages*” – Amnesty considers this “*explicit confirmation that Israel’s response is designed to punish civilians in Gaza for the actions of Palestinian armed groups*”.¹⁴⁴ Israel has claimed that Hamas steals and stockpiles fuel from citizens.¹⁴⁵
95. Once again, refusing to allow fuel into Gaza is combined with positive military actions which deny Palestinians in Gaza their existing energy resources: on 4 November 2023 it was reported by AA that Israeli airstrikes had disabled solar panels across Gaza City and the primary electricity generator at the Al-Wafaa Hospital, putting the hospital out of service.¹⁴⁶
96. The international community has condemned this deprivation of essential resources:

- a. The ICRC stated that “*with a military siege in place, people in Gaza are deprived of food, water, and medicine. Sparse aid is arriving leaving communities without the essentials to survive.*”¹⁴⁷ It further noted that the most shocking impact has been on children.
- b. The UNGA Resolution calls for:

“the immediate, continuous, sufficient and unhindered provision of essential goods and services to civilians throughout the Gaza Strip, including but not limited to water, food, medical supplies, fuel and electricity, stressing the imperative, under international

¹³⁹ OCHA Flash Update #34. [SB/H/2246-2555].

¹⁴⁰ OCHA, “Hostilities in the Gaza Strip and Israel - reported impact: Day 30,” 5 November 2023, available at <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-30>. [SB/H/2486].

¹⁴¹ WHO, “Risk of disease spread soars in Gaza as health facilities, water and sanitation systems disrupted,” 8 November 2023, available at <https://www.emro.who.int/media/news/risk-of-disease-spread-soars-in-gaza-as-health-facilities-water-and-sanitation-systems-disrupted.html>. [SB/H/2532-2533].

¹⁴² OCHA Flash Update #34. [SB/H/2246-2555].

¹⁴³ OCHA Flash Update #34. [SB/H/2246-2555].

¹⁴⁴ Amnesty, “Israel/OPT: Israel must lift illegal and inhumane blockade on Gaza” 12 October 2023, available at <https://www.amnesty.org.uk/press-releases/israelopt-israel-must-lift-illegal-and-inhumane-blockade-gaza>. [SB/G/2011-2014].

¹⁴⁵ NBC News, “Hamas is hoarding vast amounts of fuel as Gaza hospitals run low, U.S. officials say” 2 November 2023 available at <https://www.nbcnews.com/news/investigations/hamas-hoarding-vast-amounts-fuel-gaza-hospitals-run-low-us-officials-s-rcna122977> [SB/F/1510-1514].

¹⁴⁶ AA, “Israeli airstrike hits Gaza water reservoir supplying Rafah neighborhoods” 4 November 2023 available at <https://www.aa.com.tr/en/middle-east/israeli-airstrike-hits-gaza-water-reservoir-supplying-rafah-neighborhoods/3043167>. [SB/F/1553-1554]; see also OCHA, “Israel-Palestine crisis: ‘Enough is enough’ say humanitarians” 6 November 2023 <https://news.un.org/en/story/2023/11/1143237>. [SB/H/2500-2503].

¹⁴⁷ ICRC, “Israel and the Occupied Territories: Horrific suffering of civilians must end” 7 November 2023 available at <https://www.icrc.org/en/document/israel-and-occupied-territories-horrific-suffering-civilians-must-end> [SB/H/2519-2521].

humanitarian law, of ensuring that civilians are not deprived of objects indispensable to their survival".¹⁴⁸

- c. On 24 October 2023, the UN Secretary General stated that the bombardment and blockade of Gaza amounts to the “*collective punishment of the Palestinian people*” and violates international law.¹⁴⁹ On 3 November 2023, he reiterated that:

*“The humanitarian situation in Gaza is horrific. Not nearly enough food, water and medicine are coming in to meet people’s needs. Fuel to power hospitals and water plants is running out. UNRWA shelters are at nearly four times their full capacity and are being hit in bombardments. Morgues are overflowing. Shops are empty. The sanitation situation is abysmal. We are seeing an increase in diseases and respiratory illnesses, especially among children. An entire population is traumatized. Nowhere is safe.”*¹⁵⁰

- d. On 29 October 2023 ICC Prosecutor Karim A. A. Khan called on Israel to make “*discernible efforts*” to ensure civilians can access food and medicine. He warned that the curtailment of these rights could give rise to “*criminal responsibility*” under the Rome Statute.¹⁵¹
- e. The UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, stated that “*of a complete siege on Gaza involving the withholding of water, food, electricity and fuel*” will “*undoubtedly cost civilian lives and constitutes collective punishment*”, and that there was “*clear evidence*” of war crimes in Israel and Gaza.¹⁵²

