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

This replaces the Defendant's skeleton served on 30 April 2025 in order to comply with the 50-page limit directed by the Court on 1 May 2025.

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. The Foreign Secretary's advice was based on:

   (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

[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.
[2] A group of policy experts based in the Foreign, Commonwealth and Development Office ("**FCDO**"). The IHL Cell has produced regular "IHL 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]**.

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]

3. 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]

4. 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 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*

[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]**.
[11] Bethell 1, §7 **[CB/D/26/559]**.

adversaries would not wait to take advantage of any perceived weakness, having global ramifications."[12]

5. 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 (§8);

   (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 (§11);

   (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** (§11);

   (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"* (§20);

   (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, effectively, exclude them from the scope of any suspension (§§24-25).

6. 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.[14]

7. 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

[12] Defence Secretary Advice **[CB/E/29/593]**.
[13] **[CB/E/56/896]**.
[14] **[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.

reason to depart from the SELC and not to suspend those licences, is provided in the CLOSED witness statement of Keith Bethell.

8. The Claimant challenges the F-35 Carve Out (**Grounds 8 to 12**) and the decision to adopt Option 1 (**Ground 13**). The parties' respective cases are now contained in (i) the Amended Statement of Facts and Grounds, filed on 6 February 2025;[15] (ii) the Amended Detailed Grounds of Resistance, filed on 28 February 2025;[16] and (iii) the Amended Reply, filed on 21 March 2025.[17] The Interveners have also filed written submissions. Special Advocates have also been appointed and have filed a CLOSED skeleton argument.

B. GROUND 8

9. 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.[18] 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) (§§40-66 below); (ii) the Arms Trade Treaty (**"ATT"**) (Ground 8(B) (§§67-86 below); (iii) the Convention on the Prevention and Punishment of the Crime of Genocide ("**Genocide Convention**") (Ground 8(C) (§§87-101 below); and (iv); Articles 16 and 41 of the Draft Articles on State Responsibility for Internationally Wrongful Acts ("**ASR**") (Ground 8(D) (§§102-112 below).

Ground 8 is not justiciable

The principled, constitutional constraints

10. **First**, 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.

[15] **[CB/A/2/22]**.
[16] **[CB/A/3/134]**.
[17] **[CB/A/4/180]**. As will be discussed further below, the Claimant's case in respect of Ground 13 as now advanced in its Skeleton Argument appears to be different from its pleaded case.
[18] ASFG, D1.

[19] 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: see *JS* at §90 (per Lord Reed) and at §235 (per Lord Kerr).[20]

11. **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 as a ground for review. International law does not thereby become enforceable through public law: see *JS* at §§90-91 (per Lord Reed), §§122, 128, 133 (per Lord Carnwath), §§136-137 (per Lord Hughes).

12. **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.

13. *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. 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. 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).

14. **Fourth**, in the present context, there is no domestic law "*foothold*" for Ground 8.[21] As regards the international law obligations to which the UK is subject, which the Claimant alleges are being breached: (i) 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

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[19] *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, at §§90 (per Lord Reed) and 115 (per Lord Carnwath) ("***JS***"); *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, 84 (per Lord Reed).

[20] 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.

[21] See *R (on the application of Campaign for Nuclear Disarmament) v The Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin) at §36 and §40.

"*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; (ii) 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[22]; (iii) The obligation to prevent under Article 1 of the Genocide Convention has not been incorporated into domestic law[23]; (iv) customary international law ("**CIL**") rules on State responsibility are not incorporated into domestic law, for the reasons given below in response to Ground 9.

15. There are two further independent and self-supporting reasons why Ground 8 is not justiciable.

16. **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 §§44, 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: *R (on the application of Campaign for Nuclear Disarmament) v The Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin) ("***CND***") at §§41, 43, 55.[24]

17. **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: see *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 ("***Maduro***"), §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***"), §§187-188). 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 matter in the present case is, at bottom, the conduct of Israel and whether that state is*

[22] 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 attached to "*persons*" and not to the State.

[23] 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.

[24] To similar effect see Lord Brown in *Corner House* at §65.

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

18. The Claimant has raised four objections to the analysis set out above.

19. **First**, it is asserted that there is a domestic foothold because the September Decision letter states that the departure from the SELC is "*consistent with the UK's … international legal obligations*".[25] That is based on an impossible reading of the case-law. The starting point is that set out at §§10-17 above. Any departure from that 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. 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 Ltd v HM Treasury* [2021] EWCA Civ 783 ("***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 Human Rights Act 1998 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)*.

20. **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.[26] 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.

    (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 §§1-8 above.

