

BETWEEN:

THE KING
(on the application of Al-Haq)

Claimant

-v-

SECRETARY OF STATE
FOR BUSINESS AND TRADE

Defendant

SUMMARY GROUNDS
OF THE SECRETARY OF STATE

INTRODUCTION

1. Following a careful and detailed process of review, as explained in more detail below, on 18 December 2023, the Secretary of State for Business and Trade (“**the Trade Secretary**”) took the decisions (a) not to suspend extant export licences for military and dual-use equipment being exported to Israel either directly or where Israel is the final-destination, (b) not to stop granting export licences, but rather (c) to keep her decisions about whether or not to grant, revoke, or refuse licences under continuing, careful review, in view of the current hostilities in Gaza (“**the Decision**”). In reaching this decision the Trade Secretary has concluded, on the basis of all the evidence available to her, that there is not at present a clear risk that items exported to the Israeli Defence Forces (“**IDF**”) might be used to commit or facilitate a serious violation of international humanitarian law (“**IHL**”).
2. The basic facts of the conflict are well known. In brief summary, on 7 October 2023, Hamas, which is a proscribed terrorist organisation in the UK,¹ as well as in other western countries, launched an attack on Israel from the Gaza Strip. The attack resulted in the killing of approximately 1,200 people, the taking of approximately 240 hostages, including women, children, and elderly people, and included reports of rape and sexual violence against Israeli women. The Israeli Government responded to the attack by launching airstrikes on Gaza, followed by a ground offensive. Israel has stated that it is acting in self-defence with the aim of “*destroying Hamas’s military and governing*”

¹ See: <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version>. Hamas IDQ was proscribed by the UK in March 2001, and this was extended to Hamas in November 2021, after the UK government assessed that there was no longer a basis to distinguish between the military wing of Hamas and other parts of the organisation, which is now regarded as a single terrorist organisation.

capabilities and bringing the captives back home."² Between 24 November and 1 December there was a seven-day pause in hostilities. Since the ceasefire ended Israeli troops have resumed military action against Hamas in Gaza, with an increased focus on southern Gaza.

3. The Claimant challenges the Decision on three grounds:
 - a. Irrationality: The Trade Secretary's conclusion that the Decision is compatible with Criteria 1(b), 2(c) and 7(g) of the Strategic Export Licensing Criteria ("SELC") is said to be irrational.
 - b. Error of law: It is said that the Trade Secretary misinterpreted the Criteria and misunderstood related principles of law.
 - c. Procedural error: It is said that the Trade Secretary failed to follow a lawful procedure when making the Decision.

LEGAL CONTEXT

4. The Trade Secretary accepts most of the summary of the legal framework set out under the heading "*The Relevant Law*" in the Statement of Facts and Grounds ("SFG"). However, the following points are to be noted.

The Relevance of the EU User's Guide

5. As the Claimant identifies, the "User's Guide" is a commentary which accompanied Common Position 2008/944, which was implemented by the Consolidated EU and National Arms Export Licensing Criteria ("**the Consolidated Criteria**"). It includes guidance on the application of each of the criteria. The status and role of the EU User's Guide was considered by the Divisional Court in *R (Campaign against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin) ("**CAAT I**"). The Divisional Court, at §11 emphasised the following passage from the introduction to the criteria guidance:

"They are intended to share best practice in the interpretation of the criteria rather than to constitute a set of instructions; individual judgment is still an essential part of the process, and Member States are fully entitled to apply their own interpretations."

6. The Consolidated Criteria were replaced by the SELC following the UK's withdrawal from the EU. As a result, the EU User's Guide is no longer applicable to the UK, even in the limited sense identified above. However, the provisions of the SELC which are at issue in this claim are largely identical to the equivalent provisions in the Consolidated Criteria. The guidance contained in the EU User's Guide still has some relevance, not least because it has in part informed the decision-making processes which have been established and applied by ECJU since the Consolidated Criteria were first promulgated in 2014.

² Statement by PM Netanyahu, 28 October 2023.

The Application of Criterion 2(c)

7. The Divisional Court in *R (oao Campaign Against Arms Trade) v Secretary of State for International Trade* [2023] EWHC 1343 (Admin) (“CAAT 2”) emphasised the following features of the Criterion 2(c) assessment:
 - a. “... the main factors which govern a proper assessment of the Criterion 2c risk are the willingness and ability of Saudi Arabia to comply with IHL. The core evaluation which the Secretary of State and her advisers focussed on was whether Saudi Arabia had the intention and capacity to comply with IHL. In our view they were correct to do so, reflecting the approach in paragraph 2.13 of the User’s Guide.”³
 - b. “The test requires a clear risk of a serious violation of IHL. In our view clear does not simply mean something which is not theoretical... “Clear” connotes a concrete risk for which there is evidential support (albeit that it is a nuanced value judgment). It means that the risk must be clear from evidence which forms a meaningful basis for making an assessment of whether a violation might occur in the future. Insofar as that assessment is based on past breaches or possible breaches, that means that there must be sufficient information available to make a meaningful judgment on that question. The mere fact of civilian casualties or that strikes hit a humanitarian or civilian installation does not equate, in this context, to a ‘possible’ breach of IHL if there is insufficient information to form a view on the ‘why’ question. That applies equally to whether there is sufficient information to determine that an allegation is credible, i.e. the ‘what’ question... If there is not enough information to form any meaningful judgment, it can serve no useful purpose to include it as a possible breach for the purposes of informing an assessment of whether there is a clear risk of a future breach.”⁴
 - c. “As the User Guide, and the Divisional and Court of Appeal judgments recognise, the mere fact of prior breaches does not equate to a risk of future breaches, still less a clear risk of a serious breach.”⁵
 - d. “... the IHL Analysis, although undertaken with anxious scrutiny, does not play a hard-edged part in the Criterion 2c assessment. It was a tool which itself inevitably gave rise to evaluative assessments which involved standing back.”⁶
8. The assessment of Israel’s commitment and capacity to comply with IHL have formed the core evaluation in applying Criterion 2(c) in this context.

The Appropriate Standard of Review

9. The correct approach to judicial review in this context has now been considered by the Divisional Court and the Court of Appeal in *CAAT 1* and by the Divisional Court in *CAAT 2*. Each judgment has been careful to emphasise both the high threshold which

³ CAAT 2 Judgment at §108.

⁴ *Ibid.* at § 124(1) (emphasis in original).

⁵ *Ibid.* at §124(4).

⁶ *Ibid.* at §125.

must be met in order for a rationality challenge to succeed and the considerable degree of respect which must be accorded to the Secretary of State in this particular context.

10. The following are the key principles, drawn from those judgments:
 - a. Judicial review serves to correct unlawful conduct on the part of public authorities. It is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts.⁷
 - b. The courts are not concerned with the merits of the position taken by the Secretary of State in applying Criterion 2(c). Different people may or may not share the Secretary of State's view about the assessment of risk required by Criterion 2(c). It is not the function of the court to adjudicate on the underlying merits.⁸
 - c. The doctrine of irrationality 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 is that the process which was adopted by the Secretary of State was one which was not reasonably open to him.⁹
 - d. The exercise required by Criterion 2(c) is predictive and involves the evaluation of risk and the future conduct of the recipient State in a fluid and complex situation. The information upon which any assessment had to be made was complex and drawn from a wide variety of sources, including sensitive sources. In making the decision, the Secretary of State had to rely on advice from those with specialist diplomatic and military knowledge. Such evaluations were analogous to national security assessments. For all these reasons, the approach to assessment under Criterion 2(c) is for the Executive, and should command considerable respect in any review.¹⁰
 - e. The context in which the issue of "*serious violations of IHL*" arises here is not one in which the Secretary of State is sitting like a court adjudicating on alleged past violations but rather in the context of a prospective and predictive exercise as to whether there is a clear risk that equipment which is licensed for export might be used in the commission of a serious violation of IHL in the future.¹¹
11. The Court of Appeal approved the summary of the general principles relevant to the *Tameside* duty, as provided by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), at §§99-100. (See also *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at §70 for a similar recitation of the approach):

⁷ *CAAT 1*, CA Judgment at §54, citing *R (Houreau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at §326.

⁸ *CAAT 1*, CA Judgment at §56.

⁹ *Ibid.* at §57.

¹⁰ *Ibid.* at §94.

¹¹ *Ibid.* at §165.

- a. The obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Subject to a rationality challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken.
 - b. The court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision.
 - c. The court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient.
 - d. The obligation does not arise from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion.
12. For the avoidance of doubt, the Trade Secretary does not accept the list of "*rational minimum requirements*" listed at §24 of the SFG.

Principles of IHL relevant to Criterion 2(c)

13. The Trade Secretary notes the summary of the key principles of IHL at §§26-40 of the SFG. The scope of the applicable law in relation to the provision of humanitarian assistance is to some extent controversial. In particular, the treaty law applicable to Israel and the scope of customary international law in the context of Israel's actions in Gaza is far from straightforward. In this regard:
- a. As a matter of treaty law, the UK's position is that Israel continues to have obligations as an Occupying Power in Gaza under Geneva Convention IV. This includes the obligations: (i) under Article 55 to ensure the food and medical supplies of the population; and (ii) under Article 59, to accept offers to conduct relief operations that are humanitarian and impartial in character. Israel, however, does not accept that it is an Occupying Power but has stated that it will comply with Geneva Convention IV as a matter of policy.
 - b. As a matter of customary international law, the ICRC has identified that the parties to an international or non-international armed conflict "*must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.*"¹² The rule identified by the ICRC gives the parties to an armed conflict the right to control the content and delivery of aid. However, it is not always clear what this means in practice. As stated in the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*:

¹² Rule 55, ICRC customary IHL study.

“the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel may be discharged in a variety of ways, leaving parties discretion in their implementation.” (para. 57)

- c. Israel’s position is that (as a party to an armed conflict), it is required by IHL to allow and facilitate access of supplies which are essential for the survival of the civilian population, but it does not consider that it is itself required to provide such supplies.
 - d. Israel further contends that the obligation to allow free passage of consignments of essential objects is subject to conditions, mirroring those expressed in Article 23 of the Fourth Geneva Convention, namely that there are no serious reasons for fearing that the consignments may be diverted from their destination, that the control may not be effective or that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of such consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods. To what extent conditions akin to those in Article 23 are available in this context is not clear.
14. Israel’s interpretation of the scope of IHL in this area is relevant to the assessment of its commitment to comply with IHL. In short, it does not necessarily follow from the fact that Israel may take a different view of the scope of its obligations that it is not committed to complying with IHL.

Treaty Obligations Relevant to Criterion 1(b)

15. Criterion 1(b) specifies that the Government will not grant a licence if to do so would be inconsistent with *“the UK’s obligations under the United Nations Arms Trade Treaty”*.
16. The Trade Secretary accepts that, in appropriate circumstances, the obligation to prevent genocide under the Genocide Convention can inform the UK’s obligations under the Arms Trade Treaty. However, in the current circumstances, the applicable legal obligations under that Treaty are to be derived from Article 6(3) of the Arms Trade Treaty rather than Article 6(2) which is relied upon by the Claimant.¹³
17. The Claimant argues, at §44 of the SFG, that Article 6(2) of the Arms Trade Treaty (and thus Criterion 1(b)) is engaged because the UK has an obligation to prevent genocide under the Genocide Convention, and that this duty to prevent is *“engaged where the State is merely ‘aware’ of a ‘serious danger’ that genocide might occur”*. Reference is made selectively to a portion of §431 of the Judgment of the International Court of Justice (ICJ) in *Bosnia Genocide Convention case*.¹⁴

¹³ It is noted that Article 6(2) refers to *“relevant international obligations... in particular those relating to the transfer of, or illicit trafficking in, conventional arms”*, whereas Article 6(3) expressly covers genocide, crimes against humanity and grave breaches of the Geneva Conventions.

¹⁴ *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, at p. 222 (*“the Bosnia Genocide Case”*), §431.

18. However, Article 6(2) only applies “*if the transfer would violate ... [the State Party’s] relevant international obligations under international agreements to which it is a Party*” (emphasis added). The ICJ made it clear, in the same paragraph of the *Bosnia Genocide Convention* Judgment quoted in §44 of the SFG, that genocide “*must occur for there to be a violation of the obligation to prevent.*” It stated that:

“a State can be held responsible for breaching the obligation to prevent 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. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC [International Law Commission] in Article 14, paragraph 3, of its Articles on State Responsibility:

‘ . . . 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.’”¹⁵

19. Thus, although conduct required by the obligation to prevent genocide will need to occur prior to the commission of the genocide, there is no violation of the Genocide Convention (as is required by Article 6(2) of the Arms Trade Treaty) unless genocide (or the other acts listed in Article III of the Genocide Convention) has actually occurred.
20. The obligation, under the Genocide Convention, to prevent genocide, is given effect to in the Arms Trade Treaty in Article 6(3) – a provision which is cited, but not addressed by the Claimant. Article 6(3) requires that: “*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 ...*” (Emphasis added.) This provision requires not only that: (i) the arms or items, the transfer of which is under consideration, would be used in the commission of genocide (this requirement thus indicates that what is prohibited is not merely a transfer of arms in circumstances where genocide is being committed but rather a transfer of arms that are to be used to commit genocide), but also (ii) the State Party has knowledge that such use would take place. The threshold of knowledge required under Article 6(3) is thus much higher than suggested by the Claimant. Actual knowledge that genocide is taking place or would take place is required.
21. The commission of genocide requires an intention to destroy, in whole or in part, a national, ethnical, racial or religious group as such (Article II, Genocide Convention). The Claimants, in §109 of the SFG, include a list of what are described as “*statements of the intention of the Israeli State, taken with the totality of evidence as to the mass IHL violations described above, give rise to the inference that there is at least a serious risk of an attempt or incitement to genocide against Palestinians in Gaza*”. However, the threshold for concluding that the specific intent required for the commission of genocide exists is a high one. In respect of inferences, both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICJ have stated that it must be shown that such intent is the only reasonable inference that can be drawn from the pattern of conduct and from statements made:

¹⁵ *Bosnia Genocide Convention case*, §431.

- a. In *Prosecutor v. Karadžić*,¹⁶ the ICTY Trial Chamber found that certain statements:

“do not demonstrate that the only reasonable inference is that the Bosnian Serb leadership intended to physically destroy a part of the Bosnian Muslim and/or Bosnian Croat groups in order to achieve these aims.” (§2598)

and that,

“in light of the totality of the evidence, the Chamber is not convinced that the only reasonable inference to draw from these statements is that the respective speakers intended to physically destroy a part of the Bosnian Muslim and/or Bosnian Croat groups.” (§2599)

- b. In the *Bosnia Genocide Convention* case, the ICJ held that:

“The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.” (§373)

- c. In the *Croatia Genocide Convention* case,¹⁷ the ICJ made clear that:

“for the Court, intent to destroy the group, in whole or in part, must be the only reasonable inference which can be drawn from the pattern of conduct (§417).

22. The Claimant also seeks to rely on Common Article 1 of the Geneva Conventions as engaging Criterion 1(b). However, it is clear from paragraph 2.13 of the EU User’s Guide (which the Claimant relies upon in support of this contention) that the responsibility on third party states not to encourage a party to an armed conflict to violate IHL is considered to be relevant to Criterion 2(c) and not Criterion 1(b).

FACTUAL CONTEXT

Overview of the Licensing Process

23. The Trade Secretary has responsibility for the licensing of the export of military or dual-use equipment and technology. She routinely draws on advice from the Foreign Secretary and Defence Secretary. The administration of the UK’s system of export controls and licensing for military and dual-use items is undertaken by a cross-departmental unit called the Export Control Joint Unit (“**ECJU**”). ECJU comprises officials from the Department for Business and Trade (“**DBT**”), the Foreign, Commonwealth and Development Office (“**FCDO**”) and the Ministry of Defence (“**MOD**”).

¹⁶ Trial Chamber Judgement, IT-95-5/18-T, 24 March, 2016

¹⁷ *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 p. 123, §417.

24. Applications for new export licences are assessed according to the eight criteria set out in the SELC. These criteria set out certain circumstances in which export licences will not be granted by the Government, including when to do so would be inconsistent with the UK's obligations under the United Nations Arms Trade Treaty (Criterion 1(b)) and/or when there is a clear risk that items might be used to commit or facilitate a serious violation of IHL (Criterion 2(c)). The SELC also require the Government to take into account certain matters, including the risk of an undesirable end-use, either by the stated end-user or another party (Criterion 7(g)).
25. Extant licences are kept under review in light of changing international situations. If there is a risk that extant licences are no longer consistent with the SELC, the Secretary of State has the power, under Article 32(1) of the Export Control Order 2008, to amend, suspend or revoke them. Where there is a significant change in circumstances, such as the outbreak of armed conflict, which might affect exports to a particular country or region a "Change in Circumstances Review" ("**CiC Review**") is (as a matter of policy) undertaken, as described in more detail below.
26. This process of reassessment under the SELC necessarily takes some time. Consequently, the Secretary of State may, if necessary, impose a temporary stay on the processing of new licences and the use of extant licences. The scope of this "suspension mechanism" was summarised by the Divisional Court in *CAAT I* at §196:

"The Secretary of State's policy is to consider suspending licensing and extant licensing where, in light of the new evidence and information, it would be considered that a proper risk assessment against the Consolidated Criteria would be "difficult". The policy makes clear that suspension will not be invoked "automatically or lightly" but on a case by case basis. Such a situation might arise, he explained, where conflict or conditions change the risk suddenly, or make conducting a proper risk assessment difficult".
27. As at 3 November 2023, there were 482 extant licences and pending applications in respect of items destined for Israel. The extant licences include both Standard Individual Export Licences (SIELs) and Open General Licences (OGELs), which, once granted, allow an exporter to ship goods without the need to apply for an individual export licence.