97. In addition to denying access to vital resources, Israel has imposed a total communications blackout, by cutting off all telecommunication services – senior US officials have confirmed that Israel is responsible.¹⁵³ These blackouts are accompanied by attacks, and they “*enable Israel to obscure the mass atrocities committed by its forces against Palestinians in Gaza*”.¹⁵⁴ The blackout leaves Palestinians unable to access emergency medical services, “*puts the work of humanitarian agencies that try to help people on the ground in jeopardy as they lose contact with their team members*”, and prevents people from contacting loved ones to check whether they are safe.¹⁵⁵

ii. Submissions

98. It is obvious that the “*total siege*” declared by Israel is unlawful in international law. Israel is using starvation as a method of warfare, violating the protection of free passage of humanitarian aid, and imposing collective punishment. The effects of the siege are compounded by the damage caused to vital civilian objects such as bakeries, water tanks and solar panels, which

¹⁴⁸ Minogue1/§174 [CB/B/151-152].

¹⁴⁹ Minogue1/§176 [CB/B/153].

¹⁵⁰ Minogue1/§180 [CB/B/154].

¹⁵¹ Minogue1/§204 [CB/B/163-164].

¹⁵² Minogue1/§183 [CB/B/155-156].

¹⁵³ Washington Post, “Internet blackouts keep hitting Gaza. Here’s what to know.” 6 November 2023 <https://www.washingtonpost.com/world/2023/11/06/gaza-internet-communications-blackout-explainer/>. [SB/F/1697-1700].

¹⁵⁴ Al Haq, “Israel’s Last Evacuation Order Requires Urgent International Intervention to Protect Gaza’s Civilian Population, Who Have Nowhere Left to Shelter” 29 October 2023 available at <https://www.alhaq.org/advocacy/22041.html> [SB/E/1308-1311].

¹⁵⁵ Al Jazeera, “Gaza suffers another communications blackout amid Israeli bombardment” 1 November 2023 available at <https://www.aljazeera.com/news/2023/11/1/israel-imposes-communication-blackout-on-gaza-second-time-in-five-days>. [SB/F/1461-1463].

themselves are intended to deprive civilians of essential resources. As such, there is a clear risk that arms provided to Israel will be used to continue these IHL breaches.

99. As set out in §36 above, the only circumstances in which a State can target objects indispensable to the civilian population are where they are used as sustenance **solely for the members of its armed forces**; or **in direct support of military action**, provided, that in no event shall actions be taken which leave the civilian population with inadequate food or water as to cause its starvation or force its movement. Whilst Israel may argue that its destruction of food and water supplies is meant to diminish Hamas' military effectiveness (which in any event is the wrong legal test), the reality remains that they have *de facto* created a situation in which the vast majority of the civilian population is being starved to death and can no longer subsist within Gaza, creating a humanitarian crisis and preventing aid from getting into Gaza. This course of action is in direct violation of IHL. Further, it is in keeping with Israel's wider policy objectives for the region as set out below.

F. The ceasefire

100. As addressed in Minogue1/§214-222 [CB/B/168-171], a four-day cease-fire (later extended by a further two days) began on 24 November 2023 and ended on 30 November 2023. The purpose of the ceasefire is the exchange of hostages between Israel and the Hamas Military Wing.

101. While this is a matter that the SST should properly take into account, the Claimant submits that it does not mitigate the clear risk that Israel will continue to commit IHL violations, for the following reasons:

- a. Firstly, Israel has made plain in various statements that the pause is temporary, that it intends to eliminate Hamas entirely and that it will resume military action as soon as hostages are no longer being returned. For example, on 29 November 2023 Prime Minister Netanyahu made a statement that "*There is no way we won't return to fighting until the end.*"¹⁵⁶ At present, the ceasefire has ended and military action is resuming. Even if a further extension were to be agreed, there are two possibilities: either the Hamas Military Wing will continue to return all hostages until there are none left; or the Hamas Military Wing will refuse to return some hostages. In either possible outcome, the strong likelihood is that Israel will continue its onslaught.
- b. The ceasefire has not been entirely effective. As outlined in Minogue1/§221 [CB/B/170-171], there are reports (including from Sky News' own correspondents) that Israeli forces continue to attack civilians who attempt to return to northern Gaza. The forced relocation of Palestinians continues.
- c. While some humanitarian aid has been allowed to enter during the ceasefire, Israeli forces have made clear that this is only "*as part of the framework for the release of the hostages*".¹⁵⁷ Accordingly, there is no intention to comply with IHL obligations and when hostilities resume, Gaza will be under total siege once more. In any event, the UN

¹⁵⁶ Times of Israel, "As Israel awaits 6th set of hostages, Netanyahu vows war will resume after truce" 29 November 2023 available at https://www.timesofisrael.com/liveblog_entry/as-israel-awaits-6th-set-of-hostages-netanyahu-vows-war-will-resume-after-truce/ [SB/F/1753].