    (2) More fundamentally, 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 §§10-17 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. The question whether or not there is to be a departure from those core principles cannot depend exclusively on

[25] Reply §§2-5; CSkel §§153-163. A similar point is made by Oxfam in its Skeleton at §§33-34.
[26] See CSkel §§144-152.

whether there is a reference to international law in a Government policy. Instead, the question must depend on the multi-factorial and highly fact-specific analysis mandated by the *Launder* and *Kebilene* line of case-law.[27]

21. **Third**, the Claimant contends that Ground 8 is "*not a challenge to the UK's conduct of foreign policy*".[28] That is a surprising contention. This is a paradigm case of a domestic court being invited to enter an area which has long been held to be constitutionally inappropriate.

22. **Fourth**, the Claimant contends that the FAS doctrine does not apply in the present case because: (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")[29]; 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.[30]

23. As regards 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.[31] 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*, §240; *Noor Khan v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872; *Maduro*, §136(5); *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2014] QB 458 ("***Yukos***"), §104.

24. As regards the invocation of the public policy exception, 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. The exception is focused principally (but not exclusively) on *"infringements of individual fundamental rights"*: *Belhaj*, §§11(iv)(c), 102.[32] The wrongs alleged by the Claimant against Israel in this case are not ones which have been recognised as engaging the public policy exception. Any balancing exercise will militate against the application of the extension 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 previously been

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[27] No doubt recognising the difficulty with its absolutist position, the Claimant seeks to rely on the Export Control Act 2002, which it contends "underscores the centrality of international law" (CSkel §§150-151). 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 said that the decision-maker is required to take into account international legal obligations by reference to primary legislation.

[28] See CSkel §164.

[29] See CSkel §§172-172. Although framed as five reasons, they all make very similar points.

[30] See CSkel §180-182.

[31] See CSkel §14: "*The Israeli army has committed genocide, war crimes and crimes against humanity against the population of Gaza*." See also ASFG, §§205, 227, 230, 234; Reply, §§41, 58, 59(b), 59(c)(ii).

[32] See also *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; *R (WSCUK) v Secretary of State for International Trade* [2022] EWHC 3108 (Admin) ("***R(WSCUK)***"), §156(ii).

taken into account similarly militate against any such extension: (i) considerations of comity, especially if the foreign State in question is friendly *vis-à-vis* the UK (*The Law Debenture Trust Corpn plc v Ukraine* [2019] QB 1121 (Court of Appeal) ("***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, 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)*, §156(iii)).

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

25. 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*": *R (Friends of the Earth Ltd) v The Secretary of State for International Trade* [2023] 1 WLR 2011 ("***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"*.

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

27. 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. 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. 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.

(2) There is a live dispute, including in two cases before the ICJ[33] 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 *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, §91; and *Corner House*, §44.[34] Adjudication of this dispute therefore gives rise to considerations of comity and risks of overlapping judgments.

(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 §21 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.[35]

(5) The decision-maker was not "*compelled*" to take into account international legal obligations by reference to domestic statute.[36] 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*".[37]

28. Notwithstanding the clear and consistent case-law, the Claimant contends that a "*correctness*" standard should be applied. The Claimant's analysis[38] 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 immediately above.

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[33] *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)*.
[34] 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).
[35] 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).
[36] *Contra* Reply §20(e).
[37] See footnote 27 above.
[38] See, in particular, CSkel §§184-197.

29. In its skeleton argument, Oxfam contends that the "*tenable view*" standard only applies in the context of a rationality challenge.[39] This is clearly wrong, and Oxfam has cited no authority to support it. Oxfam suggests that *Friends of the Earth* "*is such a case*". That too is 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.

30. 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

31. The Claimant's case on Ground 8 has changed materially 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 went no further than assessing that there was a clear risk that F-35 components might be used by Israel to commit a serious violation of IHL, but then stopped at that assessment, and failed (or failed adequately) to examine the question of whether Israel was in fact in breach.[40]

32. These criticisms are not based on a balanced appreciation of the facts, and 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.

33. 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.[41] 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.[42] 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;[43]

    (2) consideration of issues and allegations relating to deconfliction; [44]

[39] Oxfam Skeleton §36.
[40] CSkel §§200-201, 221-222, 232, 234, 246.
[41] **[SB/B/14/116-120]**.
[42] **[SB/E/85/1028-1081]**.
[43] **[SB/E/85/1032-1039, §§14-29; 1067-1069, §24-28]**.
[44] **[SB/E/85/1039-1041, §§30-37; 1069-1071, §§29-39]**.

(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;[45]

(4) information and allegations relating to food, healthcare, and WASH (water, sanitation and hygiene);[46]

(5) reference to OCHA reporting on the impact on residential infrastructure;[47]

(6) a detailed review of public statements by Israeli politicians and military leaders and private engagement with the UK Government.[48]

34. 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 with respect to IHL. The IHLCAP Assessments in turn informed ECJU's submissions and, ultimately, the Government's decision.

35. As to point (ii) in §32 above, as the 7th IHLCAP Assessment noted:

> *"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."*[49]

36. 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.[50]

37. 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 including: the adoption of UNSCR 2728 on 25 March 2024; the ICJ's

[45] **[SB/E/85/1041, §§38-39; 1048-1049, §§58-60; 1071, §§40-42]**.
[46] **[SB/E/85/1044-1046, §§48-40]**.
[47] **[SB/E/85/1047-1048, §§54-57]**.
[48] **[SB/E/85/1058-1061, §§99-113]**.
[49] 7th IHLCAP Assessment, §9. **[CB/E/41/693]**.
[50] Hurndall 2, §20 **[CB/B/14/118]**.

Provisional Measures Orders; and the ICC Prosecutor's arrest warrants.[51]

38. The ECJU C1 Assessment considered whether the continued export of items to Israel was compatible with the UK's international obligations and commitments, including under Article 1 of the Genocide Convention, CA1 of the Geneva Conventions, and Articles 6(2) and 6(3) of the ATT. 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.

    (1) 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. … 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. … 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."*[52]

    (2) 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 the specified breaches of IHL.[53]

39. 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 that items might be used for 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

40. 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.*"

41. The key issue of interpretation between the parties concerns the obligation "*to ensure respect*". As the UK has publicly (and correctly) stated on many occasions, this concerns the duty to ensure that all those within that Party's jurisdiction respect the Conventions. See e.g. the UK

[51] **[SB/E/102/1422]**.
[52] **[CB/E/35/609]**.
[53] 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**].

explanation of vote in the context of the UK's longstanding position on the illegality of Israeli settlements in the Occupied Palestinian Territories,[54] and by way of an example prior to the current Gaza conflict, the UK comments on the work of the ILC on protection of the environment in relation to armed conflicts (the same position was reflected in the comments of Canada, Israel and the USA).[55]

42. The Claimant, by contrast, contends that that the Government has failed to take steps to ensure that Israel respects the Geneva Conventions. In its skeleton argument, the Claimant now contends that:

    (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.[56] The alleged material misdirection in this respect is premised on the case that the Government misdirected itself as to the interpretation of CA1.[57]

    (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.[58]

43. As to (1), 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*".[59] 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 assessment were all revisited ahead of the September decision: see §§31-39 above.

44. As to (2), it appears that the Claimant alleges a failure of assessment concerning the UK's obligations to ensure that individuals within its jurisdiction respect IHL (those individuals being UK officials and arms exporters).[60] It is not understood on what basis.

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

45. 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

[54] 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.
[55] 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.
[56] CSkel §§201-203.
[57] CSkel §§204 and 207-208.
[58] CSkel §205.
[59] "ECJU C1 Assessment" of 11 June 2024, §27 **[SB/E/102/1428]**.
[60] CSkel §205.

jurisdiction do not violate IHL.[61] This is the Government's position.

(2) That States are bound to ensure respect of IHL by all other States. This is the Claimant's position. It lays emphasis on a body of commentary,[62] but accepts that there is no unanimity among the commentators.[63]

46. That this is a controversial and heavily contested question of international law is plain from the materials that the Claimant relies on.

(1) See for example: Professor Geiss;[64] Maya Brehm;[65] Birgit Kessler.[66]

(2) See also the ICRC's most recent commentary on CA1,[67] and other academic commentators on whom the Claimant relies.[68]

47. The Claimant contends that the Government's position on the meaning of CA1 is a minority view.[69] But the relevant question is whether the Government's position is tenable. It is at least a tenable view, supported by various commentators.[70]

48. 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).[71] The terms of CA1 do not state that States party to the Geneva Conventions must ensure respect by other

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[61] 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.
[62] ASFG §211.
[63] Reply §25(c).
[64] 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), pp. 120 and 122; 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.426.
[65] 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.
[66] 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.
[67] 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).
[68] 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.
[69] See Reply §25(c); CSkel §207.5.
[70] 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.
[71] Vienna Convention on the Law of Treaties ("***VCLT***"), Article 31(1).

States (as opposed to ensuring respect by individuals within their jurisdiction, for instance). Further:

(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*".[72]

(2) Professor Geiss accepts "*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*", 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.[73]

(3) The Claimant contends that its expansive interpretation of CA1 is supported by the object and purpose of the Geneva Conventions.[74] 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.

49. 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.[75] 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*".[76] 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*".[77]

(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: see e.g. UN General Assembly Resolution 76/82 of 9 December 2021.[78]

(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

[72] Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, p.687.
[73] 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.
[74] Reply §23(b); CSkel §207.2.
[75] CSkel §207.3; Reply §§23(c), 24(a), (c).
[76] 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.
[77] VCLT, Article 31(3)(b).
[78] Referred to in ASFG §211; and see UN General Assembly Resolution 76/82, UN Doc. A/RES/76/82, nineteenth recital, §15.

the Claimant's case. As has been noted by the ILC: "*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'.*"[79]

50. As to the negotiating history, this demonstrates that the inclusion in CA1 of the words "*in all circumstances*" was not intended to give CA1 an external application.[80] There was no discussion of the possibility that CA1 might require States to take positive measures targeted at other States, on the basis of the latter's violations of IHL.[81]

51. The Claimant has also pointed to decisions of the ICJ. As to those:

(1) 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).[82] A duty to abstain from encouraging is different from a duty to ensure compliance with the law,[83] and encouragement has not been pleaded by the Claimant.

(2) In the (non-binding) *Wall Advisory Opinion*, the ICJ said that all States were under an obligation to ensure compliance by Israel with IHL.[84] 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,[85] as aptly noted by Judge Kooijmans in his Separate Opinion.[86] The same statement was adopted, without explanation, in the *OPT Advisory Opinion* and in *Nicaragua v. Germany*.[87]

(3) It is not understood on what basis the Claimant contends that it is relevant that the UK

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[79] ILC, Draft conclusions on identification of customary international law, 2018, Conclusion 12, Commentary at §§6 and 8.
[80] Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to "Ensure Respect"" (2020) 96 *International Law Studies* 674, p.681.
[81] 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.
[82] *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.
[83] *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.
[84] *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.
[85] 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.
[86] *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.
[87] See *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, §279; also *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order, 30 April 2024, §23.

has accepted the compulsory jurisdiction of the ICJ.[88]

52. The Claimant's allegation that the Government has changed its position on the meaning of CA1 is incorrect.[89] 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. Further, as to the Provisional Measures Order in *Nicaragua v. Germany*, it is not the UK practice to "*take issue*" with orders of the ICJ.

Alternatively, the ATT gave concrete effect to obligations under CA1

53. 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 of those obligations in the specific context of arms transfers must take into account Articles 6 and 7 ATT. In this respect, 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*"[90] (relevant rules are those which touch on the same subject matter as the treaty provision being interpreted)[91]. The Government makes four points.

54. **First,** CA1 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. As noted by the ILC's Study Group on fragmentation of international law, *lex specialis* may be used to clarify a more general law.[92]

55. **Second**, the text of the ATT links the regime established under that treaty to the Geneva Conventions, and specifically to CA1: see the preambular section to the ATT, recording that the States 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*".[93]

56. **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 suggests that States considered that the obligations expressed in the ATT would at least satisfy their obligations under CA1.

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[88] CSkel, §207.2.
[89] See ASFG §212.
[90] 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.
[91] Richard Gardiner, *Treaty Interpretation* (2015), p.299. See also 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.
[92] 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.
[93] The fifth enumerated principle.

57. **Fourth**, the ATT is a treaty with a large membership of 132 States,[94] all of whom are also parties to (or bound by)[95] 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.[96]

58. As to the Claimant's position, it is not correct that 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.[97] This is one of several different approaches,[98] 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.[99]

59. It is also not correct that Article 6(2) and/or Article 26 ATT are being ignored by the Government.[100] The first merely acts as a *renvoi* and the second is a savings provision. Neither provides guidance on the content of applicable rules. Nor is the Government seeking to "*read down*" its treaty obligations: as a matter of the applicable rules of interpretation, Articles 6(3) and 7 are to be taken into account in the interpretation of CA1.[101]

Aiding and assistance

60. The Claimant does not appear to retain a separate case that the obligation to respect under CA1 prohibits the UK from aiding or assisting Israel in the commission of violations.[102] It would be wrong to contend that a different obligation applies in the context of CA1, triggered by the likelihood or foreseeability of a breach of IHL.[103] The ICJ in *Nicaragua v USA* was considering acts that had positively encouraged breaches of IHL. The Claimant has not alleged encouragement.

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[94] This number includes both State parties (116) and signatories (26).
[95] 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.
[96] 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.
[97] Reply §26(a)(i); CSkel §211.1.
[98] Richard Gardiner, *Treaty Interpretation* (2015), 2nd ed, pp.310-317.
[99] 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.
[100] Reply §26(b); CSkel §211.2-3.
[101] Reply §26(d); CSkel §211.4.
[102] 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. Cf. ASFG §§204-205; Reply §28.
[103] See Reply §28.

61. 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*". 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.

(2) The passage of the ICRC Commentary relied on by Oxfam reflects the evolving view of the ICRC (cf. 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 is not supported by reference to cases or State practice.

62. As to further consideration of the intent and knowledge requirements, 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 §§31 to 39 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.[104]

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

63. In any event, the Government has done all it reasonably could. 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. 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.[105]

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

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[104] 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.

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

(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, while 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.

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

66. 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.[106]

Ground 8(B): Articles 6(2), 6(3) and 7(3) of the Arms Trade Treaty

Article 6(2)

67. 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."*

68. 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).[107] 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 for the reasons set out in respect of those Grounds, above and below.

69. In its Skeleton, the Claimant contends that the Government erred in two respects re: the "*assessment that the continued supply of F-35 parts complied with Article 6(2)*":

(1) The Government failed to "*assess all relevant evidence"*[108] in failing to carry out any updated analysis of Article 6(2) as part of the decision on clear risk. There was thus a failure to have regard to a material consideration.[109]

[106] Cf. Reply, §28; CSkel §205.
[107] Casey-Maslen, Clapham, Giacca and Parker, "Arms Trade Treaty: A Commentary" (OUP, 2016), §§6.47-6.79.
[108] CSkel §221, referring back to CSkel §§214-218.
[109] CSkel §§225-226.

(2) Article 6(2) does not turn on actual knowledge.[110]

70. As to (1), the Claimant provides no support for its new case that the ATT requires a broad and unqualified obligation to "*assess all relevant information"*. In any event, it is incorrect to say that there was no consideration of matters post-dating the 11 June 2024 ECJU Criterion 1 Assessment, or that relevant matters were not taken into account. 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"*.[111] As to the extent, nature and limitations on the assessment exercise, see §§31-39 above.

71. As a matter of domestic public law, it is for the decision-maker to consider what is relevant, and also the manner and intensity of enquiry to be undertaken, subject only to rationality review: *R (DSD) v Parole Board* [2019] QB 285, DC at §§135-141; *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).

72. As to (2), 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 also concerned with constructive knowledge, e.g. as for 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).

Article 6(3)

73. 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."*

74. The Government's position is as set out in the ADGR §§35-40, including that knowledge within Article 6(3) is actual knowledge at the time at which a State party is deciding whether to authorise the transfer. That is an at least tenable position.[112] There is no evidence that the UK had actual knowledge at the time of the F-35 Carve Out. Further or alternatively, even if

[110] CSkel §227.3.
[111] **[CB/E/35/609]**.
[112] As is consistent with the US position: "United States Conventional Arms Transfer Policies", US Presidential Policy Directive/PPD-27, 15 January 2014. Cf. CSkel §§230-233; Reply §37.

the test to be applied is one of constructive knowledge (there is no indication to this effect in the text), there was no breach: see ADGR §40(a)-(c).[113]

75. Article 6(3) does not import a risk-based test (cf. CSkel, §230).

(1) There is no textual basis in Article 6(3) suggesting knowledge of a risk of one of the prohibited acts. Where, as in Article 7, the ATT parties wished to establish an obligation by reference to risk, they used that term. It is of course the case that the unlawful use of the arms with which Article 6(3) is concerned is in the future as at the moment of authorisation.[114] However, that does not turn the test into one of "*substantial grounds to believe*" or "*real risk*" that does not follow from the terms actually used in Article 6(3). The ICRC's 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), and is not consistent with the terms used.[115]

(2) The Voluntary Guide to the Implementation of Articles 6 and 7 ATT is plainly not a source of agreed interpretation.[116] It could be relevant as a supplementary means of interpretation under Article 32 VCLT[117] if it reflected State practice (see e.g. Conclusion 4(3) to the 2018 ILC Draft Conclusions and Commentary).[118] However, as the Voluntary Guide itself notes at §56, the practice is mixed, and certain participants considered that actual knowledge is required.

(3) The Commentary to the ATT referred to is cast in very tentative terms, and no assistance is to be derived from its passages referring to provisions in other treaties such as Article 3 UN Convention Against Torture where materially different wording is used.[119] As to the ICRC position, this recognises that some States adopt a position that actual knowledge may be required.[120]

(4) A test of actual knowledge would not impose a test that is so high as to render Article 6(3) meaningless. 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).[121]

76. As to the Claimant's contentions on constructive knowledge, this is in large part based on its case on "risk-analysis", State practice and the Voluntary Guide, as to which see above.[122] In any event this is plainly not a "*turned a blind eye*" case.

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[113] Cf. CSkel §228.
[114] Cf. CSkel §230.1.
[115] Cf. CSkel §230.2.
[116] See ADGR §§36-37.
[117] See Reply §37(b).
[118] Draft conclusions on identification of customary international law, 2018.
[119] 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*".
[120] 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.
[121] CSkel §230.6-7.
[122] CSkel §231.

77. 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. That was an at least tenable conclusion. The Claimant's case on the Government's "*failure to go any further than assessing a clear risk*" and its related case that the Government "*cannot assert that he did not possess the relevant knowledge*"[123], is based on an incorrect appreciation of the facts on assessment: see §§31-39 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.

78. As to the very small likelihood of UK parts ending up in existing Israeli F-35s,[124] 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 were at least tenable.

Article 7(3) ATT

79. 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 … 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; ….*
>
> *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.*"

80. Article 7(3) provides for a balancing exercising for the reasons set out in ADGR §44. There is a material distinction between "*overriding risk"* and "*clear risk"*; and States are afforded a significant degree of discretion when making assessments under Article 7(3). 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.

81. The Claimant's case is that Article 7 is concerned with an assessment of overriding risk (taken to mean clear risk) of negative consequences: if so, the UK is prohibited from exporting the relevant items.[125] This makes little sense and deprives the words "*would contribute to … peace and security*" in Article 7(1) of material meaning. On its interpretation, the arms at issue could

[123] CSkel §232 and 234.
[124] Reply §41; CSkel §§237-241.
[125] ASFG §219; CSkel §244.1.

make an overwhelming and beneficial contribution to peace and security under Article 7(1), and yet the State could not accord any weight to that in assessing whether there was an overriding risk under Article 7(3).

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

(1) The Claimant relies on the Voluntary Guide,[126] as to which the Government repeats the points above at §75(2). The individual instances of State practice which the Claimant cites, i.e. the views of Canada, New Zealand and Liechtenstein, do not point to any subsequent agreement relevant for the purposes of Article 31(3)(b) VCLT.[127] The same point applies so far as concerns the position of the EU.[128]

(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*".[129] Further, the passage relied on by the Claimant is not cast as reflecting what the Treaty has established.

(3) The Claimant contends that the term used for "overriding" in the Arabic text equates to "*'great' or 'substantial'*". 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.[130]

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

(1) As set out at 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.[131] The context of the term "*overriding risk"* strengthens, not weakens, the Government's case.[132]

(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 IHL or IHRL*".[133] That is to conflate Articles 6 and 7. The latter is concerned with whether arms "*could be used to commit or facilitate a serious violation*". The question then is whether that risk is overriding notwithstanding the potential that the arms *"would contribute to ... peace and security*".

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[126] CSkel §243.1.
[127] CSkel §243.2-243.4.
[128] CSkel §243.7.
[129] Cf. CSkel §243.5.
[130] Cf. CSkel §234.6. Article 33(4) VCLT provides: "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."
[131] Reply §44(a).
[132] Cf. Reply §44(b) and CSkel §244.1.
[133] CSkel §244.2.

There is no difficulty in conceiving of such situations, in particular where, the relevant equipment is being supplied into a pool.

(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,[134] including "*Contributing to international and regional peace, security and stability*".

(4) The SELC are of course differently worded.[135] However, there is nothing in the ATT to stop a State establishing more demanding criteria in domestic guidance. Further, 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.[136]

84. The Claimant also invokes the objectivity and non-discrimination principle referred to in Article 7(1).[137] 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 the actual terms of Article 7(3).

85. The negotiating history is also instructive.[138] In the final round of negotiations, a proposal by Switzerland was made (with six other States) to change the word "*overriding"* for "*substantial"*, with the justification 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"*.[139] Yet the final text maintained the words "*overriding risk"*, notwithstanding the apparent awareness that this would be understood as giving rise to a balancing test.[140]

86. Finally, as to the Claimant's case on inadequate assessment,[141] 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.[142] It is denied that there were any errors in the Government's assessment, 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

87. 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.*"

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[134] CSkel §244.2; Reply §44(c).
[135] CSkel §244.4.
[136] Cf. CSkel §244.5.
[137] CSkel §245; Reply §44(d).
[138] Cf. Reply §44(f).
[139] Switzerland proposal on Article 4 (now Article 7), dated 18 March 2013.
[140] Switzerland proposal on Article 3 (now Article 6), dated 18 March 2013. See also, ATT Monitor, Report 27 March 2013.
[141] CSkel §246.
[142] Letter from the Defendant's Principal Private Secretary to the Foreign Secretary's Private Secretary, dated 2 September 2024 **[CB/E/18/284]**.

88. In brief terms, and as follows from §§430-431 of the *Bosnian Genocide case*,[143] 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 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*." [144]

89. 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).

90. 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 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 predicated on genocide having taken place, while there has been no finding to that effect.

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

91. 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.

92. **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.*

[143] *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).
[144] See also the subsequent reiteration of this position in the *Croatian Genocide* case and the *Ukraine v. Russia ICSFT* case: ADGR, paras. 51-52.

Israel and *Nicaragua v. Germany* (the scope of the duty to prevent genocide is now also an issue in *Sudan v. UAE*).

93. **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*".[145]

94. **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 emphasised that "[g]*reat care must be taken in finding in the facts a sufficiently clear manifestation of that intent*."[146] The Government's assessment was that the evidence does not establish the existence of the "*dolus specialis*",[147] and that there was no serious risk of genocide occurring.[148] This assessment was, at the very least, tenable.

95. The Claimant appears to argue 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.[149]

    (1) There is no support for this in the text of Article I of the Genocide Convention. Further, the ICJ 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*."[150] 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*",[151] that being the only factual situation in which the ICJ had found that genocide had occurred.

    (2) The UK's written submissions to the ICJ in *Ukraine v. Russia*, on which the Claimant relies,[152] were concerned with the situation then before the ICJ, i.e. the duty on a

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[145] ASFG §224.
[146] *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 §189; also 373. See also *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.
[147] "ECJU C1 Assessment" of 11 June 2024, §17 and 28 **[SB/E/102/1426-1427]***;* Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609]**.
[148] "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]**.
[149] CSkel §258.
[150] *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.*"
[151] *Ibid*, at §433.
[152] Reply §49; CSkel §256.

"*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.[153] 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.[154]

Alleged failures in assessment

96. The Claimant[155] 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.[156] 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 food*";[157]

(2) Failed to take into account the humanitarian situation (CSkel, §264.1).[158] This is incorrect: see above.[159]

(3) Failed to take account of the forced displacement of Palestinian citizens.[160] This is incorrect.[161]

(4) Abdicated responsibility for distinguishing between political rhetoric, and statements

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[153] *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.
[154] Reply §52.
[155] CSkel §§262-266.
[156] Reply §§44(a)(ii), (b), 57; CSkel §264.
[157] "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]**.
[158] See also AI and HRW's Skeleton §18.2.
[159] "ECJU C1 Assessment" of 11 June 2024, §§12, 16, 20-21 **[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]**. See also Annex E to 24 July 2024 Submission from the IHLCAP Cell to the Foreign Secretary **[CB/E/35/609].**
[160] CSkel §264.2; see also AI and HRW's Skeleton §18.3.
[161] 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**].

which could speak to the conduct of the campaign in Gaza.[162] This too is incorrect.[163]

(5) Improperly excluded consideration of statements by individuals in Israel's Security Cabinet.[164] However, it was plainly not irrational for the Government to determine that its assessments of genocidal intent should focus on statements emanating from the War Cabinet and its decision-makers.[165]

(6) Failed to take into account statements by senior Israeli officials that are relevant to establishing genocidal intent.[166] 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,[167] which formed part of the evidential the basis for the IHLCAP assessments.[168]

- 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.[169]

- As to CSkel, §265.3 referring to a statement by Minister Without Portfolio Benny Gantz, on 31 January 2024,[170] statements like this were considered in IHLCAP Assessments[171] and by the ECJU and assessed as "*while inconsistent with IHL, … do not suggest an intention to destroy Palestinian civilians*."[172]

- 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 such are indicative of the intent behind Israeli government actions.[173]

(7) Made an error of approach in relation to the findings of the ICJ in *South Africa v. Israel* (CSkel, §263).[174] The evidence establishes that the findings of the ICJ were fully taken

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[162] CSkel §265.
[163] "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]**.
[164] CSkel §265.
[165] "ECJU C1 Assessment" of 11 June 2024, §15 **[SB/E/102/1428-1429].**
[166] CSkel §265.
[167] **[SB/E/99/1267]**.
[168] 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.
[169] "ECJU C1 Assessment" of 11 June 2024, §15 **[SB/E/102/1428-1429].**
[170] For this statement, see **[SB/F/156/2404**].
[171] See eg the Fifth IHLCAP Assessment, §47 **[SB/E/938]**.
[172] "ECJU C1 Assessment" of 11 June 2024, §21 **[SB/E/102/1428-1429].**
[173] The statements anyway need to be read in full. See at **[SB/F/156/2363]**, **[SB/F/156/2365]**.
[174] See also AI and HRW Skeleton §18.

into account by the Government.[175]

97. 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[176] (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);[177] and that there was a "*real risk*" of prejudice to such plausible rights under the Convention.[178] Contrary to the Claimant's assertion, this is not "*tantamount*" to a finding that there is a "*serious risk*" of genocide.[179]

    (1) In *Nicaragua v. Germany*: there was no finding of a risk of genocide.[180]

98. 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 that conclusion was at least tenable.

99. 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.[181] The Government does not ask the Court to decide that genocide has not been committed and is not being committed: its position is that the Court should not make a finding on this question.[182]

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

100. In any event, the Government did not fall short of the standard of conduct required of it by Article I of the Genocide Convention. 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*".[183] 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*."[184] The ICJ has also explained that it will not readily find a breach of this duty: "*the Court requires proof at a high*

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[175] "ECJU C1 Assessment" of 11 June 2024, §§6-9, 14 **[SB/E/102/1423-1425]**.
[176] Cf. ASFG §§222-223; Reply §48.
[177] *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.
[178] *Ibid*, §§66, 74.
[179] Cf. CSkel §263.1, 263.4.
[180] *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order, 30 April 2024.
[181] Reply §53-54; CSkel §259.
[182] ADGR §§13(c), 14-19, 54. Cf. Reply §53.
[183] *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.
[184] *Ibid.*

level of certainty appropriate to the seriousness of the allegation" (i.e., of breach of the duty to prevent).[185]

101. The Government has suspended exports to Israel of arms assessed to be for use in military operations in Gaza. 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 §§63-64 above in the context of the alleged violation of CA1.

Ground 8(D): aid and assistance

Article 16 ASR

102. 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. 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."

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

104. **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 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.*"[186] 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.

[185] *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.
[186] 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.

105. **Second**, the acts of aid or assistance must have actually caused or contributed to the wrongful act.[187] There must be substantial involvement in or a material contribution to the wrongful act.[188] That is clearly not the case here for the reasons given at §63 of the ADGR.

106. **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.[189] See also with respect to genocide, §§421-423 of the *Bosnian Genocide case*.[190] There is no evidence to establish actual knowledge (or indeed constructive knowledge) of an internationally wrongful act.

107. **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.[191] Accordingly, "*the assisting State must have clear knowledge and intention to collaborate in the commission of an internationally wrongful act of another State*", and it must be knowledge "*with a high degree of particularity*".[192] 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.[193] The requirement for intention is further described as "*the essential element in defining complicity*" (i.e. aid or assistance).[194] 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 international peace and security.

108. 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.[195] Yet 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).

    (2) There are only three elements to the test under Article 16 ASR, and intent is not required.[196] This is incorrect: see §5 of the ILC Commentary and authorities cited at §65 of the ADGR. As to the Claimant's alternative argument that intent can be imputed where

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[187] 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.
[188] James Crawford, *State Responsibility: The General Part* (2013), at p.403.
[189] James Crawford, *State Responsibility: The General Part* (2013), at p.406.
[190] *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,
[191] 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.
[192] 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.
[193] *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.
[194] James Crawford, *State Responsibility: The General Part* (2013), at pp. 405-406.
[195] CSkel §269.
[196] CSkel §§270, 277.

there is certainty or near certainty as to the recipient State's intended use to commit a wrongful act,[197] even if correct, this is not satisfied on the facts.

(3) The Court can proceed on the basis that an internationally wrongful act has taken place.[198] This is incorrect: see above.

(4) The UK contribution does not need to be substantial or material.[199] This is incorrect: see above and §63 ADGR. The paragraph of the ILC Commentary on which the Claimant relies does not support its position.[200]

Article 41

109. 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."*

110. 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.

111. 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.[201] It has not been shown that the export of F-35 components makes the required contribution to maintenance of the situation in the OPT (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 §§63-64 above.

112. In its Skeleton, the Claimant 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.[202] Even if correct (it is not: ADGR, §66), that would not answer the point on the absence of contribution on the facts. That is at least a tenable view. It is also to be noted 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.

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[197] CSkel §277.2.
[198] CSkel §273.
[199] CSkel §276; cf. Reply §59(b).
[200] James Crawford, *State Responsibility: The General Part* (2013), at p. 403.
[201] ADGR §66.
[202] CSkel §§279.1 and 279.2.

C. GROUND 9

113. The Claