IN THE HIGH COURT OF JUSTICE **Claim No: AC-2023-LON-003634**
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

-and-

(1) OXFAM
(2) AMNESTY INTERNATIONAL
(3) HUMAN RIGHTS WATCH

Interveners

SKELETON ARGUMENT OF THE SECRETARY OF STATE

A. INTRODUCTION AND SUMMARY

The Decision

1. This is a challenge to the decision of the Trade Secretary[1] dated 2 September 2024 (the "**September Decision**"). It suspended licences authorising the export of items that might be used in carrying out or facilitating Israeli military operations in the current conflict in Gaza, save for licences for the export of components for the F-35 programme (the "**F-35 Carve Out**").

2. In reaching the September Decision, the Trade Secretary received advice from both the Foreign Secretary and the Defence Secretary.

3. The Foreign Secretary's advice was based on:

[1] Given that multiple departments and Secretaries of State were involved in the decision making, and given that the decisions challenged are those of the Government, this Skeleton will refer collectively to "the Government" save where it would be helpful to distinguish between the different Secretaries of State.

(1) Analysis carried out by the "IHL Cell"[2] which had concluded that: (i) Israel had committed possible breaches of international humanitarian law ("**IHL**") in relation to humanitarian access and the treatment of detainees;[3] and (ii) this undermined Israel's statements of commitment to IHL overall, including in the conduct of hostilities. In light of this assessment, the Foreign Secretary considered that the "clear risk" threshold under Criterion 2C of the Strategic Export Licensing Criteria ("**SELC**") had been met in relation to licences authorising the export of items that might be used in carrying out or facilitating military operations by the Israeli Defence Forces ("**IDF**") in the current conflict in Gaza;[4]

(2) An assessment carried out by the Export Control Joint Unit ("**ECJU**") in the FCDO against the other criteria in the SELC. This included an assessment of whether exports were consistent with the UK's international obligations and relevant commitments under Criterion 1.[5] ECJU-FCDO assessed that no current licences were in violation of the other relevant Criteria;[6] and

(3) Advice (drawn from consultations between FCDO officials and key regional Heads of Mission, the National Security Secretariat ("**NSS**") and the Ministry of Defence "**MOD**") regarding the implications for international and regional peace and security of a decision to suspend arms exports to Israel.[7]

4. In the light of all of this advice, the Foreign Secretary advised the Trade Secretary that the "clear risk" threshold under Criterion 2C had been met in relation to licences for the export of items that might be used in carrying out or facilitating IDF military operations in the current conflict in Gaza and that these licences should therefore be suspended. The Foreign Secretary recommended that the suspension should be *"targeted"*, focussing only on those items which were assessed to pose a "clear risk".[8] The Foreign Secretary further noted that the Defence Secretary's assessment (see below) provided justification for the Trade Secretary to take exceptional measures to avoid impacts to the F-35 programme and international peace and security, consistent with the UK's domestic and international legal obligations.[9]

5. The Defence Secretary provided detailed advice on the potential impact on the F-35 programme of a decision to suspend.[10] This is an international collaborative defence programme which produces and maintains F-35 combat aircraft. The UK is one of eight

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[2] A group of policy experts based in the Foreign, Commonwealth and Development Office ("**FCDO**"). The IHL Cell has produced regular "IHLC Compliance Assessment Process" Assessments since November 2023, drawing on information and analysis from a wide range of sources, including reporting from NGOs on the ground, reporting in the media and reporting from HMG engagement with Israeli counterparts. (Hurndall 2, §15 **[SB/B//14/116]**).
[3] 7th IHLCAP Assessment, §§137 and 171 **[CB/E/41/728 and 735]**.
[4] **[CB/C/17/282]**.
[5] Annex C to the ECJU Submission to the Foreign Secretary, dated 24 July 2024 **[CB/E/35/609]**.
[6] ECJU Submission of 24 July 2024, § 9 **[CB/E/31/595]**.
[7] Annex D to the IHL Cell Submission to the Foreign Secretary, dated 26 August 2024 **[CB/E/54/877]**.
[8] **[CB/E/57/906]**.
[9] **[CB/E/57/906]**.
[10] **[CB/E/59/919]**.

F-35 "Partner Nations". As such, it contributes components which are destined both for assembly lines and for the "Global Spares Pool". Israel is one of 12 Foreign Military Sales customers of the F-35 programme.[11] The Defence Secretary concluded that:

> *"… it is not possible to suspend licensing F-35 components for use by Israel without wide impacts to the whole F-35 programme. Such a suspension of F-35 licensing leading to the consequent disruption for partner aircraft, even for a brief period, would have a profound impact on international peace and security. It would undermine US confidence in the UK and NATO at a critical juncture in our collective history and set back relations. Our adversaries would not wait to take advantage of any perceived weakness, having global ramifications."*[12]

6. This advice was incorporated into a Ministerial Submission to the Trade Secretary dated 30 August 2024.[13] This Submission explained that:

   (1) In light of the Foreign Secretary's conclusions that Israel was not committed to complying with IHL and that there was a clear risk that military equipment exported to Israel that would have use in military operations in Gaza might be used to commit or facilitate a serious violation, the export of those items was no longer consistent with Criterion 2C;[14]

   (2) Items which might be used in military operations in the current conflict (and which were therefore inconsistent with Criterion 2C) would have to be suspended as a minimum. This was described as **Option 1** and was noted as the Foreign Secretary's recommended approach;[15]

   (3) The Trade Secretary could choose to suspend all extant licences for use by the IDF, regardless of their potential use. This would go beyond that which was strictly required under Criterion 2C and would constitute a decision to send a political signal. This was described as **Option 2**;[16]

   (4) The only way to avoid export of F-35 parts to Israel would be to suspend the relevant licences altogether. This would have a serious impact on all F-35 operating nations, not just Israel, and, as the Defence Secretary had advised, this would have a *"profound impact on international peace and security"*;[17]

   (5) The Trade Secretary could choose to apply the SELC consistently against F-35 licences, or he could decide to depart from the SELC for F-35 components and,

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[11] Bethell 1, §7 **[CB/D/26/559]**.
[12] Defence Secretary Advice **[CB/E/29/593]**.
[13] **[CB/E/56/896]**.
[14] *Ibid.* §8
[15] *Ibid.* §11.
[16] *Ibid*. §11.
[17] *Ibid*. §20.

effectively, exclude them from the scope of any suspension.[18]

7. In accordance with the advice he had received, on 2 September the Trade Secretary decided to adopt the narrower scope of suspension (Option 1) and to depart from all of the SELC in relation to licences for the export of F-35 components. In his letter to the Foreign Secretary of 2 September 2024, the Trade Secretary emphasised that suspending F-35 licences was likely to cause significant disruption to the F-35 programme and that this would have a critical impact on international peace and security, including NATO's defence and deterrence. He concluded that this provided justification to take exceptional measures to avoid these impacts and was consistent with the UK's domestic and international legal obligations.[19]

8. Further detail regarding the narrow scope of the F-35 Carve Out and the reasons why the Trade Secretary determined that, notwithstanding the "clear risk" assessment, there was a good reason to depart from the SELC and not to suspend those licences, is provided in the CLOSED witness statement of Keith Bethell.

9. The Claimant challenges the F-35 Carve Out (**Grounds 8 to 12**) and the decision to adopt Option 1 (**Ground 13**).

10. The Claimant's Skeleton Argument ("**CSkel**") mischaracterises the basis of the September Decision in two significant respects:

    (1) At §1.2, the Claimant states that the Trade Secretary concluded that there was a *"clear risk that <u>any military item</u> exported from the United Kingdom to Israel might be used by Israel to commit or facilitate a serious violation of international humanitarian law in Gaza."*[20] This is incorrect. The assessment was that the "clear risk" threshold had only been met in relation to items which might be used to carry out or facilitate IDF military operations in Gaza. 51 licences were identified as covering equipment registered for use by the IDF but <u>not</u> in the conflict in Gaza. These were not assessed to engage the "clear risk" threshold and were the subject of "Option 2", discussed further in relation to Ground 13 below;

    (2) At §364, the Claimant asserts that the Trade Secretary changed his position in his Amended Detailed Grounds of Resistance ("**ADGR**"), by accepting that he did not proceed on the basis that the risks arising from a suspension of F-35 licences would necessarily have overridden any risks arising from the export of F-35 components. At §382.1, the Claimant states that *"The SSBT accepts… that the risks of suspension were not necessarily overriding – such that the risks of export, properly calibrated, could in principle outweigh them."* This is a mischaracterisation of §121 of the ADGR, which simply makes the point that the Trade Secretary did not

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[18] *Ibid*. §§24-25.
[19] **[CB/C/18/284]**. For the avoidance of doubt, the reference to the UK's international obligations merely reflects the overarching duty in the Ministerial Code that Ministers should comply with international law.
[20] Emphasis added.

adopt the position that no risks to Palestinians in Gaza could ever outweigh the risks to international peace and security but that, on the facts and analysis before him, the risks to international peace and security could not be outweighed.[21]

Procedural background

11. The Claim Form was filed on 7 December 2023.[22] The original Statement of Facts and Grounds challenged the Government's previous decisions not to suspend export licences for Israel. That claim was listed for a "rolled-up hearing" to commence in October 2024.[23]

12. In light of the September Decision, following a hearing on 3 September 2024, the Court discharged all previous Case Management Orders and set directions for disclosure and amended pleadings, designed to enable the scope of the claim (in light of the September Decision) to be determined.[24]

13. Following a hearing on 18 November 2024, in a judgment dated 30 January 2025 (**"the Linkage Judgment"**), the Court:

    (1) Held that, insofar as Grounds 1 to 6 of the Claimant's draft Re-Amended Statement of Facts and Grounds (**"RASFG"**) were properly characterised as challenges to the decisions made prior to 2 September 2024, there was no value in the Court determining those Grounds;[25]

    (2) Rejected the Claimant's submission that it was necessary to consider the matters pleaded in Grounds 2 to 6 of the RASFG in determining Grounds 12 or 13, held that Ground 8 did not require reference to Ground 7 and consequently refused permission to amend the SFG to plead Grounds 1 to 7 as set out in the RASFG;[26] and

    (3) Granted permission to the Claimant to amend the SFG to plead Grounds 8 to 13 as set out in the RASFG; those Grounds to proceed to a rolled-up hearing.[27]

14. Contrary to the Claimant's assertion,[28] it does not follow from the Linkage Judgment that the Trade Secretary is precluded from referring to the difficulties inherent in assessing whether violations of IHL have been committed in the conduct of hostilities, insofar as that is relevant to the September Decision.

15. The parties' respective cases are now contained in:

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[21] **[CB/A/3/174]**.
[22] **[CB/A/1/6]**.
[23] Order of Swift J dated 23 April 2024 **[CB/B/5/234]**.
[24] Order of Chamberlain J dated 3 September 2024 **[CB/B/8/242]**.
[25] Judgment of Chamberlain J, §41 **[CB/B/11/262]**.
[26] *Ibid*. §§48-50.
[27] *Ibid*. §§ 53 and 55.
[28] CSkel §68.

(1) The Amended Statement of Facts and Grounds, filed on 6 February 2025;[29]

(2) The Amended Detailed Grounds of Resistance, filed on 28 February 2025;[30] and

(3) The Amended Reply, filed on 21 March 2025.[31]

16. By Order dated 19 March 2025, the Court varied the scope of its previous permission to interveners, granting permission:

(1) To Oxfam to file evidence, to file written submissions limited to 20 pages and to make oral submissions at the hearing, limited to 30 minutes on Grounds 8(A), 8(B), 10 and 12 (insofar as it concerns s.31(2A) of the Senior Courts Act 1981);

(2) To Amnesty International and Human Rights Watch to file evidence and to file written submissions limited to 15 pages on Grounds 8A and 8C.[32]

17. The Reasons for the Order of 19 March 2025 also records that: *"Evidence which post-dates the 2 September 2024 decision, and so was not before the decision-maker at the time when the challenged decision was taken, will not be admitted."*[33] Contrary to this direction, the Claimant:

(1) Devotes four pages of its Skeleton to "Developments Post-Dating September 2024", by reference to numerous press articles and UN/NGO reports, the only relevance of which is said to be *"to demonstrate the continuing significance of this challenge"*;[34] and

(2) Seeks to make submissions by reference to Ministerial Submissions relating to decisions taken after the September Decision.[35] These documents were provided to the Claimant, pursuant to the Government's duty of candour, in response to a second Pre-Action Protocol Letter[36], regarding a proposed challenge to an alleged failure by the Trade Secretary to keep the F-35 Carve Out under review. The Claimant has not issued a claim in respect of this proposed challenge. The inclusion of these documents in the Supplemental Bundle and the Claimant's submissions by reference to them are not accepted by the Government.

18. Special Advocates have been appointed, following the making of a declaration under s.6 of the Justice and Security Act 2013, dated 14 June 2024.

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[29] **[CB/A/2/22]**.
[30] **[CB/A/3/134]**.
[31] **[CB/A/4/180]**. As will be discussed further below, the Claimant's case in respect of Ground 13 as now advanced in it Skeleton Argument appears to be different from its pleaded case.
[32] **[CB/B/15/277]**.
[33] At §6 **[CB/B/15/279]**.
[34] CSkel §§55-57.
[35] CSkel §391.
[36] **[SB/H/189/3031]**.

B. GROUND 8

19. Ground 8 challenges the F-35 Carve Out on the basis that the Government allegedly misdirected itself in determining that the F-35 Carve Out was consistent with the UK's obligations under international law.[37] The Claimant relies on the letter from the Principal Private Secretary to the Defendant to the Deputy Principal Private Secretary to the Foreign Secretary dated 2 September 2024 which states, in relevant part, that the F-35 Carve Out is "*consistent with the UK's domestic and international legal obligations*". It is submitted that:

    (1) This Ground is not justiciable.

    (2) Alternatively, the appropriate standard of review is tenability: that is, if the Court considers that there is a "*tenable view*" that the UK has complied with the pleaded international obligations, it must dismiss Ground 8.

    (3) In any event, the F-35 Carve Out is consistent with the rules of international law on which the Claimant bases its claim, namely: (i) the UK's obligations under Common Article 1 of the Geneva Conventions (**"CA1"**) (Ground 8(A) (§§72-108 below); (ii) the Arms Trade Treaty (**"ATT"**) (Ground 8(B) (§§109-136 below); (iii) the Convention on the Prevention and Punishment of the Crime of Genocide ("**Genocide Convention**") (Ground 8(C) (§§137-154 below); and (iv); Articles 16 and 41 of the Articles on State Responsibility for Internationally Wrongful Acts ("**ASR**") (Ground 8(D) (§§155-172 below).

Ground 8 is not justiciable

The principled, constitutional constraints

20. The principled, constitutional constraints on seeking to mount a challenge on the basis of allegations of breach of international law are important in the present context. There are six key points.

21. **First**, the domestic legal system is dualist. International law is not, without more, part of domestic law. Domestic courts have no jurisdiction to interpret or apply treaties which have not been incorporated into national law: see *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, at 499F-G, per Lord Oliver; *R v Lyons* [2003] 1 AC 976, at §27 per Lord Hoffmann; *R (on the application of JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449[38], at §§90 (per Lord Reed) and 115 (per Lord Carnwath); *Belhaj v Straw* [2017] AC 964 ("***Belhaj***") at §123 (per Lord Mance); *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, §§76,

[37] ASFG, D1.
[38] Sometimes also referred to as *R (on the application of SG) v Secretary of State for Work and Pensions.*

84 (per Lord Reed). It follows that it is not permissible to mount a public law challenge on the basis that the UK has allegedly breached its treaty obligations.

22. As Lord Reed explained in *JS* at §90:

> "*It is firmly established that United Kingdom courts have no jurisdiction to interpret or apply unincorporated international treaties: see, for example, JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 499 and R v Lyons [2003] 1 AC 976, para 27. As was made clear in R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE Intervening) [2009] AC 756, it is therefore inappropriate for the courts to purport to decide whether or not the executive has correctly understood an unincorporated treaty obligation. As Lord Bingham of Cornhill said, at para 44: "Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding. Lord Brown of Eaton-under-Heywood expressed himself more emphatically, at para 67: 'It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue.'"*

23. The point was elaborated on by Lord Kerr in *JS* at §235:[39]

> *"Two dominant principles have traditionally restricted the use of international treaties in British domestic law. The first is that domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable. The second is that such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law. This is a matter of constitutional orthodoxy. It underpinned the series of decisions in which courts consistently refused to give effect to Convention rights before the coming into force of the Human Rights Act 1998…"*

24. **Second**, if the Government believes or considers or states that its decision, policy or regulations are or will be consistent with the UK's broader international obligations, that does not mean that a claimant is entitled to rely on an alleged breach of international law

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[39] Lord Kerr dissented from the majority on the disposal of the appeal but these principles were not in dispute. See, to the same effect *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, at §55, in relation to both principles; *JH Rayner* at 476-477 (per Lord Templeman), in relation to the first principle; and *Belhaj v Straw and Ors* [2017] 2 WLR 456, at §123 (per Lord Neuberger), in relation to the second principle.

as a ground for review. International law does not thereby become enforceable through public law. In *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 ("***JS***"), the claimants challenged regulations capping welfare benefits. The Government believed that the regulations were compatible with Article 3.1 of the UN Convention on the Rights of the Child. Even on the assumption (or express finding) that this belief was incorrect, the majority of the Supreme Court was clear that this erroneous understanding of the compatibility of the regulations with international law did not provide a ground for judicial review: see the judgment of Lord Reed at §§90-91, of Lord Carnwath at §§122, 128, 133, and of Lord Hughes at §§136-137.

25. **Third**, very limited and highly fact-specific exceptions have been acknowledged by the courts to these core and fundamental principles identified above. In *JS* Lord Kerr identified three possible ways in which the courts might consider unincorporated treaties as having an impact in national law: *"(i) as an aid to statutory interpretation; (ii) as an aid to development of the common law; and (iii) as a basis for legitimate expectation"* (at §§238-246). None of these categories apply in the present case.

26. In particular, *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 ("***Launder***") and *R v Director of Public Prosecutions, ex parte Kebilene* [2000] AC 326 ("***Kebilene***") represent, at most, highly circumscribed exceptions to the general rule. They cannot be extended beyond their particular facts, namely extradition and prosecution decisions respectively, by decision-makers claiming to act consistently with the ECHR before it had been incorporated in domestic law via the Human Rights Act 1998 ("**HRA**"). They do not establish any sort of blanket exception to the general rule such that, if the Government considers the UK's unincorporated international obligations as part of its decision-making process, including through the application of policy, that opens the door to the courts interpreting or applying those obligations in order to police a public law obligation on the Government's consideration of them. Nor, to substantially similar effect, do they establish that if the Government states a conclusion that a decision or secondary legislation is in its view compatible with such obligations the same door is opened.

27. The fact that *Launder* and *Kebilene* are to be treated as limited and specific exceptions to the general rule was made clear by the House of Lords in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 ("***Corner House***"), pp.845D-G at §§44 (per Lord Bingham) and 851B-F at 66 (per Lord Brown).

28. **Fourth**, in the present context, there is no domestic law "*foothold*" for Ground 8. There is "*no point of reference in domestic law to which the international issue can be said to go*", and "*nothing susceptible of challenge in the way of the determination of rights, interests or duties under domestic law to draw the court into the field of international law*": *R (on the application of Campaign for Nuclear Disarmament) v The Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin) ("***CND***"), §36.

29. As regards the international law obligations to which the UK is subject, which the Claimant alleges are being breached:

(1) The ATT has not been incorporated into domestic law. Although the SELC refer to a wide range of sources of international law, including the ATT (Criterion 1B) and "*instruments of international humanitarian law*" (Criterion 2C), the SELC are a statement of government policy, not a domestic statute. A statement by Government that it will comply with particular rules of international law does not have the effect of incorporating those rules into domestic law. Thus, in *R (on the application of Friends of the Earth Ltd) v The Secretary of State for International Trade* [2023] 1 WLR 2011 ("***Friends of the Earth***") the Court of Appeal considered the Paris Agreement to be "*pre-eminently an unincorporated international treaty that does not give rise to domestic legal obligations*" notwithstanding the fact that the Government had issued a policy (its Green Finance Strategy) stating that it was acting in compliance with the Paris Agreement: §§9, 40(i).[40]

(2) The Geneva Conventions have been incorporated into domestic law to a limited extent only, and in a manner that does not provide a domestic foothold for this claim. The Geneva Conventions Act 1957 creates individual criminal liability for committing or being an accessory to grave breaches of the Geneva Conventions and Additional Protocols I and III: s.1. The International Criminal Court Act 2001 makes it an offence to commit war crimes, which include grave breaches of the Geneva Conventions: s.51 and Schedule 8, §1. The liability created by both Acts attaches to "*persons*", and not to the State. They cannot be used to found a claim brought against a government decision-maker.

(3) The obligation to prevent under Article 1 of the Genocide Convention has not been incorporated into domestic law. Although the International Criminal Court Act 2001 creates an offence of genocide under domestic law (s.51(1) and Schedule 8), this does not constitute incorporation but rather creation of new domestic law. In any event, once again the liability attaches to "*persons*" not the State.

(4) Customary international law ("**CIL**") rules on State responsibility are not incorporated into domestic law, for the reasons given below in response to Ground 9.

30. As in *Corner House* at §§45 and 65, the issues raised by the Claimant as to the interpretation and application of international law, can and should be determined through dispute resolution mechanisms that operate on the international plane.[41] A number of

[40] Although the Paris Agreement was treated to be justiciable, that was based on an express concession made by the defendant in that case: see at §40(ii).

[41] Article 19 of the ATT provides: "*1. States Parties shall consult and, by mutual consent, cooperate to pursue settlement of any dispute that may arise between them with regard to the interpretation or application of this Treaty including through negotiations, mediation, conciliation, judicial settlement or other peaceful means. 2. States Parties may pursue, by mutual consent, arbitration to settle any dispute between them, regarding issues concerning the interpretation or application of this Treaty*." Article IX of the Genocide Convention provides:

these issues are current before the International Court of Justice ("**ICJ**").[42] Seeking to pursue complaints through the domestic courts where mechanisms exist at the international level runs the real risk of divergent rulings.

31. The absence of a domestic "*foothold*", read with the clear line of case-law identified above, is sufficient to dispose of the justiciability arguments. However, there are two further independent and self-supporting reasons why Ground 8 is not justiciable.

32. **Fifth**, Ground 8 trespasses onto "*matters of high policy*", namely the conduct of foreign affairs and compliance with international law, in the sense described in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) ("***Al-Haq 1***") at §53. Constitutionally, these matters are entrusted exclusively to the executive: *Al-Haq 1*, §59. For the Court to "*tie the United Kingdom's hands*" on the international plane by declaring an interpretation of international law rules, and how they apply to another sovereign State, would affect the UK's foreign relations and be constitutionally inappropriate: *CND* at §§41, 43, 55.[43] The Court in *Al-Haq 1* accordingly held non-justiciable a judicial review claim by which Al-Haq contended that Israel was violating peremptory norms including the right to self-determination, and was violating IHL in the conduct of hostilities in Gaza. Al-Haq sought orders including a requirement that the UK Government publicly denounce Israel's actions in the occupied Palestinian Territory, and that it suspend all approvals of licences to export military equipment to Israel. The Divisional Court held (at §44):

> "*The Government is aware of its international obligations and it is for the Government, and not the courts, to decide, in the present context, what actions are appropriate to comply with those obligations. The object of the claim is to compel a change in government foreign policy. The 'toe-hold' established in Abbasi does not entitle the court to declare or direct what action the Government is to take upon this assumed breach of international law by Israel*."

"*Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*."

[42] Article I of the Fourth Geneva Convention and Article I of the Genocide Convention are in issue in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany),* as is whether Germany failed to comply with other peremptory norms of general international in particular by rendering aid or assistance to Israel (see Application Instituting Proceedings, §§3 and 67). Article I of the Genocide Convention is also in issue in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (see Application Instituting Proceedings, §111(2)).

[43] To similar effect see Lord Brown in *Corner House* at §65, "*[f]or a national court itself to assume the role of determining such a question [the interpretation of international law] (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons"*.

The Court emphasised, further, that the non-justiciability of this subject matter was "*not a matter of discretion. It is not the case that in the modern administrative State there are no no-go areas for the courts.*": §53.

33. **Sixth**, and in any event, for the Court to decide Ground 8, it would have to rule on the international lawfulness of a foreign State's conduct, which would contravene the foreign act of State doctrine ("**FAS**"). The FAS doctrine is a common law doctrine, which can be distilled into four rules. They are set out in *Belhaj* at §§120-124; see also *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2022] 2 WLR 167, §113. It is the third rule which is relevant to this claim. Under that rule, the courts will not rule "*on issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it*", such as "*in the conduct of foreign affairs*": *Belhaj*, §123 (emphasis added; quoted with approval by the Supreme Court in *The Law Debenture Trust Corporation plc v Ukraine* [2024] AC 411 ("***The Law Debenture Trust SC***"), §187).[44]

34. In *The Law Debenture Trust SC*, the Supreme Court also quoted from Lord Sumption in *Belhaj* as follows (§188, quoting from *Belhaj*, §234):[45]

> "*…the English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states. … This is because once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country … If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities*[46] *for personal injury, trespass, conversion, and the like. This is not for reasons peculiar to armed conflict, which is no more than an ill-defined extreme of inter-state relations. The rule is altogether more general*."