¹⁵⁷ <https://twitter.com/IDF/status/1728383817243672658>

Secretary-General has stated that “it will be impossible to satisfy all the dramatic needs of the population” during the 6-day truce.¹⁵⁸

G. Serious risk of genocide

i. *Statements of intent*

102. Minogue1/§14-48 [CB/B/89-100] sets out statements of individuals representing the State of Israel in respect of the Israeli response following 7 October 2023. A selection of examples is summarised below.

103. Firstly, various members of the Knesset and military leaders have made statements making clear the intent to destroy the Palestinian people and their home, including, for example: “Now we all have one common goal - erasing the Gaza Strip from the face of the earth”;¹⁵⁹ “We will change the face of reality in the Gaza Strip decades from now”;¹⁶⁰ “to flatten and crush Gaza... The life of our soldier is more important and precious than any person in Gaza”;¹⁶¹ “Shooting powerful missiles without limit. Not flattening a neighbourhood. Crushing and flattening Gaza ... with penetrating bombs. Without mercy! Without mercy!”;¹⁶² “ Hamas has become ISIS and the residents of Gaza are celebrating. Human animals are treated accordingly, you wanted hell - and you will get hell”.¹⁶³ The UN Committee on the Elimination of Racial Discrimination has expressed high concern over the use of the dehumanising phrase “human animals”, considering it to be “language which could incite genocidal actions”.¹⁶⁴

104. Secondly, the very distinction between combatants and civilians has been elided by Israeli politicians, who hold civilians morally responsible for the actions of the Hamas Military Wing: the Israeli President has stated that: “It’s an entire nation out there that is responsible. It’s not true. This rhetoric about civilians not aware, not involved, it’s absolutely not true.”¹⁶⁵ The Israeli Heritage Minister has commented that “there is no such thing as uninvolved civilians in Gaza” and that the “northern Strip has no right to exist”, adding that anyone waving a Palestinian or Hamas flag “shouldn’t continue living on the face of the earth.”¹⁶⁶ Similarly, a military officer has stated that “there is no population in Gaza, there are 2.5 million terrorists - there is no meaning to give them warning missiles.”¹⁶⁷ These statements of how the Israeli state views civilians serve as the backdrop for its disproportionate targeting policies: when describing the “hundreds of tons of bombs” dropped on Gaza, an Israeli military spokesperson commented: “the emphasis is on damage and not on accuracy.”¹⁶⁸

105. Thirdly, the present hostilities have been consistently framed as that between the forces of good (Israel) and evil (conflating the Hamas Military Wing and the Palestinian people). For example, addressing the Knesset on 16 October 2023, Prime Minister Benjamin Netanyahu said: “This is a struggle between the children of light and the children of darkness, between humanity

¹⁵⁸ Reuters, “UN chief says extended Gaza truce not enough to meet aid needs” 27 November 2023 available at <https://www.reuters.com/world/middle-east/un-chief-pushes-gaza-truce-become-full-humanitarian-ceasefire-2023-11-27/>

¹⁵⁹ Knesset member, 7 October 2023, Minogue1/§14 [CB/B/89-90].

¹⁶⁰ Israeli Defence Minister, 7 October 2023, Minogue1/§17 [CB/B/90].

¹⁶¹ Knesset member, 10 October 2023, Minogue1/§22 [CB/B/91].

¹⁶² Knesset member, 9 October 2023, Minogue1/§21 [CB/B/91].

¹⁶³ Major General, head of Coordinator of Government Activities in the Territories, 10 October 2023, Minogue1/§26 [CB/B/12].

¹⁶⁴ Minogue1/§194 [CB/B/160-161].

¹⁶⁵ 13 October, Minogue1/§29 [CB/B/93].

¹⁶⁶ 5 November 2023, Minogue1/§37 [CB/B/95].

¹⁶⁷ 30 October, Minogue1/§35 [CB/B/95].