The assessment process in this case

Initial assessment

28. In the wake of the Hamas attack on 7 October 2023 and the Israeli response to it, ECJU initiated a CiC Review covering both extant licences and pending licences for the export of equipment to Israel.
29. The first stage of the CiC Review comprised an initial stocktake of 638 Israel-related licences and enquiries (comprising 376 extant licences, 107 pending licence applications, 18 MOD Form F680 applications (relating to the release by industry of particular equipment or information) and 137 other enquiries and requests for advice. This stocktake identified 28 extant licences and 28 pending applications as being the

highest priority for assessment, on the basis that they involved equipment which was most likely to be used by the IDF in offensive operations in Gaza. The “priority” extant licences included components for: combat aircraft; utility helicopters; armoured personnel carriers; naval vessels; radars; and targeting equipment. The “priority” pending applications included: components for military aircraft; weapon sights and targeting equipment; small arms ammunition; and materials for production of military aero-engines.¹⁸

30. Alongside the stocktake of licences related to Israel, the FCDO has established an “IHL Compliance Assessment Process” (“**IHLCAP**”), to gather and analyse information regarding Israel’s commitment and capability to comply with IHL and its past record of compliance with IHL. The IHLCAP Cell is based in the FCDO’s Middle East and North Africa Directorate (“**MENAD**”). Its analysis is based on open-source monitoring, intelligence and engagement with Israel via the FCDO’s diplomatic network. It also draws on support from the MOD.
31. The IHLCAP Cell’s first assessment was produced on 10 November 2023 and covered the events from 7 October until 3 November. A second assessment was produced in draft on 27 November, covering events from 4 to 17 November. The Cell produced an “out of cycle assessment” on 8 December covering the period up to 27 November and a further assessment on 29 December covering the period between 18 November and 1 December
32. The intention is to review and update the evidence base and assessment every two weeks, supplemented by interim assessments covering significant developments as required. The evidence base for the IHLCAP assessments is detailed, covering four main sections:
 - a. An overall analysis of the nature and dynamics of the conflict, covering the political, military, humanitarian and human rights context;
 - b. Analysis of statements made by NGOs, international bodies and partner countries relating to Israel’s adherence to IHL;
 - c. Analysis of Israel’s commitment to and capability to comply with IHL, including statements made by Government and military representatives, and information regarding military structures, processes and training; and
 - d. Analysis of Israel’s track record on compliance, including legal analysis of specific allegations of IHL violations.
33. The analysis of specific allegations of IHL breaches covers:
 - a. Analysis carried out by MOD of specific allegations relating to particular Israeli airstrikes and attacks by the IDF on the ground, including those highlighted by credible NGOs and international organisations; and

¹⁸ These figures remain under review and have fluctuated as new applications have been made and assessments have continued.

- b. Analysis carried out by FCDO of indirect military incidents, including the evacuation order, concerns relating to the blocking of humanitarian relief, allegations relating to the siege applied by Israel, including concerns that it constitutes collective punishment.
34. The assessment submitted on 27 November analysed five specific allegations highlighted by Amnesty International in its report on airstrikes dated 20 October 2023. In relation to these specific allegations, the MOD's analysis illustrates the limitation, identified by the Court of Appeal in *CAAT I*: that information from NGOs can assist in establishing what may have happened but is of limited utility in determining why events of concern have happened.¹⁹ For example, a statement that “*If Israeli forces attacked this residential building knowing that there were only civilians present at the time of the attack, this would be a direct attack on a civilian object or on civilians, which are prohibited and constitute war crimes*” merely begs the question as to what Israeli forces knew and intended to achieve at the time of the strike. In relation to each of Amnesty International's five specific allegations, the MOD concluded that there was insufficient information to draw any conclusions as to whether they might constitute breaches of IHL.
35. The IHL Assessment, drawn from this evidence base on 10 November 2023, reached the following judgments:

“Commitment to comply with IHL

Where IHL is specifically mentioned, Israel universally expresses its commitment to comply, both publicly and privately. We have received private assurances of Israeli commitment to IHL at every level, from PM-PM discussions, military-military and legal-legal.

However, some government statements during this conflict cast doubt on both their interpretation and implementation of IHL. There have been public political statements from Prime Minister Netanyahu and his ministers referencing the total destruction of Hamas. Given Hamas also has responsibility for running civilian infrastructure in Gaza, including hospitals, this rhetoric is troubling. Dehumanising comments such as “we are fighting against human animals” are also of concern, as are warnings that civilians who do not evacuate could be seen as Hamas sympathisers. It is not possible to define clearly what may be political rhetoric for a domestic audience and what speaks to the conduct of the campaign.

Record of compliance

Without accurate information on real-time IDF decision-making and operational planning, we have been unable to make a case-by-case assessment on Israel's compliance with IHL for specific strikes or ground operations during the current conflict in Gaza. Despite the lack of specific information, the volume of strikes, total death toll, as well as proportion of those who are children raise serious concerns; we will continue to seek further information as regards the interpretation and application of the principle of proportionality.

¹⁹ [2019] EWHC 221 (Admin) at 134.