35. The third rule of the FAS doctrine prevents this Court from deciding whether Israel has breached its international law obligations. In *Al-Haq 1* the Court held that a judicial review claim very similar to the present one was not justiciable because "[*t*]*he subject*

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[44] Emphasis used in *The Law Debenture Trust SC*.

[45] See also *The Law Debenture Trust SC*, §207: "*…the subject matter of such inter-state disputes is inherently unsuitable for adjudication by courts in this jurisdiction. If the availability of countermeasures at the level of international law were accepted as giving rise to a defence in domestic law, national courts would become the arbiter of inter-state disputes governed by international law which is not their function. They would be required to rule on the legality of conduct of states on the international plane and whether it constituted an internationally wrongful act. … In our view, Ukraine's case on countermeasures falls prima facie within the principle of non-justiciability of inter-state disputes.*"

[46] Emphasis added here and below unless otherwise indicated.

matter in the present case is, at bottom, the conduct of Israel and whether that state is in breach of its international obligations", which was "*beyond* [the] *competence*" of the English courts: §41. That reasoning was clearly right, and it applies equally here.

The Claimant's position is inconsistent with these principled, constitutional boundaries

36. In its pleadings and skeleton argument, the Claimant has raised four objections to the analysis set out above.

37. **First**, it is asserted that there is a domestic foothold because the 2 September 2024 decision letter states that the departure from the SELC is "*consistent with the UK's ... international legal obligations*",[47] and that, based on *Launder* and *Kebilene*, there is some general principle that wherever the Government makes a self-direction in respect of unincorporated treaty obligations, those obligations will be justiciable. That is an impossible reading of the case-law. The starting point is that set out at §§20-35 above. Any departure from that clear and fundamental starting point has occurred only in a very limited range of highly-fact specific contexts. That is clear from a proper analysis of the cases relied upon by the Claimant.

    (1) *Launder* and *Kebilene*: These were cases that concerned extradition and prosecution decisions respectively, by decision-makers claiming to act consistently with the ECHR before it had been incorporated in domestic law via the HRA: see, e.g., description in *Corner House Research*, §§44, 66; *JS*, §91. They both involved the exercise of an administrative discretion on the facts of individual cases, in a context where there was no dispute between the parties as regards the interpretation of the ECHR, and there was a significant body of ECtHR jurisprudence upon which the domestic court could draw. As the Divisional Court recognised in *CND*, §37: "*It is one thing, as in cases like Kebilene and Launder, for our courts to consider the application of an international treaty by reference to the facts of an individual case. ... It is quite another thing to pronounce generally upon a treaty's true interpretation and effect*". The latter is precisely what the Claimant is contending for in the present context.

    (2) *Heathrow Airport Ltd v HM Treasury* [2021] EWCA Civ 783 ("***Heathrow Airport***"): This case involved a very particular set of facts arising out of Brexit, in which there was an existing tax regime that the Government said could no longer be applied due to international obligations. The Government relied on its obligations under the General Agreement on Tariffs and Trade ("**GATT**") to remove the entitlement to tax relief on the basis that it perpetuated discriminatory treatment, §§4, 99. Green LJ held that the defendant's interpretation of the GATT was justiciable, for very specific reasons, including, in particular, (i) the fact that

[47] Reply §§2-5; CSkel §§153-163. A similar point is made by Oxfam in its Skeleton at §§33-34.

the GATT was reflected in subordinate legislation in relation to VAT RES, and it was "*proper to infer that Parliament adopted the reasoning which led to the laying of the SI which included the Government's interpretation of the GATT*"; (ii) the decision had an immediate impact on the nature of domestic rights applicable to individuals; (iii) the GATT rules could be characterised as "*prescriptive, hard edged*" rules, which were intended to "*be legally certain and predictable*"; and (iv) this was a context where the Government had itself sought to rely upon the GATT as a shield, rather than a claimant seeking to invoke unincorporated international law to found a claim: see §§169-176. None of these factors are present in the current context. The Government should in any event not be taken as accepting that this case, still less all aspects of its reasoning, are correct.

(3) *R (on the application of Barclay) v Secretary of State for Justice* [2010] 1 AC 464, *R (EOG) v Secretary of State for the Home Department* [2023] QB 35 and *Friends of the Earth*: In each case, justiciability arose based on a concession: §§100; 34 and 40(ii) respectively. Moreover, and insofar as necessary, none of these cases stands for the proposition that there is some sort of broad exception to the general rule in cases of self-direction. In particular, *R (EOG)* was a case in which the justiciability concession was made because the compatibility of the underlying policy itself with international law was in issue: §33.[48]

38. The factors that have been relied upon to justify the invocation of an exception in previous contexts do not apply here: (i) this is not a case in which there is international consensus or a body of jurisprudence that can be relied upon (cf. *Launder* and *Kebilene)*; (ii) the SELC are not reflected in subordinate legislation (cf. *Heathrow Airport)*; (iii) there is no immediate impact on the rights of individuals within the jurisdiction (cf. *Launder*,*Kebilene* and *Heathrow Airport)*; (iv) this is not a case in which the Government is relying on international law as a shield (*Heathrow Airport)*; (v) this is not a case that arises in the context of major constitutional shifts in the UK, for example, the coming into force of the HRA or Brexit (*Launder*, *Kebilene* and *Heathrow Airport)*; (vi) this is not a case in which there are prescriptive, hard-edged legal rules for which there are clear answers for the court (*Heathrow Airport)*.

39. **Second**, the Claimant contends that there is a "*domestic foothold*", because the September Decision concerns the SELC, which is guidance which refers explicitly to the UK's international law obligations.[49] The premise of the Claimant's argument is that: (i) the Government only disapplied Criterion 2C of SELC, and the remainder of the policy still applied; (ii) the effect of the policy is, in effect, to make every international instrument referred to in that policy justiciable in domestic courts. Both the factual and legal premise are wrong.

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[48] The same is true of *R (Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087, §28, relied upon by Oxfam in its Skeleton at §34(a).
[49] See CSkel §§144-152.

(1) As to the factual premise, it is wrong to say that only Criterion 2C has been disapplied. A decision was taken to disapply the entirety of SELC in the context of the F-35 Carve-Out: see §§1-10 above. However, as reflected in the 2 September 2024 letter, the Government remained committed to complying with domestic and international law, which explains why the Defendant received advice on compliance with international law (including the sources referred to in Criteria 1 and 4 of the SELC).

(2) More fundamentally, the Claimant is impermissibly elevating statements of Government policy into something akin to a domestic statute. The fact that the Government indicates in a policy that it intends to comply with international law cannot have the effect of making the relevant international law instrument/s justiciable. Such a conclusion would do serious damage to: (i) the dualist system; and (ii) the fundamental principles set out in the case-law discussed at §§20-35 above. If it were right it would mean that the entire corpus of international law was rendered justiciable by the overarching duty in the Ministerial Code that Ministers should comply with international law. That would be absurd, and directly contrary to the clear and consistent case-law of the House of Lords and Supreme Court. The question whether or not there is to be a departure from those core principles cannot depend exclusively on whether there is a reference to international law in a Government policy – which, in this case, would have the effect of importing almost the entire corpus of international law into domestic law, given the breadth of Criterion 1 in particular. Instead, the question must depend on the multi-factorial and highly fact-specific analysis mandated by the *Launder* and *Kebilene* line of case-law. The Claimant has not identified a single authority which supports its far-reaching submission, save for cases which preceded on the basis of a concession on justiciability (see §37(3) above).

(3) No doubt recognising the difficulty with its absolutist position, the Claimant seeks to rely on the Export Control Act 2002, which it says "*underscores the centrality of international law*".[50] That is a mischaracterisation of the legislative scheme. Section 9(4) of the 2002 Act provides: "*The guidance required by subsection (3) must include guidance about the consideration* ***(if any)*** *to be given when exercising such powers*" (emphasis added) to various matters contained in paragraph 3 of Schedule 1. "*Breaches of international law and human rights*" is one of the items in that Schedule. In no sense can it be the decision-maker required to take into account international legal obligations by reference to domestic statute. The reference to "*if any*" accords entirely with the constitutional reality that it is a matter for HMG if and to what extent international law was to be considered.

40. **Third**, the Claimant contends that Ground 8 is "*not a challenge to the UK's conduct of foreign policy*".[51] That is a surprising contention. This is a paradigm case of a domestic

[50] CSkel §§150-151.
[51] See CSkel §164.

court being invited to enter an area which has long been held to be constitutionally inappropriate.

(1) As regards Grounds 8(A) and (D): As explained further under Grounds 8(A) and (D) below, the substance of the obligations under these sub-Grounds is likely to be shaped by State practice, including that of the UK.

(2) As regards Ground 8(B): On the Claimant's own case, this treaty raises issues as to the conduct of foreign affairs. A key part of the Claimant's argument on the interpretation of the ATT is that positions taken by the States parties to the ATT in the Voluntary Guide are crucial to the interpretation of the applicable obligations.[52]. That necessarily entails the Court entering areas in which engagement by the UK on the international plane will be required as part of its participation in the underlying treaty.[53]

(3) As to Ground 8(C) and the Genocide Convention: There is presently a live dispute, including in two cases before the ICJ[54] and among States and/or between the parties in these proceedings, as to the interpretation and application of the international obligations in this case. The inappropriateness of an English Court exercising jurisdiction to make a finding of genocide is especially marked given that this very question is currently before the ICJ in *South Africa v. Israel* and *Nicaragua v. Germany* (the same applies re. CA1 which is also in issue in *Nicaragua v. Germany,* while the alleged failure to prevent genocide is now also an issue in *Sudan v. UAE*). Engaging in the issues under Ground 8(C) that are before the Court would therefore raise significant concerns as to comity in circumstances where the ICJ is seized of the very issues in dispute.

(4) The September Decision was made on the basis of the need to protect international peace and security and thus engaged national security considerations. As is well established, particular weight ought to be afforded to judgments of the Government in the field of national security: *A v Secretary of State for the Home Department* [2005] 2 AC 68; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] AC 945 at §§22-33 (per Lord Sumption); and, most recently, in

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[52] Reply §30(b).

[53] As a practical point, the reality of modern diplomatic practice is further that States will need to engage frequently and, sometimes at pace, with counterparts when working on a treaty operationally. In certain cases, these relations may be formalised as was identified by Lord Brown in *Corner House*, §65. But in other cases, especially in bilateral treaty relations, the engagement may be more subtle. What matters legally, however, is that unless there has been a conscious decision by the UK Government to bring the treaty onto the domestic plane and incorporate it into domestic law, how the Executive chooses to conduct its foreign relations and treaty practice is a matter for it. This point arises across all of Ground 8, but it is reinforced in the context of the Claimant's argument regarding Ground 8(B). The Court is further reminded of the statement of Lord Justice Brown (as he then was) at §36 of CND: "*The domestic courts are the surety for the lawful exercise of public power only with regard to domestic law; they are not charged with policing United Kingdom's conduct on the international plane."*

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*; *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*.

R (Begum) v Special Immigration Appeals Commission [2021] AC 765 at §§53-62, 70 and 109 (per Lord Reed).

(5) In respect of each of the sub-grounds, the Claimant is, in effect, seeking a finding that Israel has acted unlawfully as a matter of international law. That would obviously have significant repercussions for international relations between the UK and Israel.

41. **Fourth**, the Claimant contends that the FAS doctrine does not apply in the present case for two core reasons: (i) the Court is being asked to determine the lawfulness of a decision of a UK public authority and the lawfulness of the conduct of Israel is therefore not the subject matter of the action (what is often referred to as the "*Kirkpatrick* exception")[55]; and (ii) in any event, the FAS doctrine does not apply in cases concerning grave breaches of IHL or where the alleged conduct conflicts with fundamental points of public policy.[56]

42. As regards (i) (the *Kirkpatrick* exception), the suggestion that the domestic court is not being called upon to consider the lawfulness of the conduct of Israel, and/or that any such finding would be incidental, is artificial and wrong. The lawfulness of the conduct of Israel sits at the heart of the case.[57] That the FAS doctrine applies to cases in which the acts of English public officials are challenged, in a claim that necessarily implicates the lawfulness of the acts of a foreign State, is clear from *Belhaj*, and also *Noor Khan v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872.

43. The "*Kirkpatrick*" exception to the foreign act of State rule was explained by Lord Sumption in *Belhaj*, §240 (quoted by the Supreme Court in *The Law Debenture Trust SC*, §188):

> "*The act of state doctrine does not apply … simply by reason of the fact that the subject matter may incidentally disclose that a state has acted unlawfully. It applies only where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining*

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[55] See CSkel §§172-172. Although framed as five reasons, they all make very similar points.
[56] See CSkel §180-182.
[57] See CSkel §14: "*The Israeli army has committed genocide, war crimes and crimes against humanity against the population of Gaza*." ASFG, §205: "*Israel's actions in Gaza risk violating the Fourth Geneva Convention*"; ASFG, §224: "*It is Al Haq's position that Israel is committing genocide in Gaza*"; ASFG, §227: "*because the continued export of F-35 parts to Israel does not comply with what is required of the UK by the obligation to prevent genocide in Article 1 of the Genocide Convention and customary international law, having regard to Israel's conduct on the ground and/or to the identification by the ICJ of a "real and imminent risk of irreparable prejudice" to the right of the Palestinian people in Gaza not to be subjected to acts of genocide*"; ASFG, §230: the UK has an "*obligation not to aid or assist Israel in any breach of the Geneva Conventions, customary international law (including war crimes and crimes against humanity) or violations of the Genocide Convention*"; ASFG, §234: "*the export of F-35 parts to Israel where there is a clear risk that that they might be used to commit or facilitate such violations*"; Reply, §41: "*the UK has knowledge of facts demonstrating a real risk that Israel would use F-35s to commit the crimes*"; Reply, §58: "*On the full facts, properly and lawfully assessed, there exists (and existed on 2 September 2024) (at the very least) a serious risk that genocide will occur*"; Reply, §59(b): "*The UK's contribution to Israel's violations of IHL through F-35 bombardment plainly meets the threshold of "substantial involvement"*"; Reply, §59(c)(ii): "*the Defendant has actual knowledge "of the circumstances of the internationally wrongful acts" of Israel.*"

it."

44. In *Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela* [2023] AC 156, the Supreme Court explained (at §136(5)): "*The doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for the purpose of adjudicating on their legal effectiveness*" (or their lawfulness or wrongfulness – see *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 ("***Yukos***") at §104 (per Rix LJ)).

45. An instance of the *Kirkpatrick* exception being applied is *Berezovsky v Abramovich* [2011] 1 WLR 2290 (referred to in *Yukos*, at §81**)**. In that case, the claimant Berezovsky pleaded that he had been coerced into entering certain transactions, by the defendant Abramovich having made threats to Berezovsky. Berezovsky said that those threats had carried decisive weight for him, as a result of his belief that they were made by Abramovich on behalf of the Russian President, Vladimir Putin. To explain and substantiate this belief, Berezovsky pleaded that the Russian President had in the past made similar threats directly to him. The English court held this plea was not excluded by the FAS doctrine, because Berezovsky had pleaded the prior threats not to allege that those threats were unlawful or wrongful, but merely as a background fact used to properly understand Mr Abramovich's later threats: §§88, 97.[58]

46. The situation in the present case is very different. The very heart of the claim in this case is that Israel has acted unlawfully in its conduct of hostilities in Gaza. As explained below, the allegations against the UK depend upon a finding that Israel has acted unlawfully under international law. This is a paradigm case where the acts of a foreign State are "*the very subject matter of the action in the sense that the issue cannot be resolved without determining it*".

47. The Claimant also cannot avoid application of the FAS rule by praying in aid findings by international organisations, NGOs and UN bodies, or the Government's own findings of a clear risk that Israel has committed violations of IHL.[59] The simple fact is that there has not been any final determination by a judicial body that Israel has committed the internationally wrongful acts and crimes alleged by the Claimant in these proceedings. The Court is being asked to make this determination for the first time.

48. As regards (ii) (invocation of the public policy exception):

    (1) It has been recognised that the exception must be applied sparingly, to avoid it hollowing out the very rule to which it is said to be an exception: *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, §138 (per Lord

[58] Similarly, in *The Law Debenture Trust SC*, the Supreme Court held that the *Kirkpatrick* exception applied in respect of pleaded acts of duress by Russia against Ukraine, which were said by Ukraine to have vitiated its entry into contracts under English law. The Supreme Court held that the plea of duress did not depend upon a finding that the acts by Russia had been unlawful – otherwise lawful acts of pressure could amount to duress under English contract law: §189.

[59] See Reply §16(a).

Hope):

> "*It is clear that very narrow limits must be placed on any exception to the act of state rule. As Lord Cross recognised in Oppenheimer v Cattermole [1976] AC 249, 277-8, a judge should be slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. Among these accepted principles is that which is founded on the comity of nations. … A judge should be slow to depart from these principles. He may have an inadequate understanding of the circumstances in which the legislation was passed. His refusal to recognise it may be embarrassing to the executive, whose function is so far as possible to maintain friendly relations with foreign states*".

(2) The public policy exception to the FAS doctrine is focused principally (but not exclusively) on *"infringements of individual fundamental rights"* (*Belhaj* at §102). The Court *"will have regard to the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged by the issues raised"* (*Belhaj* at §11(iv)(c); see further *Re Al Maktoum* [2020] EWHC 2883 (Fam), §§64(f) and 78; *His Highness Sheikh Mohammed Bin Rashid Al Maktoum v Her Royal Highness Princess Haya Bint Al Hussein* [2021] EWCA Civ 129, §§23(vi) and 43). This was evident in the Supreme Court's treatment of the public policy exception in *Belhaj* itself (see §§98-99, 172, 268 and 278). It was also reflected in *R (WSCUK) v Secretary of State for International Trade* [2022] EWHC 3108 (Admin), in which Cockerill J held at §156(ii) that the public policy exception did not apply in respect of a claimed breach of the international law (*erga omnes*) right to self-determination, noting that the public policy exception "*has thus far been predominantly seen in* [the] *context*" of rules sought to be applied to individuals.

(3) Consistent with the previous point**,** case-law draws a distinction between (i) a State's treatment of a person in breach of a *jus cogens* norm (such as the prohibition on torture) that is at issue in the claim (such as in *Belhaj*) and (ii) a State's breach of general international law norms. The second category of cases would not fall within the public policy exception. This was explained by Lord Mance in *Belhaj* at §107**:**

> *"Such difference in approach as there is between Lord Sumption JSC and myself in this area makes no difference to the outcome of these appeals… But I prefer to analyse the qualifications to the concept of foreign act of state by reference to individual rights recognised as fundamental by English statute and common law, rather than to tie them too closely to the concept of jus cogens: …*
>
> *(iii) If violation of a jus cogens were a primary test of whether a domestic court could adjudicate upon an issue which was otherwise non-justiciable and upon which it would otherwise have to abstain from adjudicating, central areas of abstention identified by Lord Sumption JSC would become potentially amenable*

to adjudication. The prohibition on the use of armed force and on aggression are core examples of jus cogens. Yet these are, rightly as would be my present view, treated by Lord Sumption JSC himself as giving rise to core examples of issues upon which domestic courts should refrain from adjudicating…".

(4) To adopt every rule of peremptory norm as a principle of English public policy, which the Claimant comes very close to asserting (at CSkel §180) would conflict with the UK's dualist system, as Lord Sumption observed in *Belhaj* at §257.

(5) Any decision regarding the application of the public policy exception will ultimately require the Court to engage in a balancing exercise: (see *The Law Debenture Trust Corpn plc v Ukraine* [2019] QB 1121 (Court of Appeal) ("***Law Debenture Trust CA***"), §§175-180; *High Commissioner for Pakistan v Prince Muffakham Jah* [2020] Ch 421, §312). As part of this exercise, a key consideration is *"another aspect of public policy which underlies the third rule of foreign act of state, namely the constitutional concern that in a matter relating to the conduct of the United Kingdom's foreign affairs the courts should be astute not to usurp or cut across the proper role of the executive government, which has the primary responsibility for carrying out those affairs…"* (*Law Debenture Trust CA*, §179). As Lord Mance recognised in *Belhaj*, it is the separation of powers and the sovereign nature of inter-State activities that is the very foundation for the third rule (*Belhaj*, §11(iv)(c); see also §§91 and 107(v)).

49. The wrongs alleged by the Claimant against Israel in this case are not ones which have been recognised as engaging the public policy exception. Contrary to the Claimant's assertion, the English courts have emphasised that the public policy exception is a function of English law, and accordingly it is English public policy and not international law which triggers it: *Belhaj*, §§154, 168. Accordingly, torture was recognised in that case as engaging the public policy exception as a result of the longstanding prohibition on torture in the English common law (see e.g. at §272).[60]

50. Furthermore, any balancing exercise in the present context will not favour the application of the public policy exception. The nature of the allegations, and considerations of comity, firmly militate against this Court determining a claim in which Israel's alleged breaches of international law are put directly in issue. Other factors that have been taken into account by English courts as part of a balancing exercise to determine whether the public policy exception to FAS should apply are: (i) considerations of comity, especially if the foreign State in question is friendly *vis-à-vis* the UK (*Law Debenture Trust CA*, §176); (ii) whether the foreign State has brought a claim or has chosen to submit to the jurisdiction of the English courts, as opposed to where "*a third state has its actions called into question in litigation between two different parties*" (*Law Debenture Trust CA*, §175,

[60] The Claimant seeks to draw a parallel with *Belhaj* by asserting that Israel's conduct includes breaches of the peremptory norm prohibiting torture: CSkel §182.1. That allegation is not particularised, and goes beyond the scope of what is in fact pleaded.

and see also §177); (iii) whether the Government has taken a public position on the foreign State's acts, with which the Court's findings would be consistent (*Law Debenture Trust CA*, §179); (iv) whether application of FAS would permit the foreign State to take advantage of its own breaches of *jus cogens* norms (*Law Debenture Trust CA*, §180); (v) whether there is an alleged interference with the process of the English courts (*Re Al Maktoum* [2020] EWHC 2883 (Fam), §§79-80; and (vi) whether there is an "*individual in the picture*" of the proceedings (*R (WSCUK) v Secretary of State for International Trade* [2022] EWHC 3108 (Admin), §156(iii)). All of those considerations point, in this case, against application of the public policy exception.

51. For all of these reasons, the Court should not expand the public policy exception in the manner suggested by the Claimant.

The "tenable view" standard would apply to any determination of Ground 8

52. Alternatively, it is submitted that where a Government decision is said to involve a misunderstanding or misinterpretation of unincorporated international law, the Court is to consider only "*whether the decision-makers adopted a tenable view of that question*": *Friends of the Earth*, §40(iii). Provided it was tenable for the decision-maker to conclude that his decision complied with the UK's international obligations, the Court "*could not and should not*" gainsay that conclusion: *Friends of the Earth*, §40(iv). This rule follows from the constitutional principle that "*the court cannot and should not second guess the executive's decision-making in the international law arena where there is no domestic legal precedent or guidance*": *Friends of the Earth*, §40(vii). To similar effect, see Lord Brown in *Corner House* at §68: "*I have equally no doubt, however, that in this particular context the 'tenable view' approach is the furthest the court should go in examining the point of international law in question".*

53. The "*tenable view*" standard was considered by the Court of Appeal in *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2024] EWCA Civ 1227 ("***Stonehenge***"). The key principles were summarised at §§146-157 (see also summary of authorities at §§139-145):

> *"146. In the light of the relevant authority it seems clear that deciding whether the 'tenability' approach is the appropriate means of reviewing the Government's understanding of an unincorporated international obligation will always depend on the circumstances of the individual case. The domestic courts have been inclined to caution in this area, heeding the constitutional and practical difficulties that can arise when the court sets about interpreting unincorporated treaties for itself (see the speeches of their Lordships in Corner House, at [44], [66] and [68]; the judgment of Lord Sumption in Benkharbouche, at [35] and the judgment of this court in UKEF, at [26], [29], [49] and [50].*
>
> *147. Without seeking to lay down an exhaustive or definitive list, one can take from the case law some of the factors that the domestic courts have found significant.*

Seven considerations emerge: first, any previous case law or guidance on the interpretation of the obligation in question (Lord Bingham in Corner House, at [44], and Lord Brown, at [66]; and the judgment of this court in UKEF, at [50 (iii)]); second, the effect the interpretation will have on the conduct of international relations (Lord Bingham in Corner House, at [44]; and Lord Sumption in Benkharbouche, at [35]); third, the availability of other means to derive the interpretation of the obligations in question (Lord Bingham in Corner House, at [45]; and Lord Brown, at [65]); fourth, the importance of the interpretation to the operation of the treaty or international obligation (Lord Brown in Corner House, at [66]); fifth, the difficulty of interpreting, or ambiguity in the terms of, the obligation (Lord Brown in Corner House, at [66]; and Lord Sumption in Benkharbouche, at [35]); sixth, the question whether the correct interpretation is necessary to decide a justiciable issue (Lord Sumption in Benkharbouche, at [35]); and seventh, the question whether the decision-maker was compelled by domestic law to take into account the obligations in question (the judgment of this court in UKEF, at [40(iii)] and [50(ii)])."