¹⁶⁸ 10 October, Minogue1/§25 [CB/B/92].

and the law of the jungle".¹⁶⁹ On another occasion, he referenced scripture, stating "*You must remember what Amalek has done to you, says our Holy Bible*".¹⁷⁰ Amalek was a nation which had attacked the Israelites. The cited passage contains a commandment to Israelites to "*blot out the remembrance of Amalek from under heaven*".¹⁷¹ Another member of the Knesset has written: "*In this war the picture is clear – it's absolute evil versus absolute justice*".¹⁷²

106. Fourthly, as considered in more detail in Section E above, many statements of Israeli politicians relate specifically to denying Palestinians access to essential resources as a weapon of war, for example: "*We are imposing a complete siege on [Gaza]. No electricity, no food, no water, no fuel – everything is closed. We are fighting human animals, and we act accordingly*".¹⁷³ "*Humanitarian aid to Gaza? No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter until the Israeli abductees are returned home*".¹⁷⁴ and "*the only thing that needs to enter Gaza are hundreds of tons of explosives from the Air Force, not an ounce of humanitarian aid*".¹⁷⁵

107. Fifthly, there are also various statements of intent to ethnically cleanse and expel the Palestinian people from Gaza, including, for example: "*Right now, one goal: Nakba! A Nakba that will overshadow the Nakba of 48*".¹⁷⁶ Similarly, on 11 November 2023 the Agriculture Minister and member of the Israeli security cabinet stated that the "*We are now rolling out the Gaza Nakba*".¹⁷⁷ A leaked document purportedly from the Israeli Intelligence Ministry recommends the forcible and permanent transfer of the Gaza Strip's 2.2 million Palestinian residents to Egypt's Sinai Peninsula.¹⁷⁸ Former Head of the Israeli National Security Council wrote: "*Israel needs to create a humanitarian crisis in Gaza, compelling tens of thousands or even hundreds of thousands to seek refuge in Egypt or the Gulf... Israel needs to demand [that, first] The entire population of Gaza will either move to Egypt or move to the Gulf*".¹⁷⁹ The Heritage Minister has said that Palestinians "*can go to Ireland or deserts, the monsters in Gaza should find a solution by themselves*".¹⁸⁰

108. Finally, Israel has made clear its intention to continue violating international law, as set down by the UN Security Council. The UN Security Council has adopted a resolution calling for humanitarian corridors to be established in Gaza. Notably, UN Security Council resolutions are legally binding in international law.¹⁸¹ Israel's response has been a blank refusal to comply with its international obligations. On 15 November 2023, Israel's Ambassador to the UN Gilad Erdan posted the following statement on X, formerly known as Twitter:

"The @UN Security Council's resolution is disconnected from reality and is meaningless. Regardless of what the Council decides, Israel will continue acting

¹⁶⁹ Minogue1/§30 [CB/B/93-94].

¹⁷⁰ NPR, "Netanyahu's references to violent biblical passages raise alarm among critics" 7 November 2023 available at <https://www.npr.org/2023/11/07/1211133201/netanyahus-references-to-violent-biblical-passages-raise-alarm-among-critics>.

¹⁷¹ Deuteronomy 25:19

¹⁷² Knesset Member, 28 October 2023, Minogue1/§33 [CB/B/94].

¹⁷³ Israeli Defence Minister, 9 October, Minogue1/§20 [CB/B/91].

¹⁷⁴ Israeli Energy Minister, 12 October, Minogue1/§28 [CB/B/93].

¹⁷⁵ Israeli Minister of National Security, 17 October, Minogue1/§31 [CB/B/94].

¹⁷⁶ Knesset Member, 7 October. The Nakba is the term used by Palestinians to describe their violent and permanent expulsion in 1948 from their native lands: Minogue1/§15-16 [CB/B/90].

¹⁷⁷ Haaretz, "We're rolling out Nakba 2023, Israeli Minister says on northern Gaza Strip evacuation", 12 November 2023, available at: <https://www.haaretz.com/israel-news/2023-11-12/ty-article/israeli-security-cabinet-member-calls-north-gaza-evacuation-nakba-2023/0000018b-c2be-dea2-a9bf-d2be7b670000>. [SB/1/2951-2952].

¹⁷⁸ Minogue1/§48 [CB/B/99-100].

¹⁷⁹ 12 October 2023, Minogue1/§27 [CB/B/93].

¹⁸⁰ 5 November 2023, Minogue1/§45 [CB/B/99].

¹⁸¹ Article 25 of the UN Charter.

according to int'l law while the Hamas terrorists will not even read the resolution at all, let alone abide by it. It is unfortunate that the Council continues to ignore, not condemn, or even mention the massacre that Hamas carried out on October 7, which led to the war in Gaza. It is truly shameful!

Hamis's strategy is to deliberately deteriorate the humanitarian situation in the Gaza Strip and increase the number of Palestinian casualties in order to motivate the UN and the Security Council to stop Israel.

It will not happen. Israel will continue to act until Hamas is destroyed and the hostages are returned".¹⁸²

ii. Submissions

109. These statements of the intention of the Israeli State, taken with the totality of evidence as to the mass IHL violations described above, give rise to the inference that there is at least a *serious risk* of an *attempt* or *incitement* to genocide against Palestinians in Gaza (as recognised by the UN special rapporteurs at §71 above). For the avoidance of doubt, using the definition of genocide in Article II of the Genocide Convention, this includes “*killing members of the group*”, “*causing serious bodily or mental harm to members of the group*” and “*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*”. Accordingly, the SST’s obligations under Criterion 1(b) are engaged as the UK has a positive obligation to prevent genocide and accordingly the Defendant must suspend licencing exports to Israel for use in the current conflict.