At present there is insufficient information to assess whether or not the evacuation order, allegations of siege conditions and collective punishment, and concerns around humanitarian access are breaches of IHL.

Given the conditionality publicly being placed upon humanitarian access by Prime Minister Netanyahu (i.e. that access will only be given in return for the release of hostages), there are concerns around the basis upon which Israel is granting or withholding consent for humanitarian access. We are prioritising this for further review.

Capability to comply with IHL

Israel is assessed to have no deficits in military structure or process which would materially affect its ability to comply with IHL. The IDF has a solid legal structure with independent non-military oversight bolstered by legal experts from the Military Advisor General's Corps. IHL training is incorporated across the full spectrum of command courses from junior commanders up to senior officers. We are seeking information on the degree of after-action review that is undertaken.

The scale of the reservist call-up is of limited impact given that all reservists undergo full-time training followed by a period of active duty, giving them a solid understanding of the expectations of a professional force. We will seek to confirm if any refresher training is delivered upon mobilisation.

Israel has stated that IHL processes are incorporated into IDF operational planning, such as comprehensive target packs detailing the humanitarian consequences of actioning a kinetic strike. The number of strikes and intensity of the campaign gives rise to challenges in ensuring that due consideration is given to the balance of military advantage versus civilian harm.

On balance our assessment remains that Israel has the capability to comply with IHL.

Conclusion

We assess that Israel has made formal commitments to comply with IHL and has the capability to comply with IHL. However, we have been unable to make a conclusive determination of Israel's record of compliance, to date, in the ongoing conflict. As noted above, we are seeking further information as regards the interpretation and application of the principle of proportionality.

Given the paucity of information, the scale and intensity of the conflict, the death toll, the unusual civilian population density coupled with their inability to evacuate and the concomitance mounting effects of the conflict on civilians, HMG's current inability to come to a clear assessment on Israel's record of compliance with IHL poses significant policy risks."

36. In order to address the information gaps and uncertainties identified by the IHLCAP, an urgent request for information was sent by the Director of MENAD to the Deputy Head of Mission at the Embassy of Israel in London on 21 November 2023, seeking responses to the following questions:

- a. Information about the decisions that led to the reported targeting of the five sites raised by Amnesty International in its report of 20 October 2023;
 - b. Information about the decisions that led to the reported strikes on the Jabalia refugee camp around 31 October 2023;
 - c. Information about the decisions that led to operations in and around Al Shifa hospital;
 - d. Information about the reports in the media of strikes on an ambulance outside Al Shifa on 3 November 2023;
 - e. Information on the incident reported by the ICRC that a humanitarian convoy of five trucks and two ICRC vehicles that were carrying lifesaving medical supplies to health facilities were hit by fire;
 - f. The position of the Israeli government regarding statements that the evacuation instruction issued on 12 October 2023 could be incompatible with IHL because (1) the location to which civilians were instructed to evacuate was not safe, as airstrikes subsequently took place in the south of Gaza; and (2) the humanitarian situation in the South was inadequate to meet the basic needs of those evacuated;
 - g. The position of the Israeli government regarding statements that Israel is engaged in collective punishment;
 - h. Information on whether the statement issued by the Prime Minister's Office on 18 October 2023 regarding the provision of humanitarian assistance still represents the position of the Israeli government; and
 - i. Information regarding (1) the type and quantity of humanitarian relief, fuel and electricity that the Israeli government is currently permitting to enter Gaza; and (2) Israel's assessment of how adequate the resources currently available in Gaza are to meet the basic needs of the civilian population.
37. In accordance with the very urgent timeframe requested, Israel provided its response on 26 November 2023. The covering letter noted that Israel was not able to respond to all the questions raised, especially those which related to specific incidents, highlighting that:
- a. The process of gathering comprehensive and properly substantiated information regarding individual incidents presents significant challenges, particularly in the context of active hostilities;
 - b. Israel would not therefore be able to address the details of individual incidents prior to their examination under the designated mechanisms;
 - c. Israel attached the utmost importance to maintaining the credibility and accuracy of its accounts of specific incidents and therefore avoids giving explanations before they can be sufficiently validated.

38. In a 14-page Annex, detailing its compliance with IHL in the conflict (“**the Israeli Response**”), Israel emphasised, *inter alia*, the following points:
- a. Since the attack on 7 October 2023, Hamas, the Islamic Jihad and other terrorist organisations have fired over 10,000 projectiles indiscriminately into Israel, causing deaths, injuries and damages to civilian structures, including hospitals;
 - b. Israel is acting to completely dismantle Hamas’ military capabilities, to ensure the safe return of all the hostages and to prevent further attacks on Israel from other fronts;
 - c. Despite the fact that Israel faces adversaries who have complete disdain for the law and human life, and notwithstanding the serious challenges in engaging in urban warfare while Israel’s civilians are under attack, Israel and the IDF remain committed to IHL and to their own ethics and values in warfare, which go beyond the strict confines of the law;
 - d. Hamas, Islamic Jihad and other terrorist organisations in Gaza deliberately and systematically operate from amongst civilians, mask their militants in civilian dress and actively use their own population as human shields. Hamas has called on its population to ignore IDF warnings and recommendations to evacuate and has actively sought to prevent civilians from moving to safer areas;
 - e. Tunnels and underground structures cause damage to underground civilian infrastructure and make structures above ground unstable and more prone to collapse. Hamas has systematically dispersed its military operations and assets throughout the entirety of Gaza, such that the IDF is required to carry out a large number of attacks against countless military objectives, mostly in a dense urban environment, against an adversary that seeks to use civilians to shield their operations;
 - f. At Al Shifa hospital, Israel had credible information in advance that Hamas had built and operated an extensive underground infrastructure directly beneath or adjacent to medical wards. Israel had additional intelligence in this regard which cannot be disclosed;
 - g. The IDF has published evidence showing, *inter alia*, that: hostages were brought to and held in the basement of the Rantisi hospital, where large amounts of weaponry were found; Hamas militants had fired at IDF ground forces from within the Sheikh Hamed hospital and from within the Al Quds hospital; and at least one hostage was executed by Hamas within Al Shifa hospital;
 - h. The IDF has incorporated the rules of IHL into all aspects of military operations, including through legal training, operational procedures and plans and provides ongoing legal advice to different levels of IDF command;
 - i. IDF legal advisers are not subject to the IDF chain of command on professional matters but report directly to the Military Advocate General. IDF legal advisers

work closely with operational forces to ensure that IHL is integrated into orders, procedures, doctrines and combat decision-making;