54. See also and *R (ICO Satellite Limited) v Office of Communications* [2010] EWHC 2010 (Admin) ("***ICO***"), §94 (per Lloyd-Jones J):

"*To my mind, the present case provides a compelling example of the difficulties and the undesirability of a domestic court expressing a concluded view on a disputed point as to the meaning and effect of non-implemented instruments governing a regime established by an international organisation. It will be apparent from the documents referred to above that widely different views are held as to the consequences which should follow under the ITU regime in circumstances where, as in the present case, a number of years after its registration, an assignment has not been brought into regular operation in accordance with its notified specification. That is a live dispute as to the rights and duties of the 191 national administrations which participate in the ITU regime. Moreover, there is provision within the ITU regime for dispute resolution, although the question whether that would be applicable in the circumstances of the present case is itself apparently in dispute. A further difficulty in the present case is that the statements emanating from various officers of the ITU referred to above would, given their quality and characteristics, hardly be an appropriate basis for the task of resolving the issue. However, that apart, it would not be appropriate for this court to embark on such an undertaking for the policy reasons given by Lord Bingham and Lord Brown in Corner House. This court is not in an appropriate position to determine the issue for all those subject to the ITU scheme. Given the dispute between the parties as to the effect of the ITU regime, it would not be appropriate for this court to go beyond the "tenable view" approach in examining the point of international law in question.*"

55. For the avoidance of doubt, the "*tenable view*" standard continues to apply even where a government decision-maker formed a definitive view that his decision complied with

specific obligations owed by the UK under international law: *Friends of the Earth*, §§40(viii), 50(v).

56. In the event that any of the sub-grounds under Ground 8 are considered to be justiciable this is a clear and paradigm context where the "*tenable view*" standard must be applied. The following are particularly to be noted:

    (1) There is no domestic legal precedent or guidance for interpretation of the relevant international norms: see *Friends of the Earth*, §40(vii); *ICO*, §94. In fact, many of the obligations are highly contentious and unsettled questions of international law.

    (2) There is a live dispute, including in two cases before the ICJ[61] and among States and/or between the parties in these proceedings, as to the correct interpretation and application of the pleaded international obligations concerned (see §40(3) above). See *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, §91; and *Corner House*, §44.[62] Adjudication of this dispute therefore gives rise to considerations of comity and risks of overlapping judgments.[63]

    (3) Many of the arguments advanced by the Claimant seek to develop the relevant rules of international law beyond the positions that have to date been adopted by international courts or tribunals, as explained below.

    (4) Adjudication of this dispute would plainly interfere with and/or have significant impacts on the conduct of international relations and/or UK's national security as set out at §40 above. As Lord Brown noted in *Corner House* "*for a national court itself to assume the role of determining* [a disputed question of construction of an international law rule] *(with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons*": §65.[64]

57. Notwithstanding the clear and consistent case-law, the Claimant contends that a "*correctness*" standard should be applied. The Claimant's analysis[65] is based on a mischaracterisation and misapplication of the factors set out by the Court of Appeal in *Stonehenge* at §147 and fails to grapple with the critical points set out at §56 above.

    (1) As to the first and third factors: the purpose of these factors is to assess whether there are, in effect, judicially manageable standards by which the Court can

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[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*; *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*.

[62] The passage from *Corner House* was quoted by the Court of Appeal in *Friends of the Earth* when summarising the respondent's arguments on the tenability standard, and that summary of argument was then accepted: see §§27, 50(i).

[63] See also, §40(3).

[64] The passage was also quoted by the Court of Appeal in *Friends of the Earth* when summarising the respondent's arguments on the tenability standard, and that summary of argument was then accepted: see §§28, 50(i).

[65] See, in particular, CSkel §§184-197.

determine an obligation: §§44, 45 and 65-66 of *Corner House* The Claimant is wrong to contend that there are judicial decisions by the ICJ (Grounds 8(A) and 8(C)), and/or authoritative academic commentary (Grounds 8(A)-(D)) upon which the Court can rely. No explanation for that position is provided. Nor could it be. As the analysis that follows amply demonstrates, the issues that arise in this case are not only highly complex, but also controversial. There is not only an absence of clear domestic jurisprudence on the issues, but also international judicial precedent. Academic commentaries take the matter no further as they do not demonstrate agreement and in fact demonstrate the extent of disagreement.

(2) As to the second factor: the purpose of this factor is, in essence, to assess the effect or impact on international relations that the application of a particular standard may have: see e.g. *Corner House,* §44; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2019] AC 777 ("***Benkharbouche***"), §35. The Claimant's suggestion that this case would not have important impacts on foreign policy is unrealistic and wrong (see, e.g., §40).

(3) As to the fourth to fifth factors: the purpose of these factors is to ensure that the Court provides deference to the Government in circumstances where the content of a relevant international obligation may be unclear: see, e.g., *Corner House*, §66. As the Claimant itself accepts, the issues that arise in this case are of importance and significance for the operation of the relevant treaties or international obligations that are engaged. In addition, the issues that arise on this case are plainly not discrete nor "*not particularly"* difficult to interpret as the Claimant contends. Among other matters, the very fact of the detailed and careful argument of the parties on the substance of the obligations under Grounds 8(A)-(D) is a clear indicator that the issues that are before the Court are far from straightforward and that there are no clear standards by which the Court can determine the issues.

(4) As to the sixth factor: this derives from *Benkharbouche.* As the Court found in that case, it was necessary to determine the status of CIL on a correctness standard, but that was because the issue that arose was whether s.4 of the State Immunity Act ("**SIA**") was compatible with Article 6 ECHR. No equivalent issue arises in the present case. This factor does not, therefore, assist the Claimant.

(5) As to the seventh factor: the decision-maker was not "*compelled*" to take into account international legal obligations by reference to domestic statute.[66] The suggestion that "*[t]his is the consequence of the wording of the 2002 Act*" (which simply required the formulation of a policy) is obviously wrong. So too is the suggestion that "*compliance with the UK's international obligations is a central concern of the statutory scheme*" (see §39(3) above). The contention that the 2002 Act "*required that the exercise of those powers involve consideration of the compatibility of export control decisions with the international law of armed*

[66] *Contra* Reply §20(e).

conflict and IHRL" is simply wrong (*cf* CSkel §187).

58. In its skeleton argument, Oxfam contends that the "*tenable view*" standard only applies in the context of a rationality challenge.[67] The same argument is not advanced by the Claimant. It is clearly wrong. Oxfam has failed to identify a single authority that limits the principle in this way, and such circumscription would be inconsistent with the consistent line of authority cited above. Oxfam suggests that *Friends of the Earth* "*is such a case*". That too is clearly wrong: the central issue in that case was whether the Defendant had committed an error of law, and the "*tenable view*" standard was applied to that issue: see, e.g., §40(iv) ("*The question of whether it was an error of law for the respondents to have concluded that funding the project was aligned with the UK's obligations under the Paris Agreement must be judged by considering whether the decision-makers adopted a tenable view of that question*"): see also §§2, 21, 51.

59. For all of these reasons, if, contrary to the Government's primary submission, any of the sub-grounds under Ground 8 are considered to be justiciable, the "*tenable view*" standard should be applied by the Court. The implications of this are addressed under the individual sub-grounds below.

Grounds 8(A)-(D): the assessments

60. The Claimant's case on Ground 8 has changed again and now seeks to focus on alleged failures in the assessment process. The central complaint, which surfaces in various places throughout Ground 8, appears to be that the Government should have gone further than assessing that there was a clear risk that F-35 components might be used by Israel to commit or facilitate a serious violation of IHL, but that it failed to do so. In particular, it is alleged that, having concluded that Israel was not committed to complying with IHL and that there was a clear risk that Israel might commit or facilitate serious violations of IHL, the Government was required additionally:

    (1) to reassess whether the continued export of F-35 components was, in September 2024, still considered compliant with CA1;[68]

    (2) to assess further whether, in light of all relevant evidence, the continued export of F-35 components was prohibited under Article 6 of the ATT;[69]

    (3) to assess further so that it could determine whether Article 6(3) was engaged;[70]

    (4) to assess whether the evidence was sufficient to constitute *"knowledge"* that specified wrongs would be committed so as to engage Article 6(3);[71] and

[67] Oxfam Skeleton §36.
[68] CSkel §§200-201.
[69] CSkel §§221-222.
[70] CSkel §232.
[71] CSkel §234.

(5) to take into account the risk that F-35 components could be used to commit or facilitate a serious violation of international human rights law and/or serious acts of violence against women and children.[72]

61. These criticisms are made without taking into account: (i) the true depth and range of the information-gathering and analysis which was undertaken by the Government in reaching the September Decision; or (ii) the inherent limitations to which the analysis and assessment were subject.

62. As to (i), the process of information-gathering and analysis, which was first put in place in November 2023 and developed thereafter, is described at §§15-26 of Hurndall 2.[73] In summary, the IHLCAP Cell collated evidence and information into a regular "Evidence Base" (now called an "Information Store"). The depth and range of this evidential basis can be seen in the "Information Store" covering the period from 29 January to 24 April 2024.[74] This included:

(1) a detailed summary of allegations of attacks against: (i) refugee camps and schools; (ii) residential buildings/areas; (iii) religious and cultural buildings; (iv) hospitals and medical personnel;[75]

(2) consideration of issues and allegations relating to deconfliction; [76]

(3) reference to: (i) concerns expressed by UN Special Procedures experts regarding credible allegations of human rights violations against Palestinian women and girls; (ii) statistics relating to numbers of children killed and injured in Gaza; (iii) MSF and OCHA reporting on deficiencies in maternity care;[77]

(4) information and allegations relating to food, healthcare, and WASH (water, sanitation and hygiene);[78]

(5) reference to OCHA reporting on the impact on residential infrastructure;[79]

(6) a detailed review of public statements by Israeli politicians and military leaders and private engagement with the UK Government.[80]

63. The Evidence Bases / Information Stores, together with legal analysis of issues and incidents which were identified as being of most concern, were drawn together in the IHLCAP Cell's analysis of Israel's commitment, capability and record of compliance

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[72] CSkel §246.
[73] **[SB/B/14/116-120]**.
[74] **[SB/E/85/1028-1081]**.
[75] **[SB/E/85/1032-1039, §§14-29; 1067-1069, §24-28]**.
[76] **[SB/E/85/1039-1041, §§30-37; 1069-1071, §§29-39]**.
[77] **[SB/E/85/1041, §§38-39; 1048-1049, §§58-60; 1071, §§40-42]**.
[78] **[SB/E/85/1044-1046, §§48-40]**.
[79] **[SB/E/85/1047-1048, §§54-57]**.
[80] **[SB/E/85/1058-1061, §§99-113]**.

with respect to IHL. The IHLCAP Assessments in turn informed ECJU's submissions and, ultimately, the Government's decision that Israel was not committed to complying with IHL and that there was consequently a clear risk that certain exported items might be used to commit or facilitate a serious violation of IHL.

64. As to point (ii) in §60 above, as the 7th IHLCAP Assessment noted:

> *"The Cell has access to varying qualities and quantities of evidence, some of which is highly contested. As is normal, especially in the context of warfare, analysis must also contend with an unknown volume of dis- and mis-information, as well as active strategies of information warfare by parties to the conflict and other interested parties. Access to Gaza remains significantly restricted; the ongoing conduct of hostilities makes verification of information in a timely manner particularly challenging."*[81]

65. The Government has, from an early stage in the conflict, engaged with Israel to seek further information regarding its attitude towards and compliance with IHL. Israel has been willing to enter into regular dialogue, and has shared a large volume of material, with the Government, which is subject to analysis by the IHLCAP Cell. There are, however, limitations on the extent to which any Government is able, or reasonably willing, to share information relating to operational decisions and/or investigations and prosecutions arising out of specific incidents.[82]

66. All of the material collated by the IHLCAP also fed into the "ECJU C1 Assessment" in June 2024, together with:

    (1) information from the FCDO's Conflict and Atrocity Prevention Department and other relevant desks in the Middle East and North African Directorate; and

    (2) key developments in the period leading up to that assessment including: the adoption of UNSCR 2728 on 25 March 2024; the ICJ's Provisional Measures Orders and wider legal commentary on those Orders; and the ICC Prosecutor's arrest warrants against Prime Minister Netanyahu and Defence Minister Gallant.[83]

67. The ECJU C1 Assessment considered whether the continued export of items to Israel was compatible with the UK's international obligations and commitments, including:

    (1) the duty to prevent genocide under Article 1 of the Genocide Convention;

    (2) the duty to respect and ensure respect for IHL under CA1 of the Geneva Conventions;

    (3) Articles 6(2) and 6(3) of the ATT.

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[81] 7th IHLCAP Assessment, §9. **[CB/E/41/693]**.
[82] Hurndall 2, §20 **[CB/B/14/118]**.
[83] **[SB/E/102/1422]**.

68. This Assessment fed into "Annex E", which formed part of the analysis placed before the Foreign Secretary on 24 July 2024. Annex E considered the impact of a finding that Israel was not committed to complying with IHL on the previous assessment.

69. In relation to the duty to prevent genocide, Annex E concluded that:

> *"… a finding that Israel is not committed to comply with IHL does not necessarily indicate that it is harbouring genocidal intent. The current IHL assessment notes that concerning Israeli statements seen towards the start of the conflict have not been repeated in the same vein. There have been a range of positive statements and some negative statements from specific actors; however, their remarks are not assessed to be representative of the Israeli Government overall. The areas of most acute concern with respect to compliance with IHL do not relate to Israel making civilians the object of attack. No evidence has been seen that Israel is deliberately targeting civilian women or children. There is also evidence of Israel making efforts to limit incidental harm to civilians."*[84]

70. In relation to Article 6(3) of the ATT, ECJU assessed that neither the information and analysis contained in the current IHLCAP Assessment, nor a finding that Israel was, overall, not committed to complying with IHL, constituted knowledge that items to be exported would be used in the commission of relevant atrocities crimes.[85]

71. There was therefore no inadequacy of assessment or inquiry. Still less was there any *Tameside* irrationality; and the extent of inquiry is a matter for the rational judgement of the decision maker: see eg *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261 at §100. The Government properly and adequately considered all of the (limited) material before it. It was neither necessary nor feasible to seek to draw more detailed or hard-edged conclusions on that material. The Government was not engaged in, and could not properly have been engaged in, some sort of trial process. The appropriate conclusion by reference to the Information Store was that there was a clear risk of a serious violation of IHL, but it was not and could not be concluded that Israel was committing other breaches of IHL, still less genocide.

Ground 8(A): Common Article I to the Geneva Conventions

72. Each of the four Geneva Conventions of 1949 share the same Article 1 ("**CA1**"):

> "*The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.*"

73. The same provision is included as Article 1 to the 1977 Additional Protocol I to the Geneva Conventions, and the 2005 Additional Protocol III (the same obligation has also

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[84] **[CB/E/35/609]**.

[85] Consistent with the conclusion at §27 of the "ECJU C1 Assessment" of 11 June 2024 that CA1 was not relevant to decisions about arms exports **[SB/E/102/1428]**, no different conclusion was made with respect to CA1. See also [**CB/E/31/595, 609**].

been recognised as part of customary international law). The UK is a party to the Geneva Conventions and their Additional Protocols.

74. The CA1 obligation has two components: (1) the obligation "*to respect*" the Conventions and (2) the obligation "*to ensure respect for*" the Conventions.

75. In its pleadings, the Claimant asserted that CA1 is breached by the maintenance of export licences for F-35 components, in three respects, namely that the UK:

(1) has aided or assisted Israel in the commission of violations of IHL;[86]

(2) has not taken sufficient steps to ensure that Israel respects IHL;[87]

(3) has not taken sufficient steps to prevent a breach of IHL by companies exporting F-35 components from the UK.[88]

76. The key issue of interpretation between the parties concerns (2). As the UK has publicly (and correctly) stated on many occasions, including in the context of Israel, CA1 is concerned with respect by the relevant Party for its own obligations under the Geneva Conventions and "*ensure respect*" concerns the duty to ensure that all those within that Party's jurisdiction equally respect the Conventions. Thus, for example, in an explanation of November 2024 on the UK's longstanding position on the illegality of Israeli settlements in the Occupied Palestinian Territories, it was emphasised: "*However I wish to make clear we do not believe that Common Article 1 of the Geneva Conventions establishes third party obligations.*"[89]

77. By way of an example prior to the current Gaza conflict, in its 2022 comments on the work of the ILC on protection of the environment in relation to armed conflicts, the UK stated (in a position that was also reflected in the comments of Canada, Israel and the USA):

> "*The United Kingdom is concerned about the interpretation of common article 1 of the Geneva Conventions in the commentary. The commentary states "Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict" (emphasis added). The United Kingdom does not accept this interpretation, nor that common article 1 contains such an obligation.*
>
> *The United Kingdom requests that the commentary is amended to recognize that there is considerable debate over the ICRC position and does not simply accept*

[86] ASFG §§204-205; see also Reply §28. Cf. CSkel §208.3.
[87] ASFG §§206-208.
[88] ASFG §213.
[89] Explanation of Vote by Archie Young, UK Ambassador to the General Assembly, at the UN Fourth Committee on Palestine, 22 November 2024: at https://www.gov.uk/government/speeches/expansion-of-settlements-undermines-peace-and-must-cease-immediately-uk-explanation-of-vote-at-the-un-fourth-committee.

it as a correct statement of law."[90]

78. The Claimant, by contrast, contends that that the Government has failed to take steps to ensure that Israel respects the Geneva Conventions.

79. Further, in its skeleton argument, the Claimant has sought to make it appear less central to its case and has introduced a new[91] case on alleged failures of assessment, as follows:

    (1) When making the September Decision, the Government relied on an assessment of compliance with CA1 that had been made on 11 June 2024, and which had been based on considerations which had changed by the time of the September Decision.[92] The alleged material misdirection in this respect is premised on the Claimant's further case that the Government misdirected itself as to the interpretation of CA1, i.e. the Government's position that CA1 does not require the UK to ensure respect by other States of the Geneva Conventions.[93]

    (2) Even if the Government's interpretation of CA1 were correct, it failed to carry out any assessment of whether the F-35 Carve Out complied with CA1 after July 2024, which failure is said to have been material.[94]

80. As to this first alleged failure of assessment, the FCDO's primary conclusion on 11 June 2024 was that "*CA1 does not impose an obligation in international law to ensure that other States also respect the Conventions*".[95] The FCDO's assessment then outlined, in the alternative, an argument that failure to suspend export licences to Israel might nevertheless be consistent with even the more expansive interpretation of CA1 which the Claimant now adopts. The matters which the Claimant now identifies as having changed between June 2024 and the September Decision were cited in support of this alternative argument, not the FCDO's primary conclusion.[96] If the Court agrees that the Government's interpretation of CA1 is tenable, then the alleged misdirection falls away. In any event, the Claimant's factual contentions on the assessment are incorrect – the conclusions set out in the June 2024 ECJU assessment were all revisited ahead of the September decision: see §§60-71 above.

81. As to the second alleged failure, it appears that the Claimant's criticism is that the Government has not carried out a further assessment since concluding that there was a clear risk that Israel might use military items to violate IHL, which asks whether licensing F-35 components for export to Israel could breach the UK's obligations to ensure that

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[90] ILC, Seventy-third session, Protection of the environment in relation to armed conflicts, UN Doc. A/CN.4/749 at p. 38; see also pp. 34-36. Available at https://documents.un.org/doc/undoc/gen/n22/232/58/pdf/n2223258.pdf.
[91] At ASFG §209, there is a bare statement that the Government misdirected itself in concluding that the F-35 Carve Out complied with the UK's domestic legal obligations.
[92] CSkel §§201-203.
[93] CSkel §§204 and 207-208.
[94] CSkel §205.
[95] "ECJU C1 Assessment" of 11 June 2024, §27 **[SB/E/102/1428]**.
[96] "ECJU C1 Assessment" of 11 June 2024, §28 **[SB/E/102/1428-1429]**.

individuals within its jurisdiction respect IHL (those individuals being UK officials and arms exporters).[97] The Claimant has not identified which rule or rules of IHL might be breached in this way. In the absence of an identified violation or possible violation of IHL by individuals within the UK's jurisdiction, there can be no question of material misdirection by the Government.

82. It follows from the above that the central issue still concerns the alleged misdirection as to the interpretation of CA1.

There is no obligation on States to ensure that all other States comply with IHL

83. In broad terms, there are two differing schools of thought as to what is required by CA1. These are:

(1) That States are bound by CA1 only to ensure that individuals within their own jurisdiction do not violate IHL.[98] This is the Government's position.

(2) That States are bound to ensure respect of IHL by <u>all other States</u>. The Claimant advocates for the adoption of the second, more expansive interpretation. It lays emphasis on a body of commentary,[99] but accepts that there is no unanimity among the commentators.[100]

84. That this is a controversial and heavily contested question of international law is plain from the materials that the Claimant relies on. See for example:

(1) Professor Geiss states that: "*It remains debated, however, whether Common Article 1 goes beyond the accepted 'internal compliance dimension', and whether states that have ratified the Geneva Conventions … are also obliged to ensure respect vis-à-vis external transgressors ('external compliance dimension'). The ICRC has always endorsed such an external compliance dimension. …*"[101];

(2) Geiss also acknowledges that "*there is of course no denying that in many* relevant *instances states have been highly selective in their sporadic reactions to breaches – including grave and egregious breaches – of IHL*" [102];

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[97] CSkel §205.
[98] Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit" (1999) 2 *Yearbook of International Humanitarian Law* 3, p.60; Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, pp.678-679, 705*;* Verity Robson, 'The Common Approach to Article 1: the Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions' (2020) 25 *Journal of Conflict and Security Law* 101, p.103.
[99] ASFG §211.
[100] Reply §25(c).
[101] Robin Geiß, "The Obligation to Respect and to Ensure Respect for the Conventions", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015), p. 120.
[102] Robin Geiß, "The Obligation to Respect and to Ensure Respect for the Conventions", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015), p.122; see also Robin Geiß, "Common Article 1 of the Geneva Conventions: Scope and Content of the Obligation to 'Ensure

(3) Maya Brehm says that: "*Debate persists on the question whether this undertaking* [in CA1] *to ensure respect imposes a legal obligation on states and whether such an obligation would concern states not involved in an ongoing armed conflict*" to take steps *vis-à-vis* those states involved in the conflict[103];

(4) Birgit Kessler acknowledges the "*lack of State practice, in which the Member States openly take action under* [CA1] *to enforce the Conventions*", as well as the "*legislative history of* [CA1]", both of which seem to her to suggest against a rule requiring States take positive measures against other States (although in the event she relies on the activities of the ICRC to derive the development of such a rule).[104]

85. See also the ICRC's most recent commentary on CA1,[105] and other academic commentators on whom the Claimant relies.[106]

86. The Claimant contends that the Government's position on the meaning of CA1 is a minority view.[107] But the relevant question is whether the Government's position is tenable. It is supported by various commentators.[108]

87. CA1 is to be interpreted in good faith in accordance with the ordinary meaning of the treaty's terms (those terms to be read in context and in light of object and purpose).[109] The terms of CA1 do not state that States party to the Geneva Conventions must ensure respect by other States (as opposed to ensuring respect by individuals within their jurisdiction, for instance).

88. Contrary to what the Claimant has asserted,[110] the Government's interpretation of CA1 does not require that words of limitation be read into CA1. To the contrary, it is if

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Respect' – 'Narrow but Deep' or 'Wide and Shallow', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015), p.426.

[103] Maya Brehm, "The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law" (2008) 12 *Journal of Conflict & Security Law* 359, p.369.

[104] Birgit Kessler, "The Duty to 'Ensure Respect' Under Common Article 1 of the Geneva Conventions: Its Implications in International and Non-International Armed Conflicts" (2001) 44 *German Yearbook of International Law* 498, p.504.

[105] ICRC, Updated Commentary to Geneva Convention I, Article I, 2019, §§120, 155, 169 (available at: https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-1/commentary/2016?activeTab=#5_B); ICRC, Updated Commentary to Geneva Convention II, Article I, 2017, §§142, 177, 191 (available at: https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-1/commentary/2017?activeTab=1949GCs-APs-and-commentaries); ICRC, Updated Commentary to Geneva Convention III, Article I, 2020, §§153, 188, 202 (available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020?activeTab=1949GCs-APs-and-commentaries).

[106] Marco Sassóli, International Humanitarian Law (2nd ed., 2024), §5.156; Helmut Philipp Aust, "Complicity in Violations of International Humanitarian Law", in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the Great African Lakes Region* (2015), p.455.

[107] See Reply §25(c); CSkel §207.5.

[108] Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit" (1999) 2 *Yearbook of International Humanitarian Law* 3; Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674*;* Verity Robson, 'The Common Approach to Article 1: the Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions' (2020) 25 *Journal of Conflict and Security Law* 101.

[109] Vienna Convention on the Law of Treaties ("***VCLT***"), Article 31(1).

[110] Cf. Reply §23(a).

anything the Claimant who seeks to expand the scope of CA1 beyond what is required by its express terms.

(1) An obligation to ensure that other States comply with IHL imposes a "*very significant burden*" on signatory States, and had they intended to accept that obligation it "*would have been set forth in explicit terms*".[111]

(2) Professor Geiss (on whose work the Claimant has relied) states "*it cannot but be concluded that originally the words 'to ensure respect' were meant to emphasize a comprehensive internal compliance dimension rather than an external compliance dimension*",[112] explaining that the idea that States party to a treaty might be under a positive obligation to ensure another State complied with law would have had "*revolutionary implications*", and an intention to undertake such obligations could not be implied.[113]

(3) The Claimant contends that its expansive interpretation of CA1 is supported by the object and purpose of the Geneva Conventions.[114] This argument is circular as the Claimant is deriving object and purpose from the text of the Conventions as opposed to any statement of objects and purposes such as in a preamble. It also ignores the operation of CIL rules on State responsibility: as discussed under Ground 8(D), a State which transfers arms to another State knowing and intending that they will be used to commit grave (or any) breaches of the Geneva Conventions will be responsible for those breaches. Further, the Claimant has not pointed to any reason why the objects and purposes of the Conventions would require that they be read to include an obligation on States parties to ensure compliance by other parties, which would on any view be an extraordinary obligation.

89. As to Article 31(3)(b) of the VCLT, the Claimant asserts that there exists "*overwhelming support in State practice*" for its interpretation of CA1, and it relies on examples of resolutions by UN bodies.[115] The Claimant has not pointed to instances in which, faced with violations of IHL by another State, all or even a large number of other States have taken measures to "*ensure respect*".[116]

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[111] Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, p.687.
[112] In *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, at §33.
[113] Robin Geiß, "The Obligation to Respect and to Ensure Respect for the Conventions", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015), p.115; see also Verity Robson, 'The Common Approach to Article 1: the Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions' (2020) 25 *Journal of Conflict and Security Law* 101, p.104; Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, p.685.
[114] Reply §23(b); CSkel §207.2.
[115] CSkel §207.3; Reply §§23(c), 24(a), (c).
[116] Cf. e.g. Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, pp.690-691; also Verity Robson, 'The Common Approach to Article 1: the Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions' (2020) 25 *Journal of Conflict and Security Law* 101, pp.107-109.

90. In any event, State practice under Article 31(3)(b) is relevant to interpretation only where it "*establishes the agreement of the parties regarding its interpretation*".[117]

(1) The resolutions to which the Claimant has referred are instances of international institutions pointing out violations of IHL by other States, and expressing diplomatic condemnation of those violations. For example, the Claimant cites[118] UN General Assembly Resolution 76/82, adopted on 9 December 2021, which concerned Israeli settlements in the Occupied Palestinian Territory. In that resolution, the General Assembly condemned settlement activities by Israel in the Occupied Palestinian Territory as a violation of international humanitarian law,[119] demanding that Israel comply with its legal obligations,[120] and calling upon all States party to the Fourth Geneva Convention to exert all efforts to ensure that Israel respects the provisions of that Convention.[121]

(2) In the absence of evidence that any of the States that voted in favour of this resolution took concrete steps of the type that the Claimant argues are required under CA1, including enacting arms embargoes on Israel, this is not State practice which supports the Claimant's case that there is an obligation on States not to licence the supply of F-35 spares that might be used by Israel in circumstances where a "clear risk" threshold is passed. As has been noted by the International Law Commission ("**ILC**") in the context of formation of rules of CIL: "*Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (opinio juris) from such resolutions must be done 'with all due caution'. … for the existence of a rule to be demonstrated, the opinio juris of States, as may be evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States*."[122]

91. As to the negotiating history, this demonstrates, contrary to the Claimant's position,[123] that the inclusion in CA1 of the words "*in all circumstances*" was not intended to give CA1 an external application, but was taken from earlier conventions on the laws of war, in which it was used to denote "*an obligation on the part of Parties to an armed conflict to respect and ensure respect for the Conventions even in situations in which the enemy does not do so and regardless of casus belli*."[124] More generally, during the drafting conferences, there was no discussion of the possibility that CA1 might require States to

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[117] VCLT, Article 31(3)(b).
[118] Referred to in ASFG §211.
[119] UN General Assembly Resolution 76/82, UN Doc. A/RES/76/82, nineteenth recital.
[120] UN General Assembly Resolution 76/82, UN Doc. A/RES/76/82, §9.
[121] UN General Assembly Resolution 76/82, UN Doc. A/RES/76/82, §15.
[122] ILC, Draft conclusions on identification of customary international law, 2018, Conclusion 12, Commentary at §§6 and 8.
[123] See ASFG §211; Reply §23(a).
[124] Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, p.681.

take positive measures targeted at other States, on the basis of the latter's possible or actual violations of IHL.[125]

92. The Claimant has also pointed to decisions of the ICJ, which it says support its expansive interpretation of CA1. As to those:

(1) It is common ground that decisions of the ICJ are not sources of international law but are, rather, "*subsidiary means for the determination of rules of law*."[126]

(2) The decision of the ICJ in *Nicaragua v. United States* involved a finding that the CIA had published a manual that encouraged the commission of acts that violated IHL (knowing that such acts were likely or foreseeable).[127] A duty to abstain from encouraging is different from a duty to ensure compliance with the law,[128] and encouragement has not been pleaded by the Claimant.[129]

(3) In the (non-binding) *Wall Advisory Opinion*, the ICJ said that all States were under an obligation to ensure compliance by Israel with IHL.[130] However, the ICJ did no more than refer in general terms to the Fourth Geneva Convention and did not provide any legal reasoning or basis for its statement.[131] As Judge Kooijmans noted in his Separate Opinion: "*I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding*."[132] The same statement was adopted, again without explanation, in the (also non-binding) *OPT Advisory Opinion*.[133]

(4) In the order refusing provisional measures in *Nicaragua v. Germany*, the ICJ

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[125] This appears to be accepted at CSkel §208.2. See further the discussion in Verity Robson, "The Common Approach to Article 1: the Scope of Each State's Obligation to Ensure Respect for the Geneva Conventions" (2020) 25 *Journal of Conflict and Security Law* 101, pp.104-107, 112-113; Robin Geiß, "The Obligation to Respect and to Ensure Respect for the Conventions", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015), p.115.

[126] CSkel §207.2; Statute of the International Court of Justice, Article 38(1)(d).

[127] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at §256, and see also §220.

[128] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 210 (Separate Opinion of Judge Kooijmans), at §49.

[129] Oxfam contends that the September Decision amounted to encouragement to Israel to breach IHL: Oxfam Skeleton §42; and that the Government failed to consider and/or misdirected himself as to whether it would amount to encouragement: §41. As neither of these is an allegation pleaded against the Government by the Claimant, it falls outside the scope of the issues in dispute in the case.

[130] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, at §§158-159.

[131] See also Robin Geiß, "Common Article 1 of the Geneva Conventions: Scope and Content of the Obligation to 'Ensure Respect' – 'Narrow but Deep' or 'Wide and Shallow', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (2015), p.425.

[132] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 210 (Separate Opinion of Judge Kooijmans), at §50. See also the Separate Opinion of Judge Higgins, p. 207, §39.

[133] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, §279.

merely repeated its previous position from the *Wall Advisory Opinion*.[134] The ICJ did not say that transfer of arms (in that case, directly) to Israel would violate the duty to ensure respect for IHL under CA1, and in fact it refused to order provisional measures.[135]

(5) It is not understood on what basis the Claimant contends that it is relevant that the UK has accepted the compulsory jurisdiction of the ICJ.[136] It is not known what interpretation the ICJ would give to CA1 in putative contested proceedings in which a full airing was given to all the arguments on interpretation.

93. The Claimant's allegation that the Government has changed its position on the meaning of CA1 is incorrect:[137]

(1) The examples of UN and ICRC Conference resolutions cited by the Claimant do not show that the UK considered there to be a positive legal obligation to take concrete measures to prevent another State from violating IHL.

(2) As to the Provisional Measures Order in *Nicaragua v. Germany*, it is not the UK practice to "*take issue*" with orders of the ICJ.[138]

(3) Submissions by FCDO officials to Ministers made prior to the September decision considered Criterion 1 to the SELC and assessed whether exports of arms to Israel would violate various obligations on the UK under international law, including obligations under the ATT, the Genocide Convention, and CA1.[139] That these assessments examined CA1 does not imply that the FCDO interpreted CA1 in the expansive way the Claimant contends for. Moreover, as noted above, the FCDO assessment of 11 June 2024 explicitly affirmed that CA1 "*does not constitute an obligation in international law to ensure that other States also respect the Conventions*."[140]

Alternatively, the ATT gave concrete effect, in the arms trade context, to obligations under CA1

94. If, contrary to the UK's position, CA1 does impose positive obligations on States to take measures to prevent violations of the Conventions by other States, the nature and extent

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[134] *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order, 30 April 2024, §23.
[135] *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order, 30 April 2024, §§14, 20.
[136] CSkel, §207.2.
[137] See ASFG §212.
[138] Cf. ASFG §212(b).
[139] "Annex B: Assessments against other relevant SELC criteria", annexed to the submission of DDIS to FCDO Ministers dated 28 March 2024 **[SB/E/78/975]**; "Annex B: Assessments against other relevant SELC criteria", annexed to the submission of DDIS to FCDO Ministers dated 23 May 2024**[SB/E/93/1153]**.
[140] "ECJU C1 Assessment" of 11 June 2024, §27 **[SB/E/102/1428]**.

of those obligations in the specific context of arms transfers must take into account Articles 6 and 7 ATT.

95. Article 31(3)(c) VCLT provides that the interpreter shall take into account "*any relevant rules of international law applicable in the relations between the parties*".[141] The rules of international law to which regard can be had are any "*relevant*" rules. Gardiner identifies relevant rules of international law as those which touch on the same subject matter as the treaty provision being interpreted,[142] while Dörr identifies treaties that deal with a similar object or address the same legal situation.[143] There is no basis for the Claimant's contention that the Government is seeking to "*read down*" the content of CA1.[144]

96. The relationship between CA1 and the ATT is such that the latter assists with the interpretation of CA1, and the extent of the concrete obligations it imposes, in the context of arms transfers. The Government makes four points.

97. **First,** CA1 is notably open-textured, does not express precise standards, and still less does it identify how it might apply in the context of arms transfers. By contrast, the ATT establishes standards in this specific field and offers a ready means of clarifying the general obligations in CA1 as applied to arms transfers. The ATT can be seen both as relevant for the purposes of Article 31(3)(c) VCLT and as a form of *lex specialis*. As noted by the ILC's Study Group on fragmentation of international law, *lex specialis* may be used to clarify a more general law, with the rationale of the principle of *lex specialis* being that "*such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law*."[145]

98. **Second**, the text of the ATT links the regime established under that treaty to the Geneva Conventions, and specifically to CA1:

    (1) In the preambular section to the ATT, the States party recorded that in agreeing to the ATT, they were determined to act "*in accordance with*" specific enumerated principles, including "[r]*especting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949*".[146]

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[141] See also e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at §53 with respect to interpretation within the framework of international law prevailing at the time of interpretation.
[142] Richard Gardiner, *Treaty Interpretation* (2015), p.299.
[143] Oliver Dörr, "Article 31: General Rule of Interpretation", in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2018), §§96, 102.
[144] Cf. CSkel §210.
[145] International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions of the Work of the Study Group", 18 July 2012, UN Doc. A/CN.4/L.702, §14.7 and 14.8.
[146] The fifth enumerated principle.

(2) Articles 6(3) and 7(1)(b)(i) specifically direct States parties to consider whether exported arms would or could be used to commit a serious violation of IHL.

99. **Third**, Article 1 ATT defines as one of the treaty's objects: to "[e]*stablish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms.*" This object would not have been achieved if CA1 imposes higher standards of regulation for arms transfers. The States considered and intended that the obligations expressed in the ATT would at least satisfy their obligations under CA1.

100. **Fourth**, the ATT is a treaty with a large membership of 132 States,[147] all of whom are also parties to (or bound by)[148] at least one of the Geneva Conventions. It would be a very surprising outcome if those States intended, when entering into the ATT, to establish a parallel set of obligations for arms transfers that would exist alongside the obligations imposed by CA1 and were in material respects inconsistent with CA1.[149]

101. As to the Claimant's position:

(1) It argues that the rule in Article 31(3)(c) VCLT only permits reference to another treaty if all the States that are party to the treaty being interpreted are also parties to the other treaty.[150] But this is merely one of several different approaches to Article 31(3)(c),[151] and it is not the correct approach when it comes to interpretation by reference to a later treaty which is as widely ratified as the ATT and where there is such a degree of overlap.[152]

(2) It contends that Article 6(2) ATT is being ignored by the Government.[153] Yet Article 6(2) merely acts as a *renvoi* to other international law rules. It provides no guidance on the content of those rules, and no basis for contending that the rule in CA1 is seen as inconsistent with Article 6(3), which (unlike Article 6(2)) expressly refers to the Geneva Conventions, and Article 7, which establishes detailed rules on the assessment and authorisation of arms exports that are not prohibited under Article

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[147] This number includes both State parties (116) and signatories (26).
[148] Niue, a State party to the ATT, has not formally acceded of its own accord to the Geneva Conventions, but it considers itself bound by New Zealand's ratification of the Geneva Conventions.
[149] Cf. International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions of the Work of the Study Group", 18 July 2012, UN Doc. A/CN.4/L.702, §14.4: "*It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.*" This was quoted with approval by the International Tribunal for the Law of the Sea (ITLOS) in the context of its consideration of Article 31(3)(c) VCLT in *Advisory Opinion, Climate Change and International Law*, 21 May 2024, §136.
[150] Reply §26(a)(i); CSkel §211.1.
[151] Richard Gardiner, *Treaty Interpretation* (2015), 2nd ed, pp.310-317.
[152] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, 13 April 2006, A/CN.4/L.682, §§470-471. See also e.g. ITLOS, *Advisory Opinion, Climate Change and International Law*, 21 May 2024, §§136-137.
[153] Reply §26(b); CSkel §211.2.

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(3) It contends that Article 26(1) ATT is being ignored by the Government.[154] Yet Article 26(1) is a savings provision with respect to other international law rules. Again, it sheds no light on how such rules are correctly to be interpreted in the specific context of arms exports.

(4) It contends that using the ATT to guide the interpretation of CA1 would allow a State to "*read down*" its treaty obligations by entering into a different treaty with obligations of a narrower scope.[155] That mischaracterises the Government's position. It is not the case that the ATT replaces CA1 with "*narrower*" obligations – rather, the ATT provides specific rules for a specific context that are consistent with any more general rule in CA1 (and, as explained under Ground 8(B) below, the UK has complied with its obligations under the ATT).

Aiding and assistance

102. To the extent that it is retained,[156] the Claimant's case that the obligation to respect under CA1 prohibits the UK from aiding or assisting Israel in the commission of violations of the Conventions[157] is addressed under Ground 8(D) below. To the extent that the Claimant alleges that a different and more rigorous obligation applies in the context of CA1, which is triggered merely by the likelihood or foreseeability of a breach of IHL,[158] it provides no support for that. Although it cites the decision of the ICJ in *Nicaragua v USA*, the ICJ in that case was considering acts that had positively encouraged breaches of IHL. The Claimant has not alleged that the UK has encouraged any breaches of IHL here.

103. An argument is introduced by Oxfam in its Skeleton at §§40-42 that the so-called negative obligation under CA1 prohibits the transfer of weapons "*if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions*" (referring to the ICRC's updated 2016 Commentary to GCI). It is alleged (*inter alia*) that there was a failure to consider this obligation and that the September Decision was in breach thereof with respect to encouragement and aid/assistance to Israel. As to this:

(1) As noted above, allegations with respect to encouragement of Israel are not pleaded by the Claimant and fall outside the scope of the issues in dispute in the case.

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[154] CSkel §211.3.
[155] Reply §26(d); CSkel §211.4.
[156] The legal principles on which the Claimant relies with respect to CA1 concern only the alleged obligation to ensure respect by Israel of its IHL obligation: see CSkel §§115-122. At CSkel §208.3, it is argued by reference to the Commentary of the ICRC that CA1 and Article 16 of the ILC's ASR operate on different levels. However, this is in the context of whether the Government is correct in its position that CA1 does not impose an obligation to ensure respect by Israel of its IHL obligations.
[157] ASFG §§204-205; see also Reply §28. Cf. CSkel §208.3.
[158] See Reply §28.

(2) The passage of the ICRC Commentary relied on by Oxfam reflects the evolving view of the ICRC (cf. the more tentative formulation at Andrew Clapham (ed), *The 1949 Geneva Conventions: A Commentary*, p. 131). The position of the ICRC that there is no intent requirement for aid or assistance under CA1 (cf. under Ground 8(D) below), and that is enough for the purposes of CA1 that there be the provision of "*financial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law*", is not supported by reference to cases or State practice. There is likewise no such support for the elaboration of the relevant test as being one of "*expectation, based on facts or knowledge of past patterns*". The Government does not accept that this is an accurate statement of what CA1 requires.

104. As to further considerations of the knowledge requirement, see under Ground 8(D) below. The Government did not have the requisite knowledge and, as to the nature of the assessment and the limits on what could be derived from the information available to the Government, see §§60 to 71 above. See in particular, in this and in previous assessments, the consideration given by the IHLCAP Cell to Israel's destruction of objects indispensable to the survival of the civilian population, especially water, sanitation and hygiene infrastructure.[159]

If the UK owes any further obligation under CA1 to ensure Israel respects IHL, it has complied with that obligation

105. In any event, the Government has done all it reasonably could to ensure that Israel complies with the Conventions and there has been compliance with CA1 if it were found to be applicable. In particular it has:

(1) throughout the conflict, engaged intensively with the Israeli Government and military (from the highest levels to official level), raising general and specific IHL concerns and seeking further information regarding Israel's position, and steps taken, in response to those concerns. Further detail of this engagement is contained in the CLOSED evidence.

(2) suspended export licences which it assessed could be used to commit or facilitate Israeli military operations in Gaza. This included components for F-16 fighter aircraft, parts for unmanned aerial vehicles, naval systems and targeting equipment.[160]

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[159] See the Evidence Bases dated 3 November 2023, §§30, 34, 37, 38 [**SB/E/41/557, 558, 559**]; the Second IHLCAP Assessment dated 20 November 2023, §14 [**SB/E/46/637**]; Out of Cycle Assessment dated 30 November 2023, §§9-10 [**SB/E/49/666**]; evidence base dated 1 December 2023, §§18-19 and p. 31 [**SB/E/50/681-682, 704**]; Fifth IHLCAP Assessment dated March 2024, §15 [**SB/E/74/928**]; evidence base dated 13 January 2024, §§18-19 [**SB/E/64/828**], evidence base of 28 January 2024, §§18-23 [**SB/E/66/862-863**]; Sixth IHLCAP Assessment dated 24 April 2024 [**SB/E/83/**]; Seventh IHLCAP Assessment dated 24 July 2024, §103 [**CB/E/41/719**]. Accordingly, it is not correct, as Oxfam alleges in its skeleton at §41, that the Government did not consider Israel's treatment of objects indispensable to the civilian population, especially water, sanitation and hygiene infrastructure.

[160] Written Ministerial Statement, 2 September 2024 **[CB/C/19/285]**.

106. The Government was not required to take the additional step of suspending exports of components into the F-35 programme in circumstances where:

(1) the only means of preventing UK-manufactured F-35 components reaching Israel is to suspend all UK exports into the F-35 programme, and incur serious risks to international peace and security.

(2) on a broad analysis, the likelihood of UK-manufactured components being used in existing Israeli planes is very small.

(3) the IDF is one of the most significant and well-equipped militaries in the world and therefore the impact of suspending F-35 components on operations in Gaza is likely to be minimal.

107. In these circumstances, even if the Government was under an obligation to ensure that Israel complied with IHL, it has fulfilled that obligation (or that would be an at least tenable conclusion).

108. Finally, the UK's obligation under CA1 to ensure respect for IHL has not been violated in respect of the actions of individuals within the jurisdiction who are involved in licensing the export of F-35 components. The Claimant's argument in this respect adds nothing to its existing arguments.[161] The Claimant has not identified which rule of IHL it contends exporters have breached, nor how they are said to have done so.[162]

Ground 8(B): Articles 6(3), 6(3) and 7(3) of the Arms Trade Treaty

Article 6(2)

109. Article 6(2) of the ATT provides:

> "*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 agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms."*

110. The Claimant's case in the ASFG is that the F-35 Carve Out breaches Article 6(2) ATT because the transfer of F-35 components to Israel would violate its obligations under CA1 and Article 1 of the Genocide Convention, for the reasons set out in respect of Grounds 8(A) and 8(C).[163] The Government's case on those Grounds is set out above and below: there is no evidence that the transfer of F-35 components to Israel "*would violate"* the UK's relevant international obligations.

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[161] Cf. Reply, §28.
[162] See CSkel §205.
[163] ASFG §216; see also CSkel §223.

111. Further, and in contrast to Article 6(3), Article 6(2) makes no mention of the Geneva Conventions or the Genocide Convention (the Commentary on Article 6(2) also makes no reference to either).[164] It is principally focused on obligations "*relating to the transfer of, or illicit trafficking in, conventional arms*", and the word "*relevant*" must be given meaning and effect. To the extent that Article 6(2) is concerned with the Geneva Conventions and the Genocide Convention, the Claimant's case fails as its case under Grounds 8(A) and 8(C) anyway fails.

112. As per its Skeleton at §§224-227, the Claimant now contends that the Government erred in two respects as regards "*his assessment that the continued supply of F-35 parts complied with Article 6(2)*":

    (1) The ATT requires the Government to "*assess all relevant evidence"*,[165] but the Government failed to carry out any updated analysis of Article 6(2) as part of his decision that there was a clear risk that items exported might be used to commit or facilitate serious violations of IHL. The self-direction was therefore unlawful on the basis of a failure to have regard to a material consideration.[166]

    (2) The Government's position that Article 6(2) engages a question of actual knowledge is inconsistent with: (i) the objects of the ATT; (iii) the purposes of the ATT; (iii) the guiding principles of the ATT; and (iv) the purpose behind Article 6(1) and 6(2).[167]

113. As to (1), the Claimant provides no support from the ATT Commentary or elsewhere for its new case that the ATT requires a broad and unqualified obligation to "*assess all relevant information"*. Specific obligations of assessment are established with Article 7, whereas Articles 6(2) and (3) make no reference to obligations of assessment and do not otherwise establish the broad and unqualified obligation that the Claimant contends for. In any event, Annex E of the 24 July 2024 ECJU Submission noted that ECJU had "*carefully reviewed the information and analysis contained in the current IHL assessment, and the broader position"* and that it was on this basis that that there have been "*no changes or developments that alter ECJU-FCDO's overall conclusions"*.[168] It is therefore factually incorrect to suggest that there was no consideration of matters that post-dated the 11 June 2024 ECJU Criterion 1 Assessment, or that relevant matters were not taken into account (if required by Article 6(2) of the ATT). More generally, the Government relies on §§60-71 above as to the extent, nature and limitations on the assessment exercise.

114. As a matter of domestic public law, it is for the decision-maker to consider what is relevant, subject only to rationality review: *R (DSD) v Parole Board* [2019] QB 285, DC

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[164] Casey-Maslen, Clapham, Giacca and Parker, "Arms Trade Treaty: A Commentary" (OUP, 2016), §§6.47-6.79.
[165] CSkel §221, referring back to CSkel §§214-218.
[166] CSkel §§225-226.
[167] CSkel §227.3.
[168] **[CB/E/35/609]**.

at §§135-141. Decisions on the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such and the weight to be given to that factor are further matters for rationality review only: *R (Khatun) v Newham London Borough Council* [2005] QB 37, CA, at §35 (per Laws LJ). In this case, the approach taken was plainly rational. In any event, any different approach would have made no difference (s.31 Senior Courts Act 1981).

115. As to (2), the question of whether a transfer would violate relevant obligations cannot be considered in the abstract, and it is at least tenable to interpret Article 6(2) as prohibiting transfer by reference to the actual knowledge of the State party of the relevant facts (save where the underlying obligation at issue is concerned with actual or constructive knowledge, as would be the case with respect to Article 1 of the Genocide Convention). This is not inconsistent with objects and purposes / guiding principles of the ATT and/or the purpose behind Articles 6(1) and (2). Such an approach prevents future breaches of relevant international obligations where the relevant knowledge exists. The argument that the Government's test entails ignorance of the law is an irrelevance.[169] Plainly that is to misread the Government's case on knowledge, which only concerns knowledge of relevant facts.

Article 6(3)

116. Article 6(3) provides:

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

117. The Government's position is as set out in the ADGR §§35-40, including that knowledge within Article 6(3) is actual knowledge, as is consistent with the ordinary meaning of the word used, in context, and in light of object and purpose. That is an at least tenable position that actual knowledge is required under Article 6(3).[170] There is no evidence that the UK had actual knowledge at the time of the F-35 Carve Out. The Government has assessed that there is a "clear risk*"* that Israel might commit violations of IHL, but that is a much lower threshold.[171] Further or alternatively, even if the test to be applied is one of constructive knowledge, there is no breach of Article 6(3) for the reasons set out at ADGR §40(a)-(c).

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[169] Reply §32.
[170] Cf. CSkel §§230-233; Reply §37.
[171] Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609]**.

118. The Claimant's case is that actual knowledge is not required and that in any event the Government had the requisite knowledge, whether actual or constructive: CSkel, §228.[172]

119. The parties agree that the time at which a State party to the ATT is deciding whether to authorise the transfer is prior to the transfer (and therefore the breach) taking place, and there is no indication in the text that constructive knowledge is sufficient. Further, in the immediate aftermath of the negotiation of the ATT, the United States adopted a policy that evidenced a belief that the test under Article 6(3) was one of actual knowledge.[173]

120. Article 6(3) does not import a risk-based test as asserted by the Claimant.

    (1) There is no textual basis in Article 6(3) to support an argument that Article 6(3) is concerned with knowledge of a risk of one of the prohibited acts in Article 6(3) taking place. The word used is "*would"*, not "*may be"* or any language importing mere risk as the test. Where – as in Article 7 – the ATT parties wished to establish an obligation by reference to the existence of a risk, they used that term. It is of course the case that the use of the arms in the commission of genocide etc as prohibited by Article 6(3) is in the future as at the moment of authorisation.[174] However, that does not turn the relevant test into a risk-based analysis in the way the Claimant contends, with a view to introducing standards such as "*substantial grounds to believe*" and "*real risk*" that do not follow from the terms actually used in Article 6(3).

    (2) At CSkel §230.1, the Claimant places emphasis on a distinction between the words "*would"* and "*will"* by reference to the ICRC's position on Understanding the Arms Trade Treaty. That distinction, according to the ICRC, merely means that the standard is not one of "*absolute certainty*", which the Government would accept. The ICRC's concluding position that the test is one of substantial grounds of belief appears to be based principally on its view as to the object and purpose of the ATT and Article 6(3), as opposed to the terms used (cf. CSkel, §230.2).[175] Moreover, its ultimate recommendation is concerned with knowledge understood to include constructive knowledge, as opposed to a "*substantial grounds for believing*" test.[176]

    (3) At CSkel §230.3, reliance is placed on the Voluntary Guide to the Implementation of Articles 6 and 7 ATT ("**Voluntary Guide**") for the Working Group on Effective Treaty Implementation. As the title to this document shows, it is simply a voluntary guide. Under Articles 17 and 20 of the ATT, the Working Group on Effective Treaty Implementation does not have any powers to provide authoritative interpretations as to the ATT.[177] The Voluntary Guide can only be relevant as a supplementary

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[172] CSkel §228.
[173] See "United States Conventional Arms Transfer Policies", US Presidential Policy Directive/PPD-27, 15 January 2014.
[174] Cf. CSkel §230.1.
[175] Cf. CSkel §230.2.
[176] ICRC's position on Understanding the Arms Trade Treaty, 2016, p. 29.
[177] See ADGR §§36-37.

means of interpretation under Article 32 VCLT[178] to the extent that it reflects State practice (see e.g. Conclusion 4(3) to the 2018 ILC Draft Conclusions and Commentary).[179] However, as the Voluntary Guide itself notes at §56, the practice is mixed, and certain participants considered that the ATT requires actual knowledge standard at a minimum, which supports the Government's interpretation. Certainly, the practice referred to is inadequate to establish a test of or equivalent to substantial grounds of belief.

(4) As to the Commentary to the ATT referred to at CSkel §230.4-230.5, it is in tentative terms. No assistance is to be derived from the Claimant's reference to "*real risk*" and other tests to which the Commentary refers in the context of a consideration of provisions in other treaties such as Article 3 UN Convention Against Torture where materially different wording is used.[180] It adopts a vague and unclear reasoning as to how a test of real risk arises, and appears to ignore the wording of Article 6(3). As to the ICRC position, see above, and it is also noted that the ICRC recognises that some States adopt a position that actual knowledge may be required, while noting that: "*There are similar divergences of views under the law of State responsibility, regarding a State's responsibility for aiding or assisting another State in committing an internationally wrongful act where the first State has "knowledge of the circumstances" of the said act*."[181]

(5) A test of actual knowledge would not impose a test that is so high as to render Article 6(3) meaningless.[182] The actual knowledge threshold may readily be satisfied, and a requirement of actual knowledge may be taken as consistent with the strict prohibition that is imposed by Article 6(3).[183]

121. As to the Claimant's contentions on the standard being one of constructive knowledge :[184]

(1) Insofar as the Claimant relies on its concept of a "risk-analysis" to justify a constructive knowledge standard,[185] see above.

(2) As to reliance on State practice and the Voluntary Guide),[186] also see above. As to the reliance on commentary see above, but in any event this is plainly not a "*turned a blind eye*" case.

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[178] See Reply §37(b).
[179] Draft conclusions on identification of customary international law, 2018.
[180] Cf. CSkel §230.4 and fn. 335. Article 3 of the UN Convention Against Torture (e.g.) concerns refoulement "*where there are substantial grounds for believing that he would be in danger of being subjected to torture*".
[181] ICRC, "Understanding the Arms Trade Treaty" (2016), available at: https://icrcndresourcecentre.org/wp-content/uploads/2016/11/4252_002_Understanding-arms-trade_WEB.pdf, p.27.
[182] CSkel §230.6.
[183] CSkel §230.7.
[184] CSkel §231.
[185] CSkel §231.1.
[186] CSkel §231.2-231.3.

122. Insofar as the argument is maintained, the Claimant's reliance on Article 1 of the Genocide Convention by reference to Article 31(3)(c) VCLT cuts both ways.[187] While it is correct that the ICJ stated in the *Bosnian Genocide Case*[188] that a State's obligation to prevent, and the corresponding duty to act, arise when the State learns or, or should normally have learned, of the existence of a serious risk of genocide, it also stated in the context of complicity that actual knowledge is required: see §§420-423. It follows that the reference to the Genocide Convention in Article 6(3) can be seen as neutral on this point.

123. As to the facts, for the reasons set out in ADGR §40(a)-(c), the facts and matters set out at ASFG §217(i)-(iii) do not establish actual, or even constructive knowledge. As to the Claimant's case on the Government's "*failure to go any further than assessing a clear risk*"[189] and its related case that the Government "*cannot assert that he did not possess the relevant knowledge*"[190], this is based on an incorrect appreciation of the facts on assessment: see §§60-71 above. The same applies re. the points made at CSkel §236 on consideration of the material before the Government, and it is not accepted that any further or different assessment would have made any difference.

124. As to the Claimant's argument in response to the very small likelihood of UK parts ending up in existing Israeli F-35s,[191], the question is whether the parts "*would be used in the commission of genocide [etc]*". The Government lacked the relevant knowledge in this respect, and the conclusions reached on the absence of such use were at least tenable. As to Reply §42, the evidence shows that the Government considered Article 6(3) in the context of the September Decision and concluded that there was no breach based on the test of actual knowledge, which did not entail an error of law.[192] That was an at least tenable conclusion.

Article 7(3) ATT

125. Article 7 provides in relevant part:

> **"*Export and Export Assessment***
>
> *1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall… assess the potential that the conventional arms or items: (a) would contribute to or undermine peace and security; (b) could be used to: (i) commit or facilitate a serious violation of international humanitarian law; ….*

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[187] Reply §37(b).
[188] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at §§420-423.
[189] CSkel §232.
[190] CSkel §234.
[191] Reply §41; CSkel §§237-241.
[192] Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609]**.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1….

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export."

126. Article 7(3) provides for a balancing exercising for the reasons set out in ADGR §44. Contrary to the Claimant's arguments at ASFG §219, there is a material distinction between "*overriding risk"* and "*clear risk"*; and States are afforded a significant degree discretion when making assessments under Article 7(3).

127. For the reasons in response to Ground 12, the Government assessed that the serious and imminent risk to international peace and security if F-35 components were to be suspended outweighed the risks arising from not suspending.

128. The Claimant's case is, by contrast, that Article 7 obliges the UK (i) to assess whether arms would contribute to or undermine peace and security and whether they could be used to commit or facilitate serious violations of IHL or international human rights law; (ii) to consider measures to mitigate negative risks; and (iii) to assess whether there is an overriding risk (taken to mean clear risk) of negative consequences: if so, the UK is prohibited from exporting the relevant items.[193] This makes little sense and deprives the words "*would contribute to ... peace and security*" of material meaning. On the Claimant's interpretation, a State could correctly consider that export of the arms at issue would make an overwhelming and beneficial contribution to peace and security under Article 7(1), and yet could not accord to that any weight in assessing whether there was an overriding risk under Article 7(3).

129. The Claimant does not challenge the Government's argument as to the outcome of the balancing exercise in favour of contribution to peace and security, if such is permitted by Article 7(3) (which of course it denies).

130. In its Reply (§44) and at CSkel §§243-245, the Claimant raises various points focusing on the interpretation of Article 7(3).

131. At CSkel §243, the Claimant focuses on subsequent practice.

    (1) The Claimant relies on the Voluntary Guide,[194] as to which the Government repeats the points above at §120(3). The individual instances of State practice which the Claimant cites, i.e. the views of Canada, New Zealand and Liechtenstein, do not point

[193] ASFG §219; CSkel §244.1.
[194] CSkel §243.1.

to any subsequent agreement relevant for the purposes of Article 31(3)(b) VCLT.[195] The same point applies so far as concerns the position of the EU.[196]

(2) The statement of 98 States on which the Claimant relies is on its face a "Political Declaration" which, moreover, recognises that "*the final text does not fully meet everyone's expectations*".[197] The political decision of the States appears to be that: "*Any transfer that has the potential to lead to negative consequences, such as serious violations of human rights or international humanitarian law, shall not be authorized*." It is notable that, unlike both the preceding and following paragraphs in the Declaration, this is not cast as what the Treaty establishes.

(3) At CSkel §234.6, the Claimant contends that the term used for "overriding" in the Arabic text equates to "*'great' or 'substantial', that does not imply any form of balancing"*. It does not (cannot) challenge the use of "*risque prépondérant*" in the French text (see also the Spanish text: "*risgue preponderante*"). The Russian and Chinese texts also support the existence of some form of balancing exercise. Notably the Claimant does not contend that the Arabic text can be taken as best reconciling a difference in meaning between equally authoritative texts.[198]

132. At CSkel §244, the Claimant contends that the Government's approach to Article 7 is contrary to its proper interpretation.

(1) As set out in the ADGR §44, the ordinary meaning of Article 7(3), in context, is that it provides for a balancing exercise between the positive and negative consequences in Article 7(1). There is no sound textual basis for equating the meaning of "*overriding risk"* with "*clear risk"*, as the Claimant now accepts.[199] The context of the term "*overriding risk"* strengthens, not weakens, the Government's case, as it is clear from Article 7(1) that there may be positive factors favouring the export, and hence there is a balancing exercise to be carried out, as is then confirmed by the "*assessment*" wording of Article 7(3).[200] The Claimant's arguments deprive the words of Article 7(3) of their ordinary meaning as read in context.[201]

(2) The Claimant's case is that "*a state cannot 'contribute to' peace and security by providing the means for commission of a serious violation of a serious violation of IHL or IHRL*".[202] That is to conflate Articles 6 and 7. The question that Article 7 asks is – so far as is relevant – whether "*the potential that the conventional arms or items*

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[195] CSkel §243.2-243.4.
[196] CSkel §243.7.
[197] Cf. CSkel §243.5.
[198] Cf. Article 33(4) VCLT: "Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."
[199] Reply §44(a).
[200] Cf. Reply §44(b) and CSkel §244.1.
[201] CSkel §244.1 and 244.3; Reply §44(e).
[202] CSkel §244.2.

... could be used to commit or facilitate a serious violation" is overriding notwithstanding "*the potential that the conventional arms or items ... would contribute to ... peace and security*". There is no difficulty in conceiving of such situations, in particular where, as here, the relevant equipment is being supplied to a pool as opposed to one State.

(3) The Claimant's reliance on the object and purpose of the ATT seeks to read out of existence key elements of the treaty purpose as stated in Article 1.[203] As noted in ADGR §44, the purposes of the ATT include "*Contributing to international and regional peace, security and stability*", as well as "*Reducing human suffering"*. The "*contribute to ... peace and security*" factor referred to in Article 7(1) is then a central purpose of the ATT. The ATT thus, both as a matter of its aims and on its express language, envisages that arms exports may have positive as well as negative impacts, and hence envisages a balancing of potentially competing factors.

(4) It is of course the case that the SELC are differently worded.[204] However, there is nothing in the ATT to stop a State establishing more demanding criteria in domestic guidance.

(5) It is not correct that the Government's analysis leaves Article 7.2 out of account. The availability of mitigating measures form (and formed) part of the assessment.[205]

133. The Claimant also argues that overriding a serious risk to one group of people on the basis of an asserted benefit to others would run contrary to the objectivity and non-discrimination principle referred to in Article 7.1.[206] However, this principle refers to the general way in which an assessment is carried out, not the factors that are to be included and then weighed up. There is no form of discrimination in the September Decision, and the Claimant has not explained how or why alleged discrimination should counter or outweigh the actual terms of Article 7(3).

134. The negotiating history is also instructive.[207] In the final round of negotiations, a proposal by Switzerland was made (on behalf of Costa Rica, Ghana, Honduras, Liechtenstein, Panama and Paraguay) to change the word "*overriding"* for "*substantial"*. The justification for preferring "*substantial risk"* to "*overriding risk"* was said to be that under *"overriding risk*" "*… the State party is free to balance the humanitarian consequences of an export with other, undefined interests. This would effectively eliminate the compulsory nature of article 4 and also undermine article 3. 'Substantial' risk is the term that should be used instead..."*[208]

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[203] CSkel §244.2; Reply §44(c).
[204] CSkel §244.4.
[205] Cf. CSkel §244.5.
[206] CSkel §245; Reply §44(d).
[207] Cf. Reply §44(f).
[208] Switzerland proposal on Article 4 (now Article 7), dated 18 March 2013.

135. The final text of Article 7(3) maintained the words "*overriding risk"*, despite this objection. The record therefore shows that the word "*overriding"* was chosen in full knowledge that the term "*overriding*" was understood as giving rise to a balancing test.[209] That the UK may have sought a different test to that adopted is irrelevant. Oxfam's position appears to be that States remained in material disagreement as to the correct meaning of "*overriding*". It would follow that, at best, the *travaux* would point to a material disagreement, while it remains the case that this term was agreed to in circumstances where States were well-aware that the natural meaning was to allow for a balancing exercise.

136. Finally, as to the Claimant's case on inadequate assessment,[210] it is clear from the Letter from the Trade Secretary's Principal Private Secretary dated 2 September 2024 that Article 7(3) was, in substance, considered.[211] It is denied that there were any methodological errors in the Government's assessment as above, and that even if there were, a different approach would have led to any different outcome (s.31 Senior Courts Act 1981).

Ground 8(c): Article I of the Genocide Convention

137. By Article I of the Genocide Convention, States parties undertake to prevent genocide: "*The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.*"

138. In brief terms, and as follows from §§430-431 of the *Bosnian Genocide case*,[212] which the Court is invited to read:

    (1) The State's obligation to prevent, and the corresponding duty to act, arise when the State learns or, or should normally have learned, of the existence of a serious risk of genocide.

    (2) From that moment on, 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 the specific intent required for genocide ("*dolus specialis*"), it is under a duty to "*employ all means reasonably available to [it], so as to prevent genocide so far as possible*".

    (3) However, no violation of the duty to prevent can occur unless and until there is actually a genocide. A "*State can be held responsible for breaching the obligation to prevent*

[209] Switzerland proposal on Article 3 (now Article 6), dated 18 March 2013. See also, ATT Monitor, Report 27 March 2013.
[210] CSkel §246.
[211] Letter from the Defendant's Principal Private Secretary to the Foreign Secretary's Private Secretary, dated 2 September 2024 **[CB/E/18/284]**.
[212] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at §431 (emphasis added).

genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs". (See also the end of §431, reiterating this point.)

(4) There can then be responsibility for breach of the duty to prevent "*if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance*."

139. Therefore, for a State to have violated the duty to prevent, it is necessary (i) that the State have learned of a serious risk of genocide, (ii) that the State failed (to the requisite and demanding degree) to take reasonably available preventive steps, (iii) and also that genocide has actually occurred.[213]

140. It follows that, even if it were able to succeed with regard to serious risk and failure to take preventative action (it cannot), the Claimant's case still requires this Court to step into the shoes of the ICJ and decide that Israel has committed acts of genocide (or other acts concerning genocide listed at Article III of the Genocide Convention). It is not the Government's case that there is no obligation to prevent genocide until genocide takes place / is held to have taken place (cf. the mischaracterisation at CSkel §§251-258). The point is that the Claimant contends that the Government has acted inconsistently with (i.e. in some way in breach of) the obligation of prevention, and such a case is necessarily predicated on genocide having taken place, and there has been no finding to that effect.

No basis for this Court to find that Israel has committed genocide in Gaza

141. No English court, and no international court or tribunal, has found that Israel has committed genocide in Gaza. Nor should this Court make such a finding, for three reasons.

142. **First,** the Government repeats its submissions above made in relation to non-justiciability. The inappropriateness of the English Court exercising jurisdiction to make a finding of genocide is especially marked given that this very question is currently before the ICJ in *South Africa v. Israel* and *Nicaragua v. Germany* (the alleged failure to prevent genocide is now also an issue in *Sudan v. UAE*). The Claimant says that the Court should not reach a conclusion about whether genocide has been committed (for different reasons: Reply §44(a)). However, absent such a finding, there can be no determination of a breach of Article I of the Genocide Convention.

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[213] *Ibid*. See also the subsequent reiteration of this position in the *Croatian Genocide* case and the *Ukraine v. Russia ICSFT* case: ADGR, paras. 51-52.

143. **Second,** the Claimant has not pleaded any particulars, confining itself to the assertion that "[i]*t is Al-Haq's position that Israel is committing genocide in Gaza*".[214]

144. **Third,** in any event, the evidence available does not support a finding of genocide, and certainly there is a tenable view that no genocide has occurred or is occurring. The crime of genocide requires both acts specified in Article II of the Convention, and that those acts were done "*with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*" (the "*dolus specialis*"). The ICJ has repeatedly emphasised the significance of the *dolus specialis*, stating in the *Bosnian Genocide case* that "[g]*reat care must be taken in finding in the facts a sufficiently clear manifestation of that intent*."[215] The Government's assessment, based on analysis by FCDO officials, is that the evidence does not establish the existence of the "*dolus specialis*", especially in light of the following:

(1) There is no evidence of a high-level strategic decision, passed down through military chains of command, like that which was in evidence for the massacre and deportations at Srebrenica that were found in the *Bosnian Genocide case* to constitute genocide (the ICJ's only finding of genocide to date).[216]

(2) FCDO officials have assessed statements by Israeli public officials that are identified as concerning. The statements of most concern were found to be concentrated in the immediate aftermath of the attacks of 7 October 2023, and to have reduced over time.[217] Those statements which were made at a later date, and which still give rise to concern, were assessed to be "*primarily political*",[218] "*from specific actors*" and "*not assessed to be representative of the Israeli government overall*",[219] and in particular "*did not reflect the strategy of decision makers within the War Cabinet*".[220]

(3) The pattern of conduct by Israel in Gaza does not, to the requisite standard of certainty, give rise to an inference of *dolus specialis*. The ICJ has emphasised that *dolus specialis* can only be inferred from a pattern of conduct if "*this is the only inference that could reasonably be drawn from the acts in question*."[221] The assessment led by FCDO officials was that (i) there was no pattern suggesting deliberate targeting of civilians or civilian objects, (ii) the rough ratio of military to civilian casualties in the conflict was in line with conflicts fought in similarly dense urban environments (iii) the ratio of military to civilian casualties also had

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[214] ASFG §224.
[215] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at §189.
[216] *Ibid*, at §295.
[217] "ECJU C1 Assessment" of 11 June 2024, §17 **[SB/E/102/1426-1427]**.
[218] "ECJU C1 Assessment" of 11 June 2024, §15 **[SB/E/102/1426]**.
[219] Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609]**.
[220] "ECJU C1 Assessment" of 11 June 2024, §28 **[SB/E/102/1426]**.
[221] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at §148.

to be assessed taking into account Hamas' systematic use of civilians and civilian objects as shields, and (iv) although Israel's withholding of humanitarian aid and treatment of civilians gave rise to concerns as to compliance with IHL, that did not equate to an intention to destroy the Palestinian people.[222] The FCDO's assessment concluded that Israel's pattern of conduct in the hostilities could reasonably be explained as a legitimate military campaign waged as part of an intensive armed conflict in a densely populated urban area.[223] The assessment of an absence of *dolus specialis* was, at the very least, tenable.

145. Those three reasons are also sufficient to support the FCDO's assessment, and the Government's conclusion, that there is no serious risk of genocide occurring.[224]

146. The Claimant argues[225] that the requirement to take preventive measures against genocide is separate from the requirement that the genocide must actually occur, and that the former can be breached without the latter.[226]

(1) The ICJ, however, has made quite clear that in the absence of an actual genocide (or related violation) "*a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent*."[227] When the ICJ turned to consider the facts then at issue, it said that "[f]*or the reasons stated above (paragraph 431), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres*",[228] that being the only factual situation in which the ICJ had found that genocide had occurred.

(2) The Claimant cannot explain away the ICJ's approach by drawing a (non-existent) distinction between a violation and responsibility. The ASR establish that "[e]*very internationally wrongful act of a State entails the international responsibility of that State*."[229] The ASR do not recognise a concept of State responsibility

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[222] "ECJU C1 Assessment" of 11 June 2024, §28 **[SB/E/102/1427-1428]**.
[223] "ECJU C1 Assessment" of 11 June 2024, §28 **[SB/E/102/1428]**.
[224] "ECJU C1 Assessment" of 11 June 2024, §28 **[SB/E/102/1428]**. That the assessment was focused on the "*serious risk*" threshold is plain from §23: "*…for the purpose of our assessment of whether there is a 'serious risk' of genocide for the purpose of the duty to prevent genocide, we do not judge that it materially alters the assessment that Israel does not intend to commit genocide…"*: **[SB/E/102/1428]**.
[225] ASFG §224.
[226] CSkel §258.
[227] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, §431. See also §180: "*The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed … That will also be the case … for purposes of the obligation to prevent genocide.*"
[228] *Ibid*, at §433.
[229] *Responsibility of States for Internationally Wrongful Acts* (2001), Article 1. Although Article 2 provides that there is an internationally wrongful act by a State where there has been an act or omission attributable to the State, and that act or omission breaches an international obligation, the ILC Commentaries to Article 2 make it clear that in respect of some international obligations those two conditions may be necessary but not sufficient to establish a wrongful act: §9.

independent of the existence of an internationally wrongful act.[230]

(3) There is also no support in the text of Article I of the Genocide Convention or in the *Bosnian Genocide case* for imposing a free-standing duty to undertake an assessment of whether genocide is occurring or will occur, which can be breached regardless of whether genocide actually occurs. The ICJ has characterised the duty compendiously as a "*duty of conduct*", to "*take all measures to prevent genocide which were within* [the State's] *power*,"[231] and its approach (see above) is inconsistent with there being a separate component of Article I as to which breach could be found independent of a finding on genocide.