H. Weapons used

110. As further detailed in Alayyan/§53 [CB/B/198], Israel has made known the sheer scale of explosive capacity dropped on the small and densely populated area of Gaza: as of 1 November 2023, it had dropped more than 10,000 bombs on Gaza City alone – a space the size of Oxford. Military experts have deduced from the damage caused that some strikes used a 2,000lb Mk 84 with a lethal range of up to 360m. There are also reports that Israel has used white phosphorus, incendiary material that burns human flesh and can cause lifelong suffering, in populated areas in Gaza - an act that, according to Human Rights Watch, “*violates the laws-of-war prohibition against putting civilians at unnecessary risk*”.¹⁸³ There is evidence that the UK exported white phosphorous to Israel in 2009, only the SST can confirm whether this is still the case.¹⁸⁴
111. From Annex 1 of the UK Joint Report setting out exported items to Israel between 2017 and 2022, it is clear that the UK has licensed a very significant amount of military and dual-use equipment across a broad range of areas. For example, licenses have been granted, *inter alia*, for “high power RF weapons systems”, “launching/handling/and control equipment” for “missiles, munitions and rockets”, “beryllium”, “uranium” and “deuterium compounds” (all of which can be used in the construction of nuclear weapons), “bacteria”, “toxins”, “pathogenic genetic elements, viruses”, “command/control equipment for unmanned air vehicles”,

¹⁸² X, @giladerdan1, 15 November 2023, available at: <https://twitter.com/giladerdan1/status/1724905990284271686>. [SB/I/2943]

¹⁸³ Human Rights Watch, “Gaza’s Blocked Relief,” 30 October 2023, available at <https://www.hrw.org/news/2023/10/30/gazas-blocked-relief>. [SB/G/2143-2147]. Contrary to Protocol III to the Convention on Certain Conventional Weapons (CCW).

¹⁸⁴ Hansard, “Exports: White Phosphorus,” 12 November 2009, available at <https://hansard.parliament.uk/Commons/2009-11-12/debates/09111263000013/ExportsWhitePhosphorus>. [CB/C/265-266].

“components for combat aircraft”, “components” and “technology for surface to air missiles”, “anti-armour ammunition”, “military support aircraft”, “components for military combat vehicles”, and the list goes on. It is apparent that equipment of this nature has the potential to be used to devastating effect in the present hostilities.

112. According to the International Institute for Strategic Studies’ (IISS) Military Balance 2023, Israel’s air force has 339 combat capable aircraft, including 309 fighter ground attack jets. Of these, 196 are F-16 jets, 83 are F-15 jets and 30 are F-35 jets.¹⁸⁵ News reports suggest that F-35 jets have been used in Gaza by the Israeli military.¹⁸⁶ The rear fuselage of each and every F-35 jet is produced in the UK by BAE Systems, as are some vertical and horizontal tails, and the Active Interceptor Systems used to direct and maneuver the aircraft.¹⁸⁷ A statement from Campaign Against the Arms Trade explains how F-35s, produced in the US using parts from the UK, are then sold to Israel:

“UK industry provides 15% of the components in the F35 stealth combat aircraft that are currently being used in the bombardment of Gaza. The contract for the components is estimated by Campaign Against Arms Trade to be worth £336m since 2016.

Between 2018 and 2022, the UK exported £146m in arms sales via Single Issue Export Licences. However, a large proportion of military equipment exported is via Open General Export Licences. These open licences, which include the F35 components, lack transparency and allow for unlimited quantities and value of exports of the specified equipment without further monitoring.

According to the SIPRI Arms Transfer Database, Israel has ordered a total of 50 F-35s from the US, of which 36 have so far been delivered, up to the end of 2022. According to the detailed delivery database, a total of 6 were delivered in 2022. While the value of UK companies’ F-35 contracts with the prime contractor, Lockheed Martin, are not known, based on the 15% workshare and the estimated \$80m a plane unit cost of the F-35, this would suggest that each aircraft involves around \$12 million to UK industry. This would imply a value of \$72 million (£58m) for total UK deliveries of F-35s to Israel in 2022, far higher than the value of Single Issue Export Licences, and around \$432 million (approx. £336m.) since deliveries began in 2016.”¹⁸⁸

Submissions

113. The massive explosive capacity which has been dropped on Gaza in a short space of time is indicative of violations of the principles of distinction, proportionality and precaution.
114. As to the provision of F-35s to Israel, the assessment under the Criteria is not limited to consideration of the use of the arms sold by the recipient country: the Criteria make clear that the obligation on the Secretary of State is to consider their end use by the country of final

¹⁸⁵ Al Jazeera, “Israel’s attacks on Gaza: The weapons and scale of destruction,” 9 November 2023, available at <https://www.aljazeera.com/news/longform/2023/11/9/israel-attacks-on-gaza-weapons-and-scale-of-destruction>. [SB/E/1600-1629].