- j. Israel consistently applies the rules of IHL, including those concerning distinction, precautions and proportionality in carrying out attacks;
- k. Proportionality assessments, with respect to both civilian harm and military advantage, is based on the facts as they were understood in realtime and on the military commander's judgment at that time, not on hindsight;
- l. The IDF is taking various measures to mitigate civilian harm, including, but not limited to, conducting countless warnings before strikes; aborting attacks; and being selective in its choice of weapons;
- m. The IDF has invested significant resources in encouraging and facilitating the temporary evacuation of northern Gaza. Israel has established a humanitarian zone in southern Gaza and is facilitating the provision of aid coming from the Rafah crossing and is providing water from Israel;
- n. However, Israel has not stated that southern Gaza is a "safe zone". The overwhelming majority of rocket fire from Gaza had originated in southern Gaza and Hamas continues to plan and carry out attacks from southern Gaza. The IDF has thus been compelled to operate to some extent in southern Gaza, although northern Gaza was significantly more dangerous;
- o. The IDF does not target medical facilities where it would be unlawful to do so. The activity in the al Shifa hospital complex illustrate the IDF's efforts to minimise harm to medical services, for example by warning that Hamas' continued use of the hospital jeopardised its protected status, by encouraging and facilitating wide-scale evacuations of the hospital and, whilst in the hospital, making every effort to refrain from live fire and ensuring that medical teams and Arabic speakers accompany the forces;
- p. In relation to humanitarian relief, tonnage of supplies through Rafah is increasing and the water supply to the south coming from Israel has increased. Israel has facilitated the evacuation of patients from Gaza for medical treatment. A professional unit at Israel's Ministry of Defence, COGAT, is constantly assessing the needs of the civilian population in Gaza and assisting with facilitating aid and medical services;
- q. Hamas has itself caused direct damage to civilian infrastructure in Gaza. Hamas has also diverted aid for its military purposes;
- r. In relation to individual incidents of alleged IHL violations, the IDF has in place robust and independent mechanisms for examining and investigating allegations of misconduct and for learning lessons to improve its practices and procedures. These mechanisms serve the Military Advocate General in taking enforcement decisions. The MAG's decisions are subject to review by Israel's Attorney General as well as by Israeli courts, including the Supreme Court;

- s. The IDF's General Staff Fact Finding Assessment Mechanism has already started gathering information regarding credible complaints of incidents occurring during the current war, however examining individual incidents during largescale and intensive hostilities is challenging;
 - t. Every civilian death is a tragedy, but there is good cause to be doubtful about the casualty numbers being reported by Hamas as these figures do not distinguish between civilian casualties and military casualties, nor do they disclose which casualties were a result of Hamas' own actions;
 - u. Amnesty International's analysis and conclusions in respect of specific incidents are open to question, not least because Amnesty International has no factual knowledge of the military objectives of a strike nor of the precautions taken by the IDF.
39. On 27 November 2023, the IHLCAP Cell's second assessment was produced and shared in draft with the Foreign Secretary, with an evidence base updated to cover the period from 4 November to 17 November. This assessment concluded that:
- a. On balance, Israel has the capability to comply with IHL;
 - b. Israel has made formal commitments to comply with IHL but overall commitment remains unclear;
 - c. Israel's record of compliance would be assessed further upon receipt of the Israeli Response.

The 8 December 2023 IHL assessment

- 40. In light of the Israeli Response, the IHL Cell in MENAD produced an "Out of Cycle" IHL Assessment on 8 December 2023, which analysed the information provided by the Israelis against the existing evidence and analysis.
- 41. The assessment of Israel's **capability** to comply with IHL remained the same.
- 42. In relation to Israel's **commitment** to comply with IHL, the assessment noted that the nature and timing of the Israeli Response demonstrated cooperation and the seriousness with which Israel had approached the request for information. The document contained clear statements of Israel's commitment to IHL, including in relation to targeting procedures and investigations. The note had been formulated by senior officials who understood the reasons for the questions posed as well as the weight and level of scrutiny that would be given to the response. It explained that the IDF had incorporated the rules of IHL into all aspects of military operations, including through legal training, operational procedures and plans, and that ongoing legal advice was provided to different levels of IDF command. Details were also provided regarding Israel's understanding of Hamas tactics and the relevance of these to Israeli targeting practices. Israel's explanation that it was not able to respond to all the questions, especially those related to specific incidents was assessed to be a credible explanation in the circumstances. Israel's position that there was some intelligence that it could not share was likewise assessed to be reasonable.

43. The assessment further noted that, although Israel accepted that it was under an obligation to facilitate (but not to provide) humanitarian assistance in Gaza, the Israeli Response gave no detail of the reasons for restricting the quantity of supplies of food, water and medical supplies. The decision of the Israeli Cabinet of 18 October 2023 had linked the supply of humanitarian assistance to the release of hostages. The assessment noted that the absence of further explanation raised concerns regarding the commitment to comply with the obligation not to arbitrarily deny access to humanitarian assistance and was relevant to an assessment of Israel's overall commitment to IHL. However, Israel's position was that it is acting in accordance with what it believes to be the relevant legal obligations in relation to humanitarian assistance and it is therefore possible that this is a case of disagreement about what the law requires, rather than an intentional disregard of IHL.
44. The assessment on commitment was deferred for ministerial decision.
45. In relation to Israel's **record of compliance**, the Out of Cycle IHL Assessment recorded that FCDO and MOD had undertaken further analysis in the light of the Israeli Response. It was now assessed that it was possible that Israel's actions in relation to some aspects of the provision of/access to humanitarian relief were a breach of IHL, but that it was unlikely that Israel had breached the prohibition on collective punishment or that the evacuation order was a breach of IHL. There was no evidence that Israel's military operations were intended to cause starvation, but there was insufficient information about the military objectives of the siege to determine whether or not it was a possible breach of IHL. The MOD's assessment of the five specific incidents raised by Amnesty International remained unchanged, although the assessment noted that the Israeli Response and recent open source reporting make a number of valid points about the credibility of the violations alleged by Amnesty International.
46. Three new allegations (violence by settlers in the West Bank; IDF activity around Al Shifa hospital and an alleged attack on an ICRC convoy) had been assessed, but there was insufficient information to conclude whether or not these constituted possible violations of IHL.
47. The assessment concluded:
- "We are satisfied that we have used all best endeavours to identify relevant information and that it is reasonable that not all such information can be acquired. While there remain incidents on which we do not have sufficient information from which to draw a conclusion on compliance In light of information received and other inquiries undertaken, we are satisfied that we do have sufficient information on compliance to inform our overarching view of Israel's compliance with IHL that the record of compliance does not reveal a pattern suggestive of unaddressed underlying systemic weakness which might undermine other material pointing towards an ability and willingness to comply with IHL – noting that the assessment on commitment is subject to Ministerial decision."*

The decision

48. On 8 December 2023, a submission was sent from MENAD to the Foreign Secretary, seeking his decision on whether Israel is committed to complying with IHL.
49. On the same date, a separate submission was sent from ECJU to the Foreign Secretary, setting out three options for advising the Secretary of State for Business and Trade on the handling of extant export licences for defence-related equipment for Israel, namely:

Option 1: Not to suspend or revoke extant licences but to keep them under careful review;

Option 2: To suspend extant licences where it is assessed that the items might be used in carrying out or facilitating IDF military operations in the current conflict;

Option 3: To suspend all extant licences to the IDF.

The submission explained that the availability of each of the options turned on the Foreign Secretary's assessment of whether there is a clear risk that items would be used to commit or facilitate a serious violation of IHL.

50. On 12 December 2023, the Foreign Secretary decided that he was satisfied that there was good evidence to support a judgment that Israel is committed to comply with IHL. On the basis of that assessment in particular, the Foreign Secretary decided to recommend Option 1 to the Secretary of State for Business and Trade.
51. A submission was sent from the Director Export Control and Sanctions to the Trade Secretary of State on 14 December 2023 (including the Foreign Secretary's recommendation).
52. On 18 December 2023, the Trade Secretary took the decision not to suspend extant export licences to Israel, nor to stop granting export licences, but rather to keep her decisions about whether or not to grant, revoke, or refuse licences under careful review.

GROUND 1

53. On no view can it be said that the only rational conclusion open to the Trade Secretary is that to continue to grant licences would be incompatible with Criteria 2(c), 1(b) and 7(g).
54. In relation to **Criterion 2(c)**, in light of all the information available to the Trade Secretary, including the Israeli Response as critically analysed against all the other information and analysis collated in the IHL CAP assessments (see above), it was plainly not irrational for the Trade Secretary to conclude that there is not a clear risk that exported items might be used to commit or facilitate a serious violation of IHL.
55. For completeness (and also of relevance to Ground 3 below), the Trade Secretary's decision was the product of a thorough and detailed process of review to reassess extant licences to Israel following Israel's response to the attack launched by Hamas. In summary:

- a. The initial stocktake reviewed all licences and enquiries which relate to Israel and identified those which are most likely to be used by the IDF for offensive operations in Gaza. This includes components which will be incorporated into equipment in third states. Criterion 7(g), which requires the Government to take into account the risk of an undesirable end-use by the stated end-user or another party, has accordingly been addressed;
 - b. The IHLCAP assessments have collated detailed evidence and expert analysis, covering broader contextual concerns as well as drilling down into the detail of Israel's conduct of the hostilities. They enable ECJU to give authoritative advice to Ministers in relation to Israel's capability and commitment to, and its record of compliance with, IHL, in order to inform the assessment under Criterion 2(c). The aim is to update assessments on a fortnightly basis;
 - c. The IHLCAP assessments confirm that the Government is alive to, and has factored into its analysis, the full range of concerns and criticism which has been directed against Israel, including from the UN and from NGOs;
 - d. The Israeli Response to the questions raised by the Government contained clear statements of Israel's commitment to IHL. It explained that the rules of IHL are incorporated into all aspects of the IDF's military operations. Details were also given about the tactics deployed by Hamas and, in particular, how the IDF had responded to Hamas' use of medical facilities as shields for military operations. In relation to humanitarian assistance, ECJU noted that Israel's position is that it is acting in accordance with what it believes to be the relevant obligations in relation to humanitarian assistance and that therefore, although this is an area of concern, it may not be indicative of any intentional disregard for IHL. In relation to Israel's record of compliance, Israel's explanation that it was not able to respond in detail was assessed to be credible. The caution expressed in the Israeli Response with regard to the assumptions made by Amnesty International was reflected in other open source reporting and MOD's analysis that it had insufficient information to assess whether these allegations were possible breaches of IHL remained the same; and
 - e. In the context of a conflict situation such as the present, it is not surprising that the information available to the Government is incomplete. It does not follow that the only rational approach was to invoke the "suspension mechanism". As the Divisional Court emphasised in *CAAT I*, it is clear that the suspension mechanism will not be invoked "*automatically or lightly*". It was reasonable for the Government to identify the critical gaps in its understanding and to pursue these on an urgent basis with the Israeli Government, before concluding whether it was too difficult to carry out a proper risk assessment under Criterion 2(c).
56. In relation to **Criterion 1(b)**, the applicable provision of the Arms Trade Treaty is Article 6(3), which deals specifically with the risk that exported arms or items might be used in the commission of genocide. For the reasons set out above, the threshold for establishing the commission of genocide is a very high one. It prohibits exports only if a State Party (here, for relevant purposes the UK) has knowledge that the arms or items would be used in the commission of genocide. There is no factual basis for any such

conclusion, on the contrary. It cannot be said that the only rational conclusion open to the Trade Secretary was that continuing to grant export licences would violate the UK's international obligations and that the Criterion 1(b) threshold was therefore engaged.

57. For completeness, the focus on Criterion 2(c) was plainly appropriate, and on any view rational, in circumstances where the real concern relates to Israel's use of licensed equipment in armed conflict, a context for which IHL provides the primary legal framework. The suggestion, at §124 of the SFG, that Criterion 1(b) sets a "*lower standard*" because it requires the Trade Secretary to "*tak[e] a view on an objective legal question*" (whether the grant of a licence would be inconsistent with the UK's treaty obligations) rather than conducting a predictive risk assessment is wrong. Articles 6(2) and 6(3) of the Arms Trade Treaty both require a predictive assessment as to the future use of exports. Further, for the reasons set out at, Article 6(3) of the Arms Trade Treaty (which would be the applicable provision) sets a very high threshold.
58. **Criterion 7(g)** requires the Secretary of State to take into account "*the risk of an undesirable end-use either by the stated end-user or another party*". As explained above, the stocktake identified all licences and enquiries which relate to Israel. This included components which will be incorporated into equipment in third states. Criterion 7(g) has accordingly been complied with.

GROUND 2 and 3

59. Ground 2 (error of law) and Ground 3 (failure to follow the proper procedure) are presented as the "*two obvious explanations for the plainly irrational decision taken by [the Trade Secretary]*". Although it is asserted that they are distinct challenges to the rationality ground, no specific errors of law or procedure are identified: the submission is simply that a decision to continue licensing must have been based on an error of law or procedure. Grounds 2 and 3 thus add nothing to the irrationality case advanced in Ground 1.
60. In any event, there has been no error in the application of the principles of IHL or the UK's treaty obligations with respect to genocide.
61. In relation to the principles of IHL, the proper role of the Secretary of State (and the courts) in applying the "serious violation of IHL" threshold in Criterion 2(c) has been clarified by the Court of Appeal in *CAAT 1*:

*"In our view, it would not be appropriate to seek to give some abstract definition of the concept of "serious violations" of IHL, since so much depends on the precise facts... Furthermore, we have to recall that the context in which the issue arises here is not one on which the Secretary of State is sitting like a court adjudicating on alleged past violations but rather in the context of a prospective and predictive exercise as to whether there is a clear risk that arms exported under a licence might be used in the commission of a serious violation of IHL in the future."*²⁰

²⁰ CAAT 1, CA Judgment at §165.

62. In relation to genocide, as set out at §§12 ff and summarised at §55 above, the Claimant misrepresents the relevance and application of the UK's treaty obligations in this context.
63. As to the procedure, the summary of the principles identified in *CAAT 1* above confirm the high threshold which is applicable in this context. In particular, the court should not intervene because it considers that further enquiries would have been sensible or desirable, but only if no reasonable authority could have been satisfied that it had the information necessary for its decision. In the light of the detailed assessment process which has been put in place, as summarised under Ground 1 above, there is no basis to suggest that there was a failure of procedure and/or that the Trade Secretary has not satisfied the *Tameside* duty.
64. At §133 of the SFG, the Claimant asserts that the “burden is on the SST to explain what material she has taken into account and how this rebuts and/or clarifies the factual position contrary to the evidence presented by C herein.” A similar attempt to set up a presumption from third party reporting was rejected by the Divisional Court in *CAAT 1* at §207:
- “The claimant and intervenors naturally place heavy reliance on the numerous third party reports in 2016 of civilian casualties and allegations of breaches of international humanitarian law by the Coalition in Yemen. However, in our view, the third party reports do not raise any legal presumption that Criterion 2(c) is triggered, although, as the Secretary of State accepts, their content must be properly considered in the overall evaluation.”*
65. It is evident that the concerns identified by the UN, Amnesty International and other third parties have been fully addressed in the IHLCAP assessments and properly considered in the decision-making process.

CONCLUSION

66. In these circumstances, it is submitted that permission should be refused on the basis that none of the Grounds is properly arguable. The Secretary of State seeks her *Mount Cook* costs (see attached schedule of costs).
67. If permission is granted, the Secretary of State agrees that the claim is suitable for a degree of expedition, but the timetable must be sufficient and realistic.
68. On reflection, the Secretary of State does not accept that this case is one which is appropriate for a Costs Capping Order (“CCO”) to be granted:
- a. The claim is not properly arguable and (in the case of Grounds 2 and 3) is not properly particularised.
 - b. In any event, the proper approach to decision-making in relation to licensing for arms exports, and in particular the application of Criterion 2(c) has been the subject of lengthy and detailed proceedings in the Divisional Court and Court of

Appeal in *CAAT 1* and again in the Divisional Court in *CAAT 2*. The principles guiding the Trade Secretary's decision have been clarified by the courts. This claim involves the straightforward application of those principles to the specific facts of the case. It does not raise an issue of general public importance.

69. If, however, the court determines that a CCO is appropriate, the parties have agreed that the Secretary of State's costs liability should likewise be capped, at £70,000.

**SIR JAMES EADIE KC
JESSICA WELLS
KATHRYN HOWARTH
PROFESSOR DAPO AKANDE**

12 January 2024