(4) The UK's written submissions to the ICJ in *Ukraine v. Russia*, on which the Claimant relies,[232] were concerned with the situation then before the ICJ, i.e. the duty on a "*Contracting Party which is purporting to take action pursuant to the obligation to prevent genocide to carry out an assessment*", and were in any event seemingly not accepted by the Court.[233] This does not indicate that there is a freestanding duty to carry out an assessment in all circumstances; rather, that in the circumstances where Russia was purporting to take action justified by a duty to prevent, it was incumbent on Russia to have first undertaken a good faith assessment as to whether the duty was engaged. There is no basis for the contention that the Government has breached the duty of candour or acted improperly in the submissions it makes in the present proceedings.[234]

Alleged failures in assessment

147. The Claimant[235] and Amnesty International / Human Rights Watch have alleged errors in the assessment of whether there was a serious risk of genocide. It is alleged that, when the FCDO examined the conduct of hostilities, it:

(1) Examined only whether there had been deliberate targeting of civilians by Israel.[236] That mischaracterises the assessment. The assessment conducted on 11 June 2024 examined civilian "*casualties*" (not just killings, as the Claimant appears to allege), and it also looked at "*extensive destruction of civilian infrastructure – including schools, hospitals, refugee camps and aid convoys*", and displacement of the population. It particularly noted as potentially relevant to allegations of genocide that "*there has been a significant impact on children, healthcare and access to*

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[230] Cf. Reply §§49-50. Nor does Article 14(3) of the 2001 Articles, dealing specifically with duties of prevention, draw a distinction between violation and responsibility: it provides that "*The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs…*"
[231] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at §430.
[232] Reply §49; CSkel §256.
[233] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening*), Preliminary Objections, 2 February 2024, §§139-143.
[234] Reply §52.
[235] CSkel §§262-266.
[236] Reply §§44(a)(ii), (b), 57; CSkel §264.

food";[237]

(2) Failed to take into account the humanitarian situation, including possible violations of IHL by Israel in respect of humanitarian relief (CSkel, §264.1).[238] This is not correct: see the consideration noted above as to the impact on children, healthcare and access to food. The FCDO's assessment of whether genocide was occurring also gave specific consideration to "[c]*oncerns ... about Israel's commitment to comply with IHL in the area of humanitarian relief*", and concluded that Israel's stance on humanitarian relief, namely to withhold aid to put pressure on Hamas to release hostages, did not suggest an intention to destroy the Palestinian people.[239] A further review on 24 July 2024 adopted the same conclusion.[240]

(3) Failed to take account of the forced displacement of Palestinian citizens.[241] This is incorrect. The scale and lawfulness of the displacement of civilians featured heavily in assessments across the course of the conflict.[242]

(4) Abdicated responsibility for distinguishing between political rhetoric, and statements which could speak to the conduct of the campaign in Gaza.[243] In making this criticism, the Claimant quotes from the First IHLCAP Assessment, which was undertaken in November 2023.[244] Later assessments, including assessments under Criterion 1 undertaken in June and July 2024, did distinguish between the two types of statements.[245]

(5) Improperly excluded consideration of statements by individuals in Israel's Security Cabinet.[246] However, it was not irrational for the Government to determine that its

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[237] "ECJU C1 Assessment" of 11 June 2024, §12 **[SB/E/102/1425]**. See also discussion of humanitarian access at §§16 and 21, and the significance of whether Israel is deliberately targeting civilian infrastructure at §20: **[SB/E/102/1426-1427]**.
[238] See also AI and HRW's Skeleton §18.2.
[239] "ECJU C1 Assessment" of 11 June 2024, §21 **[SB/E/102/1427]**. See also Annex B to the ECJU-FCDO Submission on Arms Exports to Israel dated 23 May 2024, "Annex B: Assessments against other relevant SELC criteria" **[SB/E/1153]**.
[240] Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609]**
[241] CSkel §264.2; see also AI and HRW's Skeleton §18.3.
[242] The Evidence Bases for the IHLCAP Assessments gave specific consideration to the scale of civilian displacement: see eg evidence bases dated 3 November 2023 [**SB/E/41/558**], 17 November 2023 [**SB/E/45/599, 621-622**], 1 December 2023 [**SB/E/50/680**], 15 December 2023 [**SB/E/56/773**], 13 January 2024 [**SB/E/64/825**], 28 January 2024 [**SB/E/66/861**], 24 April 2024 [**SB/E/85/1046-1047, 1072**]. The IHLCAP Assessments then considered civilian displacement as part of considering Israel's record of compliance with IHL, including displacement as a result of evacuation orders: see eg First IHLCAP Assessment dated 10 November 2023 [**SB/E/44/588**], Second IHLCAP Assessment dated 20 November 2023 [**SB/E/46/637, 639**], Out of Cycle Assessment dated 30 November 2023 [**SB/E/49/671, 672**], Fourth IHLCAP Assessment dated 29 December 2023 [**SB/E/61/813**], Fifth IHLCAP Assessment dated March 2024 [**SB/E/74/927, 928**], Sixth IHLCAP Assessment dated 24 April 2024 [**SB/E/83/996, 1015**]. The ECJU Assessment of Criterion 1 dated 11 June 2024 also considered displacement of the civilian population specifically in the context of assessing compliance with the Genocide Convention [**SB/E/102/1425**].
[243] CSkel §265.
[244] **[SB/E/44/588]**.
[245] "ECJU C1 Assessment" of 11 June 2024, §15 **[SB/E/102/1426]**; Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609]**.
[246] CSkel §265.

assessments of genocidal intent should focus on statements emanating from the War Cabinet and its decision-makers.[247]

(6) Failed to take into account statements by senior Israeli officials that are relevant to establishing genocidal intent.[248] As to those:

- The statement by the Prime Minister of Israel, identified in the Claimant's skeleton at §265.1, was included in a list of statements compiled by an FCDO contractor,[249] which formed part of the evidential the basis for the IHLCAP assessments.[250]

- Of the statements by various Israeli politicians referenced in the Claimant's skeleton at §265.3, all but one were made by politicians who were not members of Israel's War Cabinet. ECJU has assessed that statements like these "*did not reflect the strategy of the decision makers within the War Cabinet*" and therefore did not indicate a genocidal intent motivating government decisions.[251]

- §265.3 also cites to a statement by Minister Without Portfolio Benny Gantz, on 31 January 2024, advocating the reduction of humanitarian aid "*as part of the pressure to build another mechanism in the Strip and also as part of the moves to return the captives.*"[252] Statements like this were considered in IHLCAP Assessments.[253] ECJU assessed that statements like this, which raised concerns about Israel's commitment to comply with IHL in the area of humanitarian relief, were a factor to consider but "[do] *not automatically equate to harbouring genocidal intent*" because reasons for withholding aid (such as putting pressure on Hamas to release hostages), "*while inconsistent with IHL, … do not suggest an intention to destroy Palestinian civilians*."[254]

- The statements quoted in the Claimant's skeleton at §265.4 were made by military officials of various ranks, including a Master Sergeant (a non-commissioned officer). The Claimant has not explained why statements

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[247] "ECJU C1 Assessment" of 11 June 2024, §15 **[SB/E/102/1428-1429].**
[248] CSkel §265.
[249] **[SB/E/99/1267]**. The statement as considered differs slightly from that quoted by the Claimant, presumably as a result of differences in translation: "*I want to clarify that we will not end this war with anything less than achieving all of its objectives. And this means eliminating Hamas, returning all the captives, and ensuring that Gaza does not pose any threat to Israel. We will not withdraw the army from the Gaza strip, and we will not release thousands of troublemakers. All of this will not happen; what will happen is a resounding victory.*"
[250] The IHL Cell's use of information collated by a third party contractor is explained in Hurndall 2, §§16-17 **[SB/B/14/116-117]**. See eg the Seventh IHLCAP Assessment **[CB/E/41/692]**, explaining the IHL Cell's methodology in completing IHLCAP Assessments, which includes reviewing information collated by a third party and assessing the Government of Israel's stated commitment to IHL.
[251] "ECJU C1 Assessment" of 11 June 2024, §15 **[SB/E/102/1428-1429].**
[252] For this statement, see **[SB/F/156/2404**].
[253] See eg the Fifth IHLCAP Assessment, §47 **[SB/E/938]**.
[254] "ECJU C1 Assessment" of 11 June 2024, §21 **[SB/E/102/1428-1429].**

made by some individuals, amongst the thousands of members of the armed forces, as opposed to senior government decision-makers, should be attributable to the Israeli government and/or indicative of the intent behind Israeli government actions.

- Further, the first two statements quoted in the Claimant's skeleton at §265.4, when viewed in full, do not reveal any intent to destroy the Palestinian people, but rather a concern that support for Hamas and terrorism was beginning to pervade the civilian population.[255]

- The final statement quoted by the Claimant at §265.4, once again, concerns the advocation of restrictions on humanitarian aid, which have been addressed above (third bullet).

(7) Made an error of approach in relation to the findings of the ICJ in *South Africa v. Israel* (CSkel, §263).[256] The evidence establishes that the findings of the ICJ were fully taken into account by the Government.[257]

148. As to those findings, and the findings in *Nicaragua v. Germany*, the ICJ did not make a finding that there is a "*serious risk*" of genocide[258] (cf. the Claimant's assertion that the orders "*equate*" to such a finding of serious risk: Reply §55 and CSkel §263). The ICJ's findings were:

(1) In *South Africa v. Israel*: that at least some of the rights claimed by South Africa and for which it was seeking protection are plausible (including the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III).[259]

(1) Also in *South Africa v. Israel*: that there was a "*real risk*" of prejudice to such plausible rights under the Convention.[260] Contrary to the Claimant's assertion, this is not "*tantamount*" to a finding that there is a "*serious risk*" of genocide.[261]

(2) In *Nicaragua v. Germany*: there was no finding of a risk of genocide or the rights

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[255] The first statement is at **[SB/F/156/2363]**, and reads in full: "*It saddens me to know that a few months ago we were in the area of this beach with our battalion. It was clear that this is a war. A war on Gaza. In all of Gaza! There was no confusion, and why? Because all of Gaza is one big terror, including the bathers on the beach in the picture."* The second statement is at **[SB/F/156/2365]**, and reads in full: "*There are no civilians in this war… I was last in Gaza in 2004 . . . we knew what families, which groups were not pro-terrorist . . . now I don't know who's innocent here. What the terrorists have managed to do since 2005 is to brainwash a whole generation of young kids into hating Israel, into embracing terrorism as a means of life, and that that's the only future and hope for them.*"

[256] See also AI and HRW Skeleton §18.

[257] "ECJU C1 Assessment" of 11 June 2024, §§6-9, 14 **[SB/E/102/1423-1425]**.

[258] Cf. ASFG §§222-223; Reply §48.

[259] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order, 26 January 2024, §54.

[260] *Ibid*, §§66, 74.

[261] Cf. CSkel §263.1, 263.4.

of the Palestinians under the Genocide Convention, and the ICJ refused to indicate the requested provisional measures.[262]

149. Accordingly, the Government was correct to conclude that the evidence does not establish that there was a serious risk of genocide, nor that genocide is occurring or has occurred; and certainly, in all of the circumstances, that conclusion was at least tenable.

150. The Claimant argues that it would be improper for the Court to reach a conclusion that genocide has not been committed in light of the Court's order of 30 January 2025, refusing the Claimant permission to include grounds that challenged the assessments prior to the September decision.[263] The import of the Court's decision of January 2025 was that it will not, in these proceedings, seek to resolve contested questions of fact regarding Israel's conduct of hostilities in Gaza. The Government does not ask the Court to decide that genocide has not been committed and is not being committed: its primary position is that the Court should not make a finding on this question.[264] It is also not necessary to the Government's case that the Court rely on or agree with the FCDO's assessment of the conduct of hostilities in Gaza: as explained above, the Government's primary position is that the Court should not enter into an assessment.

151. The Claimant also cannot make out a violation of the obligation to prevent by attaching this to the offence of an attempt to commit at Article III(d) of the Convention (cf. ASFG, §226). The same considerations that make it inappropriate for the Court to make a finding of genocide apply with equal force to an allegation of attempted genocide.

In any event, the UK has done all that is required by Article I

152. In any event, the Government did not fall short of the standard of conduct required of it by Article I of the Genocide Convention.

153. The measures required by the obligation to prevent genocide are such measures as are "*reasonably available* [to the State in question]", and "*which might have contributed to preventing the genocide*".[265] The ICJ has emphasised in particular the question of whether the State had the "*capacity to influence effectively the actions of persons likely to commit, or already committing, genocide*."[266] The ICJ has also explained that it will not readily find a breach of this duty: "*the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation*" (i.e., of breach of the duty to prevent).[267]

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[262] *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order, 30 April 2024.
[263] Reply §53-54; CSkel §259.
[264] ADGR §§13(c), 14-19, 54. Cf. Reply §53.
[265] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at §430.
[266] *Ibid.*
[267] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at §210.

154. The Government was not required by Article I to suspend export licences for F-35 components. The Government has suspended exports to Israel of arms assessed to be for use in military operations in Gaza as already noted. The limited exception was only in relation F-35 components for all the reasons given. Those reasons indicate that suspending export licences for F-35 components was not "*reasonably available*" to the UK. In any event, it is entirely unrealistic to suppose that the suspension of these components (a) would have had any material impact on Israel's military policy in Gaza or (b) would have significantly curtailed its military activities in Gaza; or (c) more generally that any possibility of genocide would have been altered by any such curtailment on the use of F-35s. Reference is made to §§105-106 above in the context of the alleged violation of CA1.

Ground 8(D): aid and assistance

Article 16 ASR

155. Ground 8(d) is premised on the application of secondary obligations of customary international law (Articles 16 and 41 ASR), the nature and content of which are in significant part not settled. In order to establish the liability of the UK under Article 16 or 41 ASR in respect of aid or assistance to Israel's commission of an unlawful act, it would first be necessary to establish that Israel has indeed committed the relevant internationally wrongful act (Article 16) and/or serious breach of a peremptory norm of international law (Article 41). Such wrongful acts have not been established, and it would not be appropriate for this Court to adjudicate the international legality of the acts of another State.[268]

156. Article 16 provides:

> *"Article 16*
>
> *Aid or assistance in the commission of an internationally wrongful act*
>
> *A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
>
> *(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*
> *(b) the act would be internationally wrongful if committed by that State."*

157. There are (at least) four reasons why there is no question of aid or assistance in this case.

158. **First**, a State cannot be liable for providing aid or assistance to a wrongful act unless the wrongful act has actually taken place. This is recognised in the ILC Commentary on

[268] See §165(3) below. As noted at 40(3) above the alleged wrongful act include issues that are currently being disputed before international courts in *South Africa v Israel* and *Nicaragua v Germany*.

ASR, Article 16: "*A State is not responsible for aid or assistance under article 16 unless … the internationally wrongful conduct is actually committed by the aided or assisted State.*"[269] It has not been established that Israel is committing any internationally wrongful acts, whether using F-35 components originating in the UK or at all.

159. **Second**, the acts of aid or assistance must have actually caused or contributed to the wrongful act.[270] There must be substantial involvement in or a material contribution to the wrongful act.[271] That is clearly not the case here for the reasons given at §63 of the ADGR.

160. **Third,** in providing aid or assistance a State must "*do so with knowledge of the circumstances of the internationally wrongful act*": ASR, Article 16(a). Actual knowledge is required, and constructive knowledge is not sufficient.[272] See also with respect to genocide §§421-423 of the *Bosnian Genocide case,* where the ICJ stated:[273]

> "*421. … there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator. …*
>
> *422. … it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; …*
>
> *423. … It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide."*

161. There is no evidence to establish actual knowledge (or indeed constructive knowledge) of an internationally wrongful act.

162. **Fourth**, a State will only be responsible for providing aid or assistance that is given "*with a view to*" facilitating, or which was "*intended*" to facilitate, the international wrongful acts.[274] Accordingly, "*the assisting State must have clear knowledge and intention to collaborate in the commission of an internationally wrongful act of another State*", and

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[269] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, at §5.
[270] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, at §1.
[271] James Crawford, *State Responsibility: The General Part* (2013), at p.403.
[272] James Crawford, *State Responsibility: The General Part* (2013), at p.406.
[273] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43,
[274] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001), Vol. II, Part Two, Commentary to article 16, at §5.

it must be knowledge "*with a high degree of particularity*".[275] As above, where the primary wrongful act has an intention element, the aiding or assisting State must have been aware of the specific intent of the principal perpetrator.[276] The requirement for intention is further described as "*the essential element in defining complicity*" (i.e. aid or assistance).[277] This view is further supported by Crawford:

> "*The very 'idea' of complicity in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving supplies intends to use them. Without this, there can be no question of complicity."*[278]

163. There is no evidence of any intent on the part of the Government to collaborate in violations of IHL. To the contrary, the evidence is that the F-35 Carve Out was decided with a view to ensuring the UK's security, and international peace and security.

164. In its Reply, the Claimant appears to accept that under Article 16 ASR:

    (1) It is necessary that an internationally wrongful act has taken place;[279]

    (2) The aid or assistance in question must have actually caused or contributed to the wrongful act and there must be substantial involvement or a material contribution thereto.[280]

165. In its Skeleton, the Claimant argues that:

    (1) There is no evidence of the Government having assessed the compatibility of the F-35 Carve Out with Articles 16 and 41 ASR;[281]

    (2) There are only three elements to the test under Article 16 ASR (it argues that intent is not included);[282]

    (3) The Court can proceed on the basis that an internationally wrongful act has taken place;[283]

    (4) The UK contribution does not need to be substantial or material.[284]

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[275] Christian Dominicé, "Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State", in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (2010), at p. 286.
[276] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, at paras. 421-422.
[277] James Crawford, *State Responsibility: The General Part* (2013), at p. 405.
[278] James Crawford, *State Responsibility: The General Part* (2013), at p. 406.
[279] Reply §59(a).
[280] Reply §59(b).
[281] CSkel §269.
[282] CSkel §§270, 277.
[283] CSkel §273.
[284] CSkel §276; cf. Reply §59(b).

166. These arguments should be dismissed for the following reasons:

(1) There was no need for the Government to consider Articles 16 and 41 separately. All the material facts bearing on those Articles were considered in any event. Further, any such separate consideration would have made no difference (s.31 of the Senior Courts Act 1981) given that there was no breach of Articles 16 or 41 ASR for the reasons set out below.

(2) Intent is plainly part of the test under Article 16 ASR. This is made clear by §5 of the ILC Commentary and authorities cited at §65 of the ADGR. The position taken by the Claimant at CSkel §277.1 appears inconsistent with its own authority, in particular Moynihan cited at Reply §59(c).[285] As to the Claimant's alternative argument that if there is a test of intent, it can be imputed where there is certainty or near certainty as to the recipient State's intended use to commit a wrongful act,[286] even if correct, this is not satisfied on the facts. As noted above, on the facts, the Government has concluded that overall Israel is not committed to complying with IHL, but no specific violations of IHL have been found. Further or alternatively, any F-35 components supplied are to facilitate the F-35 programme for all States.

(3) It is wrong to suggest that the Court can proceed on the basis of an assumption or assumed fact that there is an internationally wrongful act by Israel. There must be an internationally wrongful act before Article 16 can be engaged. It is further important to know precisely what that internationally wrongful act is if a State is to have knowledge of the circumstances of an internationally wrongful act, in accordance with §§421-423 of the *Bosnian Genocide case.* Finally, in *R (on the application of Campaign Against the Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin), §56, the Court accepted that it would be necessary to find that Saudi Arbia had breached international law in considering an argument based on Article 16 ASR. The same logic applies here and any attempts to side-step this issue should be rejected.

(4) The UK contribution must plainly comprise substantial involvement or entail a material contribution for the reasons set out at §63 of the ADGR. The paragraph of the ILC Commentary on which the Claimant relies does not support its position.[287]

167. Insofar as they are maintained, the Claimant's arguments at §59 of the Reply do not assist:

(1) Reply, §59(a): any alleged methodological errors are beside the point. The Court has determined the scope of the issues and it is not for the Claimant to seek to go behind that.[288] It was at least tenable for the Government to take the view that no internationally wrongful acts have taken place. Further, as already explained above,

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[285] Moynihan, §§64.
[286] CSkel §277.2.
[287] James Crawford, *State Responsibility: The General Part* (2013), at p. 403.
[288] See [2025] EWHC 173 (Admin).

the allegedly unlawful acts of Israel are not justiciable.

(2) Reply, §59(b): in the absence of an internationally wrongful act by Israel, the Claimant cannot prove that the aid or assistance provided to Israel (the export of F-35 components) contributed to any violations of IHL or made a substantial or material contribution thereto. See further ADGR, §63. Andrews-Briscoe 2 does not change that position because it does not account for alternative theatres in which F-35 may be used, or in fact demonstrate that the transfer of F-35 components on the facts makes a substantial or material contribution to any breaches of international law.

(3) Reply, §59(c): to the extent that the knowledge requirement under Article 16 includes wilful blindness, this was plainly absent (see the nature of the assessment carried out, as outlined at §§60-71 above.

(4) Reply, §59(d): §166(2) above is repeated.

Article 41

168. Article 41 of the ASR provides in material part:

> *"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.*
>
> *2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."*

169. The Claimant's case under Article 41 proceeds on an assumption that Article 41 reflects customary international law. The Government's position is that its status is uncertain. The burden is on the Claimant to prove that a rule it relies on is part of CIL.

170. Further, even if Article 41 reflects CIL, the test for aid and assistance under Article 41 is substantively the same as under Article 16 and is not met.[289] It has not in any event been shown that the export of F-35 components makes a substantial or material contribution to the maintenance of the situation in the occupied Palestinian Territory (the view to the contrary is at the very least tenable), and it has not been shown that the UK intends thereby to assist Israel to maintain that situation: see AGDR, §§66-67 and see also §§105-106 above.

171. The Claimant's response to the Government's arguments, in the Reply at §61, is to assert that allowing Israel to maintain a fleet of F-35 fighter jets meets the threshold of substantial contribution to the occupation. But that does not answer the legal objections raised. It would be for the Claimant to establish that Israel is committing serious breaches

[289] ADGR §66.

of peremptory norms, as to which the supply of parts to the F-35 programme renders aid or assistance in maintaining such breaches. It does not come close to doing so.

172. In its Skeleton, the Claimant further argues that: (1) that there is no requirement of intent under Article 41; and (2) that it is therefore irrelevant to the assessment under Article 41 why F-35 components may be supplied.[290] But that again does not answer the Government's objection that there has been no substantial or material contribution on the facts, nor does the Government agree that intention does not form part of the test under Article 41.[291] That is at least a tenable view. It is of further note that the ICJ Advisory Opinion *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, expressly excluded the Gaza conflict from its scope, at §81.

C. GROUND 9

173. The Claimant contends that the following are CIL obligations that should form part of the English common law[292] (the "**Alleged CIL Obligations**"): the obligation to respect and ensure respect for IHL; the obligation to prevent genocide; the obligation not to facilitate internationally wrongful acts.[293]

174. CIL has consistently been held to be a "*source*" when developing new principles of common law: see *R (The Freedom and Justice Party) v The Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, §§114, 123. Whether to shape the common law in this way is a "*policy issue*": *R (on the application of Keyu) v. Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, §§149-150. There is no blanket rule providing for automatic incorporation of CIL rules into the English common law. A majority in the Supreme Court explained in *The Law Debenture Trust SC* at §204(per Lord Reed, Lord Lloyd-Jones and Lord Kitchin, Lord Hodge agreeing):

> "*…the application by courts in this jurisdiction of rules of international law is clearly restricted by domestic constitutional principles, including principles of non-justiciability. Moreover, it is not possible to make sweeping deductions from broad statements of principle. The relationship between customary international law and the common law in this jurisdiction is far more complex. It seems preferable, therefore, to have regard* [to] *customary international law not as automatically a part of the common law but as a source of the common law on which the courts in this jurisdiction may draw as appropriate. As part of this process they will have to consider whether there may exist any impediments or bars to giving effect to customary international law as a result of domestic constitutional principles. Moreover, as Lord Mance JSC pointed out in* [*Keyu*]*, it appears that judges in this jurisdiction may face a policy issue as to*

[290] CSkel §§279.1 and 279.2.
[291] See ADGR, §66.
[292] The Government's submission in response to Ground 9 are made without prejudice to the question whether the relevant obligations are all to be recognised as rules of CIL.
[293] CSkel §281.1; ASFG §237.

whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of customary international law, the presumption should be in favour of its application." (emphasis added)

175. There are important reasons of policy and constitutional principle why the Court should not adapt the English common law so as to adopt the Alleged CIL Obligations.

176. **First,** the Claimant's argument would cut across the rules on FAS and non-justiciability, which constitute a constitutional constraint on the jurisdiction of the English courts, as explained at §§41-51.

177. **Second,** the Claimant is not seeking to adapt or guide the development of existing common law rules, but rather to create new rules constraining executive decision-making by reference to international law. In *The Law Debenture Trust SC*, a majority in the Supreme Court refused to accept that an English law contract could be lawfully repudiated in the application of international law rules on lawful countermeasures, because those international law rules could not be relevant to English law rights and duties under contract law: §207. This reflects the caution of English courts when developing the common law: *R (Elgizouli) v Secretary of State for the Home Department* [2021] AC 937, §170 (per Lord Reed, Lord Hodge agreeing), also §193 (per Lord Carnwath).

178. The Claimant advocates for the wholesale adoption of CIL obligations into English domestic law, apparently solely as restrictions on Government decision-making.[294] This appears inconsistent with the rule that a Government decision-maker is not required to have regard to the UK's international obligations, nor give effect to them: see *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, §§55-58, (per Lord Brown, Lords Bingham and Rodger agreeing), and §18 (per Lady Hale). The position was explained by the Supreme Court, in a unanimous judgment given in *R (Yam) v Central Criminal Court* [2016] AC 771, at §35:

"[A] *domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate*."

179. **Third,** the Alleged CIL Obligations would interfere with Parliament's choices in the relevant areas. It is inappropriate for a court to allow international law rules to guide the common law where Parliament has already entered the field to strike the appropriate balance: see e.g. *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, holding that it would be inappropriate to import into the English common law a customary international law obligation (if it existed) to investigate killings, because Parliament had already legislated in this field: §117 (per Lord Neuberger, Lord Hughes

[294] ASFG §240; Reply §64(e).

agreeing) and §151 (per Lord Mance); also *Al-Saadoon v The Secretary of State for Defence* [2016] EWCA Civ 811, §200.

180. Parliament has enacted legislation to give effect in English law to certain rules of IHL, and to prohibitions on genocide and the commission of war crimes. This was done in particular by the enactment of the Geneva Conventions Act 1957 and the International Criminal Court Act 2001. In enacting this legislation, Parliament chose not to incorporate into domestic law the Alleged CIL Obligations:

    (1) The Geneva Conventions Act 1957 was enacted to enable effect to be given to the Geneva Conventions of 1949, and Additional Protocols I and III, those conventions being recorded in schedules to the Act. However, Parliament chose only to provide for the criminalisation of "*grave breaches*" of the Conventions. The Act does not incorporate into domestic law the obligation in CA1 to ensure respect for IHL.

    (2) The International Criminal Court Act 2001 criminalises the commission of genocide and war crimes (see at s.51), but it does not make any provision in domestic law for the obligation to prevent genocide, and nor does it make any provision for the CIL obligation to not aid or assist in breaches of IHL or the commission of war crimes.

181. The above considerations are not altered by the Claimant's reference to *jus cogens*.[295] The Claimant has not identified any authority providing for any special rule in this respect. The Claimant's reference to the judgment of Lord Bingham in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 does not assist: the conclusion that evidence obtained by torture should be excluded from judicial proceedings was premised on the fact that (1) "*the English common law has regarded torture and its fruits with abhorrence for over 500 years*", amounting to a constitutional principle (§51); and (2) the ECHR, to which the English courts are required by domestic law to give effect, itself prohibits torture and takes account of the UN Convention Against Torture(§52). This is not relevant to the present case.

D. GROUND 10

182. This aspect of the claim is advanced on the vague and speculative basis that at some unspecified point in the future, circumstances may arise which require investigation by reference to matters of the criminal law. In the circumstances of this case, the Court is invited to dismiss this Ground at the threshold stage as a matter of discretion and/or on the basis that it is not justiciable. In the alternative, it is submitted that there is no basis for concluding on the current information that the F-35 Carve Out does create any "*clear and significant risk*" of facilitating crime. The following may be noted, by way of preliminary observations:

    (1) The Claimant does not assert that there has been the commission of an identifiable

[295] Reply §65; CSkel §292.

criminal offence.

(2) The Claimant does not assert that an identified individual has committed a criminal offence.

(3) The Claimant does not assert that an identified individual currently subject to the jurisdiction of the criminal law of England and Wales has committed a criminal offence as a principal or as a secondary party.

(4) The Claimant accepts that not every serious violation of IHL will amount to a violation of the international criminal law.[296]

(5) The exercise invited by the Claimant is entirely prospective.

The permissibility or appropriateness of the exercise proposed by the Claimant

183. Only in the most exceptional case would it be permissible for the civil courts to make a finding of prospective criminal liability. This reflects the broader proposition that the civil courts should not stray into areas where the criminal courts would only be engaged with a concrete set of facts, looking retrospectively. In *R (Rusbridger and another) v. Attorney General* [2004] 1 AC 357, the House of Lords allowed an appeal by the Attorney General concerning an application for a declaration as to whether particular conduct would engage the criminal law, before embarking on a particular course of conduct. Citing Viscount Dilhorne in *Imperial Tobacco Ltd v. Attorney General* [1981] AC 718 at 742, Lord Rodger explained (at §56) that only in the most exceptional case will the Courts accede to an application in a civil case for a declaration concerning the lawfulness, in the criminal law, of future conduct. Lord Steyn stated at §19 that: "*Normally, the seeking of a declaration in a civil case about the lawfulness of future conduct will not be permitted. But in truly exceptional cases the court may allow such a claim to proceed*." As to those "*truly exceptional*" cases in which it may be appropriate for a Court to make a declaration concerning future criminal liability, one of the three features which will remove a case from the category of exceptionality is "*whether the case is fact sensitive or not. This is a*

[296] As applicable to the law of England and Wales by virtue of the International Criminal Court Act 2001 and the Geneva Conventions Act 1957. Such a concession is necessary and relevant, as to which see Gabriella Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield, International Law Studies*, 100 INT'L L. Stud. 133 (2023): *"Though the substantive content of the list of recognized war crimes has drawn heavily on the prescriptions of IHL, the two bodies of law clearly operate in different dimensions. (…) IHL is essentially a law of State responsibility (which also applies to some organized nonstate actors), whereas ICL applies to individuals. States must comply with the rules of IHL and if they do not, they incur, in principle, international responsibility for their violations, including the general duty to make reparations. The commission of a war crime by an individual, conversely, gives rise to possible prosecution, conviction, and punishment, in addition to a possible duty to make individual reparations. Moreover, the rules of IHL are prospective in nature, intended to guide the planning and execution of military operations on the battlefield, including the dissemination of the rules within the armed forces. International criminal law is more retrospective in nature, even if, like domestic criminal law, it also offers guidance on which behavior to avoid and uses the power of deterrence, among others, to minimize the incidence of crime. From this description, it becomes apparent that efforts to transpose the logic of ICL onto IHL are bound to encounter serious difficulties."*

factor of great importance and most claims for a declaration that particular conduct is unlawful will founder on this ground." (Lord Steyn, at §23).[297]

184. The matters advanced by the Claimant are acutely fact sensitive and controversial. The Claimant's submission overlooks that any conduct, if it were to be alleged, would necessarily involve consideration of military operations overseas in the context of a complex and highly contentious conflict. Even assuming that, *prima facie,* there was a basis for considering that criminal offences had occurred, it would be impossible for a court to conclude that the ingredients of a particular offence had been made out. There has never been a prosecution in this jurisdiction under circumstances analogous to these. This (civil) court would be required to engage in a speculative, theoretical exercise involving untested issues which sit at the limits of the criminal law of England and Wales.[298]

185. Perhaps to circumvent these clear principles, the Claimant contends that the F-35 Carve Out is unlawful by reason of the risk that it "*might*" facilitate crime. The decisions cited by the Claimant in purported support of that submission do not in fact advance the claim; and specifically, they do not provide support for the proposition that any finding of a significant risk of the F-35 Carve Out facilitating crime would inexorably, and in disregard of cogent public policy considerations lead to a finding that the F-35 Carve Out is unlawful.

186. The Claimant suggests that the principle of statutory interpretation for which it contends was '*established by the Court of Appeal'* in *R v Register General ex p Smith* [1991] 2 QB 393'. *Smith* predated the judgment in *Rusbridger* and did not involve consideration of *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 at 742. The facts in that case could not have been clearer, and they were regarded as "*wholly exceptional*" (Sir Stephen Brown P, at 401F). The applicant had been convicted of two killings and there were well-founded fears that if he were granted the relief sought, he would kill again. "*It is not too extreme to say that* [to grant the relief sought] *might even be tantamount to signing her death warrant*" (Sir Stephen Brown P, at 401G).[299] Staughton LJ described the principle

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[297] The other two features are: (i) the absence of any genuine dispute about the subject matter; and (ii) whether there is a cogent public or individual interest which could be advanced by the grant of a declaration (*per* Lord Steyn, at §§22 and 24 respectively). *Rusbridger* was relied upon by the defendant in *R (on the application of Noor Khan) v Secretary of State for the Foreign and Commonwealth Affairs* [2014] 1 WLR 872 (as the Court of Appeal reflects at §§45 – 46), though the issues there set out were not ultimately determined.
See also: *R (on the application of Pretty) v. Director of Public Prosecutions* [2002] 1 A.C. 800 (Lord Bingham, at §39), to the effect that would not be appropriate or permissible to grant any proleptic immunity under the criminal law. Lord Hobhouse stated (at 851C): *"In exceptional circumstances it may be proper for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct is lawful and name the Attorney General as the formal defendant to the claim. But that is not what occurred here and, even then, the court would have a discretion which it would normally exercise to refuse to rule upon hypothetical facts."*

[298] So far as the Government is aware, there has been only one successful prosecution under the International Criminal Court Act 2001: Corporal Donald Payne (UK armed forces) pleaded guilty before a court martial to inhuman treatment as a war crime for his treatment of Iraqi detainees in Basra in 2003. There have been no prosecutions under the Geneva Conventions Act 1957.

[299] The Court of Appeal in its analysis relied heavily upon the decision of *R v. Secretary of State for the Home Department ex p Puttick* [1981] QB 767 (referred to in CSkel at §317). In *Hicks v Secretary of State for the Home*

contended for as "*fraught with difficulty*" (403E). Similarly, in *R (Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), the factual position was clear in that the outcome of the decision of the High Court (Munby J) would have determined whether those responsible for prescribing a variety of forms of birth control and the morning after pill would be committing offences under ss.58 and 59 of the Offences against the Person Act 1861.

187. The Court is invited, as a matter of discretion, to decline to engage in any exercise involving the determination of prospective criminal liability. The above matters and principles are sufficient to dispose of the Claimant's submissions under Ground 10, at the threshold stage.

Justiciability

188. Ground 10 also falls to be dismissed on the ground that it is non-justiciable. The Claimant's case in relation to the International Criminal Court Act 2001 concerns potential accessorial liability for war crimes, crimes against humanity and genocide under that Act, and principal and accessorial liability under the universal jurisdiction conferred by the Geneva Conventions Act 1957.[300] For accessorial liability to be established, it would have to be proved that the IDF will commit war crimes (or that offences will be encouraged or assisted with the necessary state of mind).

189. An argument almost identical to that pursued in the present claim was raised and dismissed by the Court of Appeal in *R (on the application of Noor Khan) v Secretary of State for the Foreign and Commonwealth Affairs* [2014] 1 WLR 872 (Lord Dyson MR, Laws and Elias LJJ). The claimant in *Noor Khan* was seeking a public declaration that a GCHQ officer or other Crown agent who passes 'locational intelligence' to an agent of the US may commit an offence of 'encouraging or assisting in a crime' under ss.44 to 46 of the Serious Crime Act 2007. The Court of Appeal dismissed the application on grounds both of principle and discretion. Addressing the point of principle, the Court (at §25) adopted as correct the following statement of Moses LJ in the Divisional Court:

"(…) the courts would not even consider, let alone resolve, the question of the legality of United States' drone strikes. The principle was expressed by Fuller CJ in the United States Supreme Court in Underhill v Hernandez (1897) 168 US 250, 252: 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. (…) The principle that the courts will not sit in judgment on the sovereign acts of a foreign state includes a prohibition against adjudication on

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Department [2005] EWHC 2818 (Admin), Collins J described (at §28) the principle which formed the basis of the decision in *Puttick* as confined to the rule of public policy which should prevent a person benefiting from his criminal behaviour.

[300] For the avoidance of doubt, so far as the International Criminal Court Act 2001 is concerned, the Claimant's argument can only concern accessorial liability. The International Criminal Court Act 2001 does not establish universal jurisdiction, therefore only accessorial liability of UK officials is capable of falling within this argument.

the legality, validity or acceptability of such acts, either under domestic law or international law: Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, 1080, para 24. The rationale for this principle, is, in part, founded on the proposition that the attitude and approach of one country to the acts and conduct of another is a matter of high policy, crucially connected to the conduct of the relations between the two sovereign powers. To examine and sit in judgment on the conduct of another state would imperil relations between the states: Buttes Gas case [1982] AC 888, 933."

190. In relation to the matter of discretion, the Court of Appeal accepted that arguably the offences created by ss.44-46 of the Serious Crime Act 2007 did not require a finding that the US operators of the drone had committed murder, but only a finding that they would have done so if they had been British citizens. However, they declined (at §§36-37) to determine the question because the public, especially in the US, would be unlikely to make or understand that distinction:

"(…) a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US. In reality, it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful. The fact that our courts have no jurisdiction to make findings on either of these issues is beside the point. What matters is that the findings would be understood by the US authorities as critical of them."

191. The decision of the Court of Appeal in *Noor Khan* was endorsed by the Supreme Court in *Belhaj v Straw* [2017] AC 964; [2017] UKSC 3 (Lord Mance at §§93-95; Lord Sumption at §§223-224, 237 and 266). Relying on *Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48; [2013] 1 AC 614[301], the Claimant repeats an argument raised, and rejected by the Court of Appeal in *Noor Khan* (at §39 – 43). The Supreme Court in *Rahmatullah* was careful to say that, on the facts of that case, it was not being asked to sit in judgment on the acts of the United States Government, applying "*well established principles to an unusual situation*" (§43). That was not the case in *Noor Khan*; nor is it the position here.

192. The Claimant in the present claim seeks a declaration or finding that determines whether the substantive crimes to which it is argued accessorial liability would attach (or which could in principle and at a level of generality be the subject of prosecutions under the Geneva Conventions Act 1957) will be committed by the IDF. Such an exercise would involve the Court determining whether the IDF will commit war crimes, crimes against humanity and genocide. This would require the Court to *"sit in judgment"* in relation to Israel's conduct of hostilities in the conflict in Gaza. In *Noor Khan*, a specific incident had been identified which had allegedly caused the deaths of the claimant's family

[301] CSkel §346.

members. Here, no specific incident or deaths underpin the claim. Any decision by the Court, whether by way of declaratory relief or a finding that the F-35 Carve Out is *ultra vires* by reason of the risk of facilitating crime would inevitably be understood as a finding as to the legality of Israeli Government policy. Applying the decision of the Court of Appeal in *Noor Khan*, Ground 10 falls to be dismissed at a threshold stage on the basis that it is non-justiciable. The Court either has no jurisdiction as a matter of principle; or should decline to exercise jurisdiction as a matter of discretion. The public policy exception does not apply, for reasons set out above in relation to Ground 8. Contrary to the Claimant's submission,[302] these principles do not bear on the specific statutory jurisdiction under the Geneva Conventions Act 1957 and the International Criminal Court Act 2001 to prosecute in respect of specific criminal acts, retrospectively.

193. The Claimant seeks to avoid the issue of non-justiciability by inviting the Court to avoid making findings about whether the IDF will commit war crimes, grave breaches, crimes against humanity and genocide, submitting that such a finding is unnecessary because "*the significant risk of facilitating crimes is disclosed by the Defendant's own assessment of risk in relation to the export of military items to Israel* "[303] That is a mischaracterisation of the Government's Criterion 2(c) assessment.

194. Ground 10 involves inviting the Court to consider and rule – at a general level, in the absence of concrete facts – on the criminal liability of the IDF for war crimes, crimes against humanity and genocide in the conflict in Gaza. In view of the clear authority of *Noor Khan*, that would require the Court to consider and rule on matters which are non-justiciable. There are powerful reasons why the Court should refrain from so doing.

No significant risk of facilitating crime

Accessorial liability

195. In the event the Court accedes to the Claimant's invitation to adjudicate on the issue of whether the F-35 Carve Out gives rise to a *"clear and significant risk"* of facilitating crimes under the International Criminal Court Act 2001 and Geneva Conventions Act 1957, it is submitted that this high threshold is not close to being surmounted.

196. The Claimant seeks to bolster its argument with the contention that it is '*not necessary for the Court to delve into the specifics*'[304] of the ingredients of the offences which are sought to be relied upon. This exposes a key deficiency in the Claimant's case: this argument is general because it is speculative, there being no specific facts on which the Claimant can mount a meritorious argument that the F-35 Carve Out involves a significant risk of facilitating crime. The true position is that a successful prosecution of a person as a secondary party to war crimes or as a principal would require proof, beyond reasonable doubt, that a specific item of equipment had been used in an identified

[302] CSkel, §345
[303] CSkel, §344
[304] Reply, §79 [**CB/A/4/223**].

operation, such as to constitute a crime by the IDF. War crimes investigations and prosecutions are specialist, complex and difficult to pursue to any firm conclusion. It would be necessary to consider the strategic purpose of a particular operation and the state of knowledge or intention of the person when supplying the specific item of equipment. It might also, for example, involve a requirement for evidence concerning the information or intelligence underpinning an operation and any possible justification for acts carried out. These are fact-sensitive matters which would be very difficult to establish, with all the jurisdictional and evidential difficulties inherent in investigating an overseas conflict.

197. *Accessorial liability*: For crimes under the Geneva Conventions Act 1957 and the International Criminal Court Act 2001, accessorial liability creates a high threshold, requiring:

(1) The commission of a principal offence (i.e., the relevant war crimes, grave breaches, crimes against humanity, or acts of genocide).

(2) That accessorial *actus reus* is established i.e., that the accessory participated in the substantive offence(s) by assisting or encouraging their commission; [305] and

(3) That the accessory participated with the necessary *mens rea* i.e., that they intended to assist or encourage the perpetrator(s) to commit the *actus reus* and *mens rea* of the substantive offence, and that they had knowledge of the type of criminal offence that would be committed. [306]

198. The Claimant suggests[307] that the Court should (or could) reach conclusions regarding prospective accessorial liability by looking at the *actus reus* alone, without regard to the essential component of *mens rea.* This submission lacks any legal basis: it is presumably advanced because the *mens rea* threshold to establish accessorial liability is obviously unattainable in these circumstances.

199. In relation to (a) (the *actus reus* of the principal offence) there can be no accessorial liability unless the principal offence has been committed. It would thus be impossible for the Court to avoid determining whether specific offences will be committed. The Claimant is unable to identify with precision that any such offences will be committed.

200. In relation to (b) (the *actus reus* of the accessory offence) the Court would need to consider whether the actions of UK Ministers and officials will assist or encourage the commission of the substantive offence(s). In *R v Jogee* [2017] AC 387; [2016] UKSC 8 ("*Jogee*"), the Supreme Court held that it is a question of fact whether the conduct in question "*was so distanced in time, place or circumstances from the conduct*" of the principal that it would not be realistic to regard the principal's offence as encouraged or

[305] *R v Jogee* [2017] AC 387; [2016] UKSC 8, at §8.
[306] *Blackstone's Criminal Practice* 2025 ed., A4.5 and A4.11, *R v Jogee*, at §10.
[307] CSkel §341

assisted by such conduct. The complex supply chain in relation to F-35 components is such that any action by an individual in the UK regarding the transfer of a F-35 component that ends up in Israel will have "*faded to the point of mere background*" insofar as it might be capable of engaging any potential future war crime committed through the means of an F-35 with a component originating in the UK. [308]

201. In relation to (c) (*mens rea*), the threshold to establish the *mens rea* for accessorial liability is high: It was clarified – and raised – by the Supreme Court in *Jogee*. An accessory must intend to assist the principal to commit the crime(s) in which the principal acts with the necessary intent required for the principal's crime(s). Put another way, if the principal offence itself requires a particular intent, the accessory must intend to assist or encourage the principal offender to act with such intent.

202. As noted above, the Claimant is unable to identify who will allegedly be involved in facilitating crimes. In relation to the *mens rea* of the alleged accessory, the Court would need to consider whether during the various processes of reviewing and assessing the licences under the SELC, those involved have formed an intention to assist the IDF to commit crimes under the International Criminal Court Act 2001 and grave breaches of the Geneva Conventions. The *mens rea* threshold could only be satisfied if it could be established that officials and Ministers intend that F-35 components be supplied to Israel *in order that* the IDF commit the alleged crimes with the necessary intent. The Claimant is obviously unable to attain that threshold in the present case.

203. The Claimant asserts[309] that '*Any conduct encouraging or assisting the commission of an offence under the ICCA or the GCA would constitute an offence under Section 44-46 of the Serious Crime Act 2007, regardless of where the conduct took place'*. The Claimant's submission (again) fails to acknowledge the essential *mens rea* component for the establishment of secondary party liability under the Serious Crime Act 2007. In light of *Jogee*, it is clear that secondary party liability would arise only if the secondary party intended to assist or encourage the principal, knowing or believing that the principal was going to commit the offence.[310] No conduct can be identified which comes close to reaching this threshold.

204. For completeness, it is submitted that evaluations regarding detainee treatment and humanitarian assistance are so far removed from the risks potentially associated with the use of F-35 components as to offer no assistance in the resolution of the issues arising in this claim.

205. <u>*Principal criminal liability under the Geneva Conventions Act 1957*</u>: the Claimant now places particular emphasis on an asserted risk of facilitating crime in relation to principal offences involving grave breaches of the Geneva Conventions. The Geneva Conventions Act 1957 creates, under domestic law, an offence of committing a *"grave breach"* of the

[308] *Jogee*, §12.
[309] CSkel §315
[310] *Jogee*, §90.

four Geneva Conventions of 1949, as well as under Additional Protocols I and III to the Geneva Conventions (but not Additional Protocol II). A grave breach of any of the scheduled Conventions is limited to Articles 50, 51, 130 and 147 respectively of the Four Geneva Conventions, Articles 11(4), 85 and 86 of the First Additional Protocol of 1977 ('**API**'), and Article 6 of the Third Additional Protocol of 2005 ('**APIII**'). The relevant provisions of the Four Geneva Conventions and API apply exclusively to situations of IAC. Whilst APIII applies also to NIAC, the relevant section of the Geneva Conventions Act 1957 relates only to the misuse of the protective emblems of the ICRC, a matter outside of the scope of this claim.

206. The Claimant relies on the decision of Pre-Trial Chamber I of the International Criminal Court ('ICC') on 21 November 2024 (subsequent to the decision under challenge) to issue arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Israeli Defence Minister Yoav Gallant[311] in respect of war crimes and crimes against humanity. The decision of the ICC is no more than a preliminary procedural step. The threshold for the issuance of an arrest warrant by the Pre- Trial Chamber is that "*there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court*", a determination made on a comparatively low evidential bar, with the presumption of innocence persisting until conviction.[312] An arrest warrant does not establish as fact the commission of past crimes and thus has little value in identifying the risk of future crimes. The ICC arrest warrant is thus a matter significantly removed from any assessment of the likelihood that domestic crimes under the International Criminal Court Act 2001 or the Geneva Conventions Act 1957 will be committed as a consequence of the F-35 Carve Out. The Claimant is incorrect to suggest[313] that "*The Defendant's complete dismissal of the significant risk of crimes flies in the face of its membership of the ICC*." The Government rejects the Claimant's characterisation of the Government's assessment of risk. Moreover, it involves no inconsistency with the UK's membership of the ICC. The UK is a strong supporter of the ICC.

207. The Claimant's argument by reference to the Geneva Conventions Act 1957 adds nothing to its existing case on accessorial liability. As noted, it also requires a principal offence with the applicable *actus reus* and *mens rea*. As with accessorial liability, it would be necessary for the Court to determine whether (i) specific grave breaches will be committed by the IDF in Gaza with the relevant *mens rea*, and (ii) whether F-35 components not caught by the Suspension Decision will be used in the commission of grave breaches by the IDF (in relation to which, the issues raised above in relation to (a) and (b) are likewise relevant). Here also, whether offences involving grave breaches are engaged at all will depend on whether relevant conduct will take place in the context of a Non-International Armed Conflict ('**NIAC'**) or an International Armed Conflict ('**IAC'**). The question as to whether future conduct is committed in the context of a

[311] Pre-Trial Chamber I also issued a warrant for the arrest of Hamas military commander Mohammed Diab Ibrahim Al-Masri, commonly known as 'Deif'.
[312] Article 58(1)(a) of the Rome Statute, 1998.
[313] Reply, §72 [**CB/A/4/221**].

NIAC or IAC can only be assessed on the basis of concrete facts. Given the uncertainties as to the classification of future military operations in the context of the conflict between Israel and Hamas, it is impossible to determine whether the Geneva Conventions Act 1957 will be engaged at all.[314] As matters stand, no specific principal offences, or individuals physically within the jurisdiction of England and Wales can be identified by the Claimant.

208. In conclusion, there is a cogent basis for the Court to dismiss this Ground at the threshold stage as a matter of discretion (*Rusbridger*) and/or on the basis that it is not justiciable (*Noor Khan*). Even if, contrary to all of the above, the Court were to engage in the exercise invited by the Claimant and then conclude that there was a significant risk of the F-35 Carve Out facilitating domestic crime, it would not follow that the Secretary of State's decision was *ultra vires*, in circumstances where the decision not to suspend or revoke certain licences is owing to powerful reasons relating to the maintenance of global security.[315]

E. GROUND 11

209. Ground 11 asserts that the Government's assessment of the risks of suspending licences for the export of F-35 components was irrational because the export of F-35 components to Israel could have been prevented by *"the simple mechanism of informing the [Global Spares Pool] operators that any UK manufactured parts must not be provided to Israel."*[316] For reasons set out in Detailed Grounds and in the OPEN and CLOSED witness statement of Keith Bethell, the factual premise of Ground 11 is simply wrong.

210. The only substantive paragraph of the Reply which addresses this Ground[317] complains that the Government has not provided OPEN evidence as to when it would be possible to bring to an end this *"trade agreement"* or the steps that have been taken to do so. None of this advances the Claimant's assertion that the Government's decision was irrational.

211. The Claimant's Skeleton identifies and challenges three "considerations" relied upon by the Government. As the Claimant acknowledges,[318] the OPEN evidence in relation to

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[314] The Pre-Trial Chamber's decision remains sealed. However, the ICC's press summary states that: "*The Chamber found reasonable grounds to believe that during the relevant time, international humanitarian law related to international armed conflict between Israel and Palestine applied. This is because they are two High Contracting Parties to the 1949 Geneva Conventions and because Israel occupies at least parts of Palestine. The Chamber also found that the law related to non-international armed conflict applied to the fighting between Israel and Hamas."*https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges
The Chief Prosecutor of the ICC, Karim Khan KC, clarified in a press conference at the time of application for arrest warrants that, "*the war crimes alleged in these applications were committed in the context of an international armed conflict between Israel and Palestine, and a non-international armed conflict between Israel and Hamas running in parallel.*"https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[315] ADGR §102 [CB/A/3/169-170].
[316] ASFG, §§258-259 **[CB/A/2/126]**; CSkel§§350-351.
[317] Reply §85 **[CB/A/4/225]**.
[318] Reply §86 **[CB/A/4/225]**.

each of these is limited. Submissions on Ground 11 will therefore principally be in CLOSED. Without prejudice to those more detailed submissions, the Government makes the following OPEN points of clarification in response to the Claimant's Skeleton:

(1) It is wrongly suggested[319] that the Government impliedly conceded in the ADGR that logistical modifications are achievable. On the contrary, the ADGR expressly referred to the OPEN evidence that: *"There are significant obstacles to any changes to the present structure."*[320]

(2) The Government does not suggest that the UK's obligations under the MOU *"take precedence over its other international obligations"*.[321] In fact, the opposite is the case. As emphasised in the 2 September 2024 letter,[322] the Government remained committed to complying with domestic and international law and, for the reasons set out in response to Ground 8 above, the continued export of F-35 components does not contravene the UK's international obligations.

F. GROUND 12

212. The challenge under Ground 12 was a narrow one and it has become even narrower in light of the Reply and the Claimant's Skeleton. The Claimant has now confirmed that this ground only challenges the rationality of the process adopted by the Government, reiterating that:

(1) *"The Defendant is wrong to suggest that … the Court is directed at the outcome of the balancing exercise … the Claimant's complaint on Ground 12 concerns the Defendant's approach to the balancing exercise. The Court is therefore concerned with process rather than outcome."* (emphasis in original); [323]

(2) *"The Claimant maintains that the Defendant's approach was irrational."*[324]

(3) *"The Claimant agrees that, as Ground 12 is a process challenge, the question of the appropriate standard of review for an outcome challenge is unlikely to arise."* (emphasis in original).[325]

(4) *"Ground 12 is concerned with "process" rationality…"*[326]

213. The "*relevant principles*" which were set out at §§261-266 of the ASFG and §88 of the Reply, and which were all said to relate to the appropriate standard of review for an outcome challenge – and specifically for a challenge to a conclusion that there is a "good

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[319] CSkel §351.
[320] ADGR §114 **[CB/A/3/172]**, citing the Detailed Advice from the Defence Secretary **[CB/E/30/589]**.
[321] Cf CSkel §354.
[322] **[CB/C/18/284]**.
[323] Reply, §89. **[CB/A/4/227]**.
[324] *Ibid*., §90.
[325] *Ibid.,* §92.
[326] CSkel §357.

reason" to depart from a policy – are consequently no longer relevant.[327] The reference to those authorities at CSkel §§109 and 366 is otiose.

214. The relevant principles regarding the appropriate standard of review in relation to a rationality challenge to the decision-making process in this context were summarised by the Court of Appeal in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020 at §57:

"… [T]he principal error of law which it is alleged was committed by the Secretary of State in the present case is that he acted irrationally in the process which he adopted in order to make the assessment required by Criterion 2c… What is important for present purposes, and in particular in addressing ground 1 in the appeal, is that the only legal error which is alleged to have been committed is founded on the public law doctrine of irrationality. This sets a deliberately high threshold. The court is not entitled to interfere with the process adopted by the Secretary of State merely because it may consider that a different process would have been preferable. What must be shown by [the Claimant] is that the process which was adopted by the Secretary of State was one which was not reasonably open to him."[328]

215. At §94, the Court of Appeal endorsed the Secretary of State's submission that the process of carrying out assessments under Criterion 2C was a matter for the executive and should command considerable respect, for the following reasons – which apply with equal, if not greater, force to the balancing exercise which was undertaken by the Government in the present case:

"… The exercise is predictive and involves the evaluation of risk and as to the future conduct of Saudi Arabia in a fluid and complex situation. The information upon which any assessment had to be made was complex and drawn from a wider variety of sources, including sensitive sources. In making his decision, the Secretary of State had to rely on advice from those with specialist diplomatic and military knowledge. Such evaluations are analogous to national security assessments. For all these reasons the approach to assessment under Criterion 2c is for the executive, should command considerable respect in any review and is capable only of rationality challenge."[329]

216. The only remaining basis of this ground of challenge is that the Government failed properly to assess the risks arising from the continued export of F-35 components because it failed:

(1) To assess the *"extent, nature and potential gravity"* of the clear risk of a serious violation of IHL (referred to as a *"calibration"* exercise); and

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[327] As the Claimant appears to accept at CSkel, footnote 510.
[328] *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020 at [94].
[329] *Ibid.*

(2) To *"identify or calibrate other potential risks associated with departing from Criterion 2(c)"*.[330]

217. The Claimant advances: (i) no authority in support of the supposed *"calibration"* requirement; (ii) no explanation of what that exercise should have involved; (iii) no particularisation of *"other potential risks of export"*[331] which the Government should have taken into account; and (iv) no suggestion of what different level of risk the "calibration" would have achieved. The Claimant merely asserts that, unless the Government carried out such a calibration, he could not differentiate between: (i) a clear but limited risk that the items would be used to commit an isolated *"violation"* of IHL, affecting a limited number of people; and (ii) a clear likelihood of them being used to commit or facilitate widespread war crimes, crimes against humanity or acts of genocide, capable of affecting millions of people.[332] But neither of those extremes reflect the evidence and analysis which were before the Trade Secretary when he made his decision and he was not therefore required to "calibrate" between them. The fact that there is a broad hypothetical spectrum of likelihood does not rationally require a decision-maker, in undertaking a balancing exercise of this kind, to consider the whole spectrum and/or to pinpoint where precisely on that spectrum the risk lies. In any event, it bears emphasis that the Criterion 2C threshold is engaged by a clear risk of a *"serious violation"* of IHL and thus incorporates an assessment of gravity which the Claimant now seeks to read out. "*Serious violations of IHL*" include grave breaches of the Geneva Conventions and war crimes under section 8 of the Rome Statute of the International Criminal Court.

218. Oxfam contends that, as a matter of rationality, the Government was obliged to undertake a calibrated risk assessment of serious violations should have taken account of Israel's attacks on and damage to "WASH" infrastructure and Israel's obligations in relation to indispensable objects. It is then contended that such an assessment would have led to the further assessment that there were at least possible breaches of IHL in relation to the conduct of hostilities and that that would have resulted in the conclusion that there was a *"clear risk"* that F-35 components might be used to commit or facilitate a serious violation of IHL. It is then said that the finding of a *"clear risk"* as to the conduct of hostilities, combined with the existing finding of a *"clear risk"* in relation to humanitarian access/aid and the treatment of detainees, would have resulted in a materially greater *"clear risk"* overall under Criterion 2C.[333]

219. These contentions misunderstand the critical premise of the September Decision. As the Court has emphasised, the September Decision *"heralded a very substantial change of approach"* and *"since 2 September 2024, the Government has been unequivocal in its assessment that Israel is not committed to complying with IHL and that, accordingly,*

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[330] ASFG, §269 **[CB/A/2/129]**; Reply, §90 **[CB/A/4/227]**.
[331] ASFG, §269 merely asserts in general terms that a decision to depart from the SELC may give rise to risks of violations of other rules of international law, or risks to international peace and security, or risks that the UK Government would be exposed to liability for serious violations of international law.
[332] Reply, §90 **[CB/A/4/227]**; CSkel §370.
[333] Oxfam submissions, §49.

there is a clear risk of a serious violation of IHL by Israel in Gaza, including in the conduct of hostilities."[334] Accordingly, even if (which is denied) the process suggested had been undertaken in the manner suggested, that would have had no impact on the overall *"clear risk"* assessment, because the Trade Secretary accepted that there was a clear risk of a serious violation of IHL in the conduct of hostilities. The fact that he may have reached that conclusion by a different route does not render it a *"materially lesser"* clear risk. There was no requirement to chase down other possible routes to that conclusion or to seek more finely to grade the extent of the risk.

220. The circumstances and premises on which the September Decision was based demonstrate that no such calibration exercise was necessary or appropriate. In particular:

(1) In reaching that assessment, the Foreign Secretary acknowledged that "Israel's actions in Gaza continue to lead to immense loss of civilian life, widespread destruction to civilian infrastructure, and immense suffering."[335]

(2) The broad scope of allegations regarding Israel's conduct of hostilities has been a central focus of the IHL Compliance Assessment Process.[336] However, it was recognised that the difficulties of gaining timely access to sensitive military information, including targeting information, perceived military advantage and necessity made it unlikely that the IHL Cell would be able to reach a conclusive IHL judgment in relation to the majority of incidents.[337]

(3) The difficulties in reaching conclusive IHL judgments reflect the realities of the "fog of war"; the lack of access to Gaza (including for international media); the complexities arising from the sheer amount of information and disinformation; the context of a conflict in which Hamas is embedded in a dense civilian population; and the nature of the IHL regime.

(4) Alongside Israel's record of compliance with respect to the conduct of hostilities, broader evidence of Israel's commitment to IHL in other areas has been carefully considered. In the September Decision, the negative evidence, including with respect to these other areas of IHL, was assessed to outweigh the positive statements of commitment made by the Israeli Government and Military. The assessment that Israel had committed potential violations of IHL in relation to humanitarian access and the treatment of detainees carried particular weight, given the difficulties of assessing Israel's record of compliance in the conduct of

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[334] *R (Al Haq) v Secretary of State for Business and Trade* [2025] EWHC 173 (Admin). Emphasis in original.
[335] Oral Statement of the Foreign Secretary to the House of Commons, 2 September 2024 **[CB/C/20/290]**
[336] By way of example only, the 7th IHLCAP Assessment, which provided the basis for the September Decision: addressed allegations of the existence of "kill zones"; analysed 13 of the most concerning incidents out of the 65 allegations which were reported during the assessment period; considered more broadly evidence relating to the principles of proportionality and distinction (noting the difficulty of drawing reliable conclusions in a conflict of this nature); considered the implications of the arrest warrants issued by the International Criminal Court and the further Provisional Measures ordered by the ICJ; analysed the implications of two thematic UN reports published during the assessment period **[CB/E/41/689]**.
[337] 7th IHLCAP Assessment at §47 **[CB/E/41/702]**.

hostilities.

(5) In light of that assessment, it was concluded that the "clear risk" threshold in Criterion 2C had been crossed and that licences which it was assessed might be used in carrying out or facilitating military operations in the current conflict in Gaza must be suspended.

(6) The September Decision also took into account the analysis by ECJU-FCDO against other relevant criteria in the SELC and the assessment that:

(i) Current licences were not inconsistent with the UK's international obligations and other commitments (Criterion 1);

(ii) There was not a clear risk that items currently licensed might be used to commit or facilitate internal repression (Criterion 2A); and

(iii) There was not a clear risk that the items currently licensed would, overall, undermine peace and security (Criterion 4).[338]

221. The F-35 Carve Out was thus premised on the basis that there was a clear risk that Israel might commit serious violations of IHL in the conduct of hostilities in Gaza, including through the use of F-35s. This was not a *"finely balanced"* risk assessment.[339] The serious concerns regarding Israel's conduct of hostilities (including its conduct of airstrikes) and the gravity of the harm being suffered in Gaza were centrally relevant to the analysis and assessment on which the September Decision was based. The advice to the Trade Secretary was clear: if an item might be used by the IDF in military options in the conflict in Gaza, the export licence had to be suspended.

222. It is further noted that the Claimant does not challenge the gravity of the risks to the F-35 programme, and to international peace and security if the F-35 programme were to be compromised.[340] The risks identified in the Detailed Advice provided by the Defence Secretary on 18 July 2024[341] clearly provided a "*good reason*" for the disapplication of the SELC in relation to F-35 components. In summary:

(1) The suspension of licences for UK-manufactured components into the GSS would, within weeks, lead to very serious consequences and disruption for F-35s across the programme.

(2) The UK currently operates a fleet of 34 F-35 aircraft, with a further 13 scheduled to be in service by the end of 2025. The F-35 fleet is a critical component of the

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[338] ECJU Submission of 24 July 2024, § 9 **[CB/E/31/595]**.
[339] Cf ASFG, §269 **[CB/A/2/129]**
[340] Contrary to the suggestion at §272 of the ASFG **[CB/A/2/130]**, Ground 11 only challenges the Government's conclusion that it was not possible to avoid these risks (and for the reasons set out above and in the Government's CLOSED skeleton argument, that challenge has no merit).
[341] **[CB/E/30/588]**.

UK's Carrier Strike capability, which is in turn a key part of the UK's military commitment to NATO.

(3) The global F-35 fleet currently comprises in the region of 1,000 aircraft, with a high proportion conducting national or NATO taskings to reassure allies and deter adversaries.

(4) The F-35 is a central pillar in NATO's air power and represents a significant element of NATO's defence posture, in particular against Russia.

(5) In the event of future conflict, an inability to deploy F-35s in sufficient numbers would drastically reduce NATO's ability to gain control of the air, risking a protracted, attritional land campaign with much higher casualty rates.

(6) Any disruption to NATO's F-35 fleet would immediately start to undermine the credibility of the Alliance's warfighting plans.

(7) A prolonged disruption to the production of new F-35s or the operation of the existing fleet might require NATO states (such as Denmark and the Netherlands) to pause their planned transfer of F-16s to Ukraine; a damaging impact on Allied support to Ukraine.

(8) The F-35 also plays an important role in the maintenance of global peace and security, further details of which are provided in the CLOSED evidence.

223. As to the Claimant's repackaged *"secondary case"* on Ground 12:

(1) The F-35 Carve Out was also premised on the basis that licences were consistent with other criteria in the SELC. For the reasons set out in response to Ground 8 (above) this assessment was a lawful one and the Trade Secretary was not rationally required to undertake any further "calibration" of the level of that risk.[342]

(2) To the extent that the Claimant also now seeks to rely on the alleged error in Ground 9 as being relevant to Ground 12, for the reasons set out in response to Ground 9 (above) there was no such error.[343]

(3) For the reasons set out in response to Ground 10 (above), there was no *"risk of the commission of the most serious crimes in the international legal order"*.[344]

(4) For the reasons set out in response to Ground 11 (above), the Trade Secretary did not err in his assessment of the risk of suspending licences for the export of F-35 components.[345]

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[342] Cf ASFG, §275 **[CB/A/2/130]**; CSkel §386.1.
[343] Cf CSkel §386.4.
[344] Cf ASFG, §274 **[CB/A/2/130]**; CSkel §386.2.
[345] Cf ASFG, §272 **[CB/A/2/130]**; CSkel §386.3.

224. Finally, the Government addresses an erroneous criticism which the Claimant has raised in its Reply and perpetuated in its Skeleton. In the ASFG, it was asserted that *if* the Government was suggesting that no risks or consequences for Palestinians in Gaza could override the risks to international peace and security arising from a suspension of licences for the export of F-35 components, that would be manifestly irrational.[346] In the ADGR, the Government confirmed that this was not its position.[347]

225. The Claimant now complains that this is inconsistent with the Government's position at the time of the Linkage Judgment.[348] The Government's position, as recorded in §17 and §31 of the Linkage Judgment, was that:

    (1) It was not necessary for the Court to consider the errors in Proposed Grounds 2 to 5[349] of RASFG because the gravity of the risk to international peace and security was such that it would have *"overridden any such further evidence of serious breaches of IHL"*;[350] and

    (2) Even if there were any error in the methodology applied to the assessment of Israel's conduct of hostilities prior to the September Decision, they would be irrelevant because given the forward-looking nature of the "clear risk" assessment, the risk that Israel might commit a serious violation of IHL *"would not have weighed more heavily in the balance even if the Defendant had adopted a different approach to the analysis of Israel's conduct of hostilities and even if that different approach had led him to reach a different conclusion on Israel's compliance with IHL in that regard."*[351]

226. The Government was not saying that nothing could ever override the risks of suspending licences for F-35 exports, but merely that, in the circumstances obtaining at the time of the Decision, the alleged errors identified by the Claimant would not have affected the balance.[352]

Conclusion on Ground 12

227. For the reasons given above, the Claimant's contention that the Government's approach to the balancing exercise was irrational is without merit.

228. Furthermore, there is no basis for any assumption that, if the Government had adopted a different approach, it would have accorded greater weight to the risks inherent in not suspending F-35 licences. Still less is there any basis for the assumption that it would

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[346] ASFG, §268 **[CB/A/2/128]**.
[347] ADGR, §121 **[CB/A/3/174]**.
[348] Reply, §87(c) **[CB/A/4/226]**.
[349] In the version of the RASFG filed on 23 October 2024.
[350] §19 of the version of the DGR filed on 20 December 2024.
[351] *Ibid,* §140.
[352] The Claimant refers to the fact that these passages have now been deleted in the ADGR, but those deletions simply reflect the fact that Grounds 2 to 5 had fallen away in light of the Linkage Judgment.

have assessed that risk to outweigh the immensely serious and imminent risks to international peace and security which were weighed in the other side of the balance. Accordingly, even if, contrary to the foregoing, this Ground were made out, it is highly likely that the outcome would have been the same: see ss.31(2A) and 31(3C) of the Senior Courts Act 1981.[353]

G. GROUND 13

229. Ground 13 is premised on the fact that the Ministerial Submission which was made to the Trade Secretary on 30 August 2024, provided two options for his decision: (i) to suspend extant export licences where it was assessed that the items were for use in military operations in the conflict in Gaza; and (ii) to suspend all extant licences for use by the IDF, included those which were not assessed to be for use in the conflict in Gaza. The Ministerial Submission explained that Option 1 represented the minimum category of licences which must be suspended and that Option 2 would go beyond the strict requirements of the SELC and constitute a decision to send a political signal.[354]

230. A list of licences which would have been captured by Option 2 was provided at Part 2 of Annex C to the Ministerial Submission of 30 August 2024.[355] The following points should be noted:

    (1) Of the 47 individual licences covered by Option 2, 32 covered the export of components for trainer aircraft. As explained in response to an RFI from the Claimant, trainer aircraft *"do not have the design capability to carry live ordnance so cannot be used in military operations in Gaza."*[356] It is equally the case that they could not be used in military operations in the West Bank.

    (2) The other components falling within Option 2 covered: parts for support and maintenance of Maritime Patrol Surveillance Radar; components for Air Defence systems; testing equipment for night vision goggles; replacement parts for submarines; components for jet aircraft;[357] IED disposal equipment; security scanners for crossing points and printed circuit boards and other components for dual use goods.

231. This was not, therefore, the kind of equipment that could be used to commit or facilitate a serious violation of IHL nor engage the other SELC. The kind of equipment that might

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[353] As to the statements of alleged principle at CSkel, §112, although the Court of Appeal has set down a number of high-level principles in this context (see *R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179, §§35-45; *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, §§272-274; *R (Bradbury) v Awdurdod Park Cenedlaethol Bannau Brycheiniog* [2025] EWCA Civ 489 at §§71-72) it has declined to give or to endorse more detailed and exhaustive statements of principle of the kind relied on by the Claimant, emphasising instead that much will depend on the particular facts of the case before the court: see e.g. *Plan B Earth*, §273; *Bradbury*, §§73-75.

[354] DBT Submission to the Defendant, 30 August 2024, §11 **[CB/E/56/899]**.

[355] **[CB/E/58/912]**.

[356] Letter from GLD to Bindmans dated 17 October 2024 **[SB/A/5/43]**.

[357] For the avoidance of doubt, it was explained in the 17 October letter that the "jet aircraft" was a private aircraft.

be used for Israeli operations in the West Bank was already suspended on the basis that it might be used in military operations in Gaza.

232. Until the Claimant served its Skeleton Argument, it had not contended that the Government was required by the SELC to adopt Option 2, but that he had a discretion whether to go further than the requirements of the SELC by imposing a broader suspension than was strictly necessary. Thus:

(1) In the ASFG, the Claimant stated that: *"It is common ground that the SSBT had a discretion in deciding whether it would be appropriate to cancel all licences for use by the Israeli army in the West Bank and/or for Israeli army training purposes…"*[358]

(2) The ADGR made clear that the Government's understanding was that: *"The Claimant does not suggest that the Defendant was required to adopt Option 2: the challenge is to the exercise of his discretion."*[359]

(3) The Claimant did not raise any objection in its Reply.

233. However, in its Skeleton Argument the Claimant does now appear to be asserting that the Government was required under the SELC to adopt Option 2. In particular:

(1) At §388.2, the Claimant asserts that *"The SSBT appears to have adopted an approach of ignoring Israel's conduct in the West Bank (in particular) on the basis that the SELC only 'required' suspension of items for military use in Gaza… the SSBT's decision on which option to adopt was taken on the sole basis of whether this would be an appropriate way to 'send a political signal'"*;

(2) At §388.4, the Claimant refers to an alleged *"…misdirection that the decision between option (i) and option (ii) was wholly one of political signalling"*;

(3) At §389, the Claimant asserts, not only that the Government failed to have regard to Israel's history of breaches of international law outside Gaza, but also (for the first time) that it failed to consider the *"consequential risk that the items might be used to maintain Israel's illegal presence in the OPT and/or facilitate other unlawful acts by Israel"*; and

(4) At §390, the Claimant contends that the Government's alleged error in failing to have regard to *"a mandatory relevant consideration under the SELC"* appeared to be based on *"a misdirection that the decision was an unfettered exercise of political discretion"*.

234. If, and to the extent that, the Claimant does now claim that the Government was required by the SELC to suspend licences for the export of items destined for use by Israel in the

[358] ASFG, §280 **[CB/A/2/131]**.
[359] ADGR, §132 **[CB/A/3/177]**.

West Bank, that is an entirely new claim, which cannot be introduced at the last minute and by the back door. If the Claimant wished to make such a claim, it has had every opportunity to do so in the period since 20 September 2024 (when, through disclosure, it received the Ministerial Submission of 30 August 2024) and the Government should have been given a proper opportunity to plead its case and adduce evidence in response.

235. If, and to the extent, that this is now the basis of Ground 13, the Government submits that permission to advance this Ground should not be granted.

236. In any event, even if Ground 13 is properly advanced on the basis that this was a matter of discretion, the Claimant's reasoning appears to be that the SELC criteria should be "*reimported*" as matters which the Government was required to assess in determining whether he should exercise his discretion to go beyond the requirements of the SELC.[360] However, the Government's assessment of the mandatory considerations under the SELC was (at best) of limited relevance in determining whether, as a matter of discretion, to impose a suspension extending beyond the strict requirements of the SELC.

237. In any event, as to the matters which the Government is said to have failed to take into account:

    (1) The assessment of Israel's past conduct of hostilities was at the heart of the Suspension Decision, including the decision to adopt Option 1 rather than Option 2 (and for all the reasons set out in Grounds 8 and 9 above, this was a lawful assessment).

    (2) An assessment against the other relevant SELC criteria was undertaken and was taken into account by the Foreign Secretary in advising the Trade Secretary. The assessment noted that the consequences of the ICJ's Advisory Opinion on the Occupied Palestinian Territories were being considered in detail across relevant Government departments. It concluded that no current licences were in violation of the other relevant Criteria. [361]

    (3) The issue of Israel's commitment to comply with IHL, including an assessment of the assurances given by the Israeli Government and military, was at the forefront of the IHL Assessment and the advice which was provided to the Trade Secretary and, in any event, no assurances regarding the use of unsuspended items in the West Bank or elsewhere were sought by the UK or given by Israel.[362]

238. The countervailing considerations were set out in the assessment of the implications of a suspension decision for regional peace and security (conducted by the FCDO, MOD and the NSS).[363] This assessment emphasised the need to manage the UK's relationship with

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[360] ASFG §280(a) **[CB/A/2/131]**; Reply §98 **[CB/A/4/231]**.
[361] ECJU Submission to the Foreign Secretary, 24 July 2024, Annex E **[CB/E/35/609]**.
[362] Cf ASFG §280(b) **[CB/A/2/132]**; CSkel, §389.4.
[363] ECJU Submission to the Foreign Secretary, 26 August 2024, Annex D **[CB/E/54/877]**.

Israel and the need to mitigate the risk of a decision to suspend being *"instrumentalised by Israel's enemies"*. Further details are contained in the CLOSED version of this document. The Claimant (rightly) does not suggest that it was irrational for the Government to take these matters into account.

239. The decision whether it would be appropriate to *"send a political signal"* to a foreign State exercising its right to self defence was taken at a time when the political and military sensitivities in the region were even more than usually acute. The sensitivities of the Suspension Decision are evident from the fact that the "handling plan" for the announcement of the decision included a direct call between Prime Minister Starmer and Prime Minister Netanyahu ahead of the announcement. This is pre-eminently the type of decision in which the courts should accord the Executive considerable respect. (See §215 above.)

240. In the light of the above, it cannot be said that his decision to adopt the narrower scope of suspension was flawed as the Claimant alleges.

241. In any event, even if the Government failed to take into account relevant factors, it would not have affected his decision to adopt Option 1, given the international sensitivities prevailing at the time and this challenge would accordingly fail under ss.31(2A) and 31(3C) of the Senior Courts Act 1981.

242. The Claimant contends that the Government cannot establish that it is *"highly likely that the outcome for the applicant would not have been substantially different"* because he had failed to carry out a *"calibration"* of IHL violations by Israel. This simply repeats the Claimant's arguments under Ground 12 and should be dismissed for the reasons set out above.

30 April 2025

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