¹⁸⁶ “Online postings by the Israel Defence Forces (IDF) suggest that the state-of-the-art F-35 stealth fighter is among the aircraft that have been used in the relentless bombing of targets in Gaza City and elsewhere”: iNews, “The weaponry the UK has sold to Israel, including parts for F-35 jets used to bomb Gaza” 31 October 2023 available at <https://inews.co.uk/news/weaponry-uk-sold-israel-f35-jets-bomb-gaza-2724324> [SB/F/1446-1449].

¹⁸⁷ BAE Systems, F-35 Programme, available at <https://www.baesystems.com/en/product/f-35-lightning-ii>. [CB/C/405-406]

¹⁸⁸ CAAT, “Statement of UK Arms Exports to Israel” 17 October 2023 available at <https://caat.org.uk/news/statement-on-uk-arms-exports-to-israel/> [SB/G/2042].

destination. Criterion 7(g) requires the SST to take into account the risk of an undesirable end-use by the stated end-user or another party. Where the UK is aware or should be aware that the end-user of a controlled item is Israel, it is required to consider whether there is a risk that the end-use of that item would be undesirable. Where the end-user is Israel there is a risk that the end-use of the item could be the commission of breaches of IHL and/or the Genocide Convention for the reasons set out above, such that the license should not be granted. In particular, in the present case the SST must be taken to know that F-35s made in the US are sold onto other countries, and must be taken to know (as is public knowledge and well publicised) that Israel has an ongoing contract for deliveries of F-35s with the US. Every single F-35 uses parts made in the UK, such that the SST knows that parts sold to the US will inevitably be used by Israel, and there is a clear risk that they will be used to commit the IHL breaches and treaty violations described above.

115. Accordingly, in addition to suspending licences granted to Israel, the SST must suspend licences of F-35 parts granted to the US.

THE GROUNDS OF REVIEW

116. C has set out the relevant legal framework and facts above. For clarity of presentation, C has further sought – when setting out the relevant facts – to set out its submission in relation to the proper conclusions to be drawn from those facts. C can accordingly present its grounds of review in relatively short form.

Ground One – on the premise that the SST has satisfied herself that the decision to continue to grant, and not to suspend, licences is compatible with Criteria 1(b), 2(c) and 7(g) of the Strategic Export Licensing Criteria, this conclusion is irrational

117. As was discussed at length in the decision in *R (CAAT) v Secretary of State for International Trade* [2023] EWHC 1343 (Admin) at [107], one appropriate form of challenge against the Government’s decision to issue export licenses is a rationality review.
118. It is C’s case, based upon the factual and legal material set out above, that the SST has acted irrationally in concluding that military and dual-use equipment for use in Israel should continue to be licensed. The actions of Israel, catalogued in detail in the statement of facts above, plainly establish the clear risk that Israel has committed breaches of IHL against Palestinians since the escalation of the hostilities. Given the particular context of the current proceedings, and in particular the fact that Israel’s conduct in the period commencing on 7th October 2023 has been of a continuing and consistent nature, forming part of a single military campaign, Israel’s past and continuing conduct in this period should be taken as overwhelmingly indicative of its continuing and future conduct. In light of the above, no reasonable decision maker presented with the necessary and relevant material could have reached the conclusion that Criteria 2(c) allowed the UK Government to continue licensing military and dual-use equipment to, or for use in, Israel.
119. Criterion 2(c) requires an assessment of “*the recipient country’s attitude towards relevant principles established by instruments of international humanitarian law*”. Any rational assessment under this requirement would conclude that Israel has made clear its total disregard for the established norms of international law.

- a. Israel has blankly refused to comply with the binding resolution of the UN Security Council mandating that humanitarian corridors be established.
 - b. Israel is not a party to API and disputes that a “*considerable number*” of its provisions represent customary international law.¹⁸⁹ Per the User’s Guide at [2.10], one question which factors into the assessment in relation to Criterion 2(c) is “*Ratification of the four Geneva Conventions of 1949 and their Additional Protocols of 1977*”.
120. Further, applying Criterion 1(b), the SST must not grant a licence where to do so would be inconsistent with the UK’s obligation under the Genocide Convention to take all feasible steps to prevent genocide where it knows of a serious risk that another government is preparing genocide or harbours a specific intent to commit genocide. Israel’s specific intent is plain from the statements of its politicians, outlined above; and the multitude of serious IHL breaches which continue to mount on a daily basis make plain that it is serious in that intent.
121. Pursuant to Criterion 7(g), the same obligations apply in relation to licensing exports to States for manufacture and/or onward export where the end-user is, or is likely to be, Israel, on the basis that Israel will put those exports to an undesirable end-use through the likely commission of breaches of IHL and the Genocide Convention against Palestinians in Gaza and the West Bank.
122. C’s primary case is thus that there is such sufficient and overwhelming evidence in relation to Criteria 1(b), 2(c) and 7(g) that it is irrational for the SST to form any other view.
123. In the alternative, C’s secondary case is that it is irrational for the SST not at least to have suspended licences on an interim basis, in light of the factual material and allegations which arose from the start of the escalation of hostilities, pending a thorough review of the situation which has been developing rapidly. The starkness of the facts, demonstrating terrible loss of civilian life, combined with the profound importance of the legal norms which are engaged, would require any reasonable decision maker to take such an immediate interim decision.
124. Finally, while C submits that on these facts irrationality is obviously made out, C further contends that the standard under Criterion 1(b) is lower than that of Criterion 2(c). Previous challenges have been brought primarily under Criterion 2(c) and the court has not yet had the occasion to consider the standard under Criterion 1(b).¹⁹⁰ There are stark drafting differences between the Criteria: while Criterion 2(c) is couched in the language of discretion and requires the SST to “*determine*” whether there is a “*clear risk*” that the items “*might be used*” to commit serious IHL violations having “*assessed*” the recipient country’s attitude towards IHL principles, Criterion 1 states strictly that the government will not grant a licence if to do so would be inconsistent with its treaty obligations. In setting a high standard under Criterion 2(c), the Court of Appeal emphasised that Criterion 2(c) requires a prospective assessment of risk by the SST.¹⁹¹

¹⁸⁹ Per a statement by the Permanent Mission of Israel to the UN on 20 October 2020 available at https://www.un.org/en/ga/sixth/75/pdfs/statements/protocols/12mtg_israel.pdf, Israel specifically disputes Articles 1(4), 35(3), 55, 43-45, 37(1) and “*a considerable number of other provisions... that we will not elaborate upon here*”. [SB/H/2333-2336].

¹⁹⁰ The High Court summarily dismissed the Intervener’s arguments under Criterion 1(b) in *R (CAAT) v SST* [2017] EWHC 1754 (Admin) at [56], without consideration of the applicable standard. The High Court’s judgment was later overturned on appeal, but that point was not appealed: [2019] EWCA Civ 1020.

¹⁹¹ *R (CAAT) v SST* [2019] EWCA Civ 1020 at [44], [94], [165].

By contrast, under Criterion 1(b) the SST is taking a view on an objective legal question which the Court is at least as well placed to answer as the SST.¹⁹²

Ground Two – the SST has made an error in law concerning Criteria 2(c), 1(b) and 7(g)

125. There are two obvious explanations for the plainly irrational decision taken by the SST to continue licencing arms to Israel: she has either made an error of law in misapplying the relevant norms of IHL and treaty law, as imported by Criteria 2(c), 1(b) and 7(g), or failed to properly inform herself of the relevant facts (addressed in Ground Three).
126. The Court has the power to review decisions of the executive to consider whether they misapplied the law (*R v Barnett LBC, ex p Nilish Shah* [1983] 2 AC 309, 350D). The question of the correct interpretation and construction of legal principles is an objective question for the Court to decide. These are hard-edged question of law in which it is permissible for the Court to substitute its own view for that of the executive.
127. Judicial review on the ground that the decision maker erred in law applies with equal force to the Government’s interpretation of international law as it does to domestic law. Where the UK has incorporated the relevant international treaties into its domestic law, the Court conducts a hard-edged review, in which there is only one correct interpretation of the applicable legal principles. As Lord Sumption held in *Al-Maki v Reves* [2017] UKSC 61 [2019] AC 735 at 12 “*an international treaty has only one meaning*”.¹⁹³
128. This results from the principle of dualism, under which incorporated treaties form part of English law, whereas unincorporated treaties do not, such that the interpretation by the executive of the latter is usually reviewed to the standard of tenability (i.e., whether the view taken by the executive is tenable). That tenability does not apply to incorporated treaties should be a matter of common ground: see for example the Government’s recent acceptance of the point in *R (Friends of the Earth) v SST* [2023] EWCA Civ 14 at [26].
129. All treaty provisions relied on in §§24-39 and 42-25 above are incorporated in domestic law. The four Geneva Conventions are incorporated through the Geneva Conventions Act 1957 and their Additional Protocols are incorporated via the Geneva Conventions (Amendment) Act 1995. Similarly, the Genocide Convention is incorporated under the Genocide Act 1969 and the Rome Statute of the ICC is incorporated under the International Criminal Court Act 2001.
130. For the reasons set out above, it is submitted that, had the SST made no error of law, she would have been led to the conclusion that Criteria 1(b), 2(c) and 7(g) required her to cease to grant, and to suspend, arms licences to, and for use in, Israel. For the avoidance of doubt, Ground 1 concerns an irrationality challenge against the application of the law to the facts of the present case, on the assumption that the SST construed the law correctly. In contrast, Ground 2 of this challenge is concerned with the scenario in which the SST misconstrued the law when

¹⁹² The Court has yet to determine the correct standard of substantive review for Criterion 7(g) and C will also invite the Court to address this issue.

¹⁹³ See also *R (Charles) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 1620 (Admin) at 48; and *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2759 (Admin) [2003] 3 LRC 335 at 10 noting that questions of international law are to be determined as sharp-edged questions of law); *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62 [2017] ICR 1327 at 35 where Lord Sumption held that “*If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer*”.

applying it to the facts of the present case. These are distinct challenges and ones which the SST must meet head on.

Ground Three – the SST has failed to follow the proper procedure in relation to assessment under Criteria 2(c), 1(b) and 7(c)

131. As previously canvassed, the SST has wholly failed to engage with the pre-action correspondence on this matter. It is therefore unclear what information has been taken into account and what steps have been taken. However, had the SST taken into account all of the relevant evidence set out in the statement of facts above – for example the verified news reports of attacks on hospitals, medical personnel, civilians, women, children, the elderly, schools and places of worship, using disproportionate means and with little regard for harm caused to civilians and civilian structures, combined with express statements of unlawful intent – she could not have reached the decision to continue permitting licenses for the export of military equipment to, and for use in, Israel.
132. To this end, C submits that for the SST to have reached this conclusion, she must (absent substantive irrationality or error of law) have misdirected herself as to the necessary and relevant evidence when making the decisions, or irrationally failed to acquire the relevant evidence.
133. The burden is on the SST to explain what material she has taken into account and how this rebuts and/or clarifies the factual position contrary to the evidence presented by C herein. Further, she should explain how she has sought to obtain information and what information was sourced which allowed it to make the decision to continue granting licenses for export of military equipment to Israel.
134. To the extent that the information was supplied directly by Israel to the UK, the SST must further explain to what lengths did the UK Government go to try and verify and/or test that material, or whether it accepted it at face-value. See in particular *Alayyan*/§72-120 [CB/B/206-224] regarding Israel’s credibility.
135. Moreover, as set out in §23 above, the current context requires regular review of the facts. There is no indication whether the SST has considered suspending licences or is reviewing her decision with sufficient regularity.
136. Further, and for the avoidance of doubt, public law powers must be exercised for a proper purpose, and so too must decisions be taken only by reference to relevant considerations and not irrelevant considerations. If the SST took into account the commercial benefits to the UK’s arms industry of the value of the equipment sold, or the UK’s relationship with Israel and the US, those would be improper matters falling outside the carefully crafted scheme of the Criteria, which focuses principally upon whether the arms sold will be used to commit breaches of IHL and IHRL by the end-user. Under “other factors”, the Government can, in exceptional circumstances, decide not to grant a licence for reasons other than those set out in the Criteria where the items may have a significant negative impact on the UK’s international relations. There is no indication that international relations might justify a decision to *continue* to grant, or not to suspend, licences. If international relations or commercial or industrial interests have formed part of the assessment, this is a material error which renders it unlawful.

137. Once the SST has complied with her duty of candour, C will of course be in a better position to address any such matters in the Replies.

RELIEF

138. C respectfully requests that the Court grant the following (as well as the directions and orders sought in section 9 of the claim form):

- a. Permission to apply for judicial review.
- b. An order requiring the SST no longer to grant, and requiring the SST to suspend, all licenses of exports to Israel, both directly and where Israel is the State of final-destination, until there is any material change of circumstance (together with any necessary quashing order in relation to decision(s) taken thus far).
- c. In the alternative to (b), an order that the SST suspends all licenses to, and for use in, Israel on an interim basis, pending her taking a fresh decision or decisions in that regard (together with any necessary quashing order in relation to decision(s) taken thus far).
- d. Declaratory relief, in particular as to the interpretation of the applicable law and as to the applicable procedure.
- e. Costs.
- f. Such further or other relief that the Court sees fit.

Victoria Wakefield KC

Jagoda Klimowicz

Brick Court Chambers

Luke Tattersall

Essex Court Chambers

5 December 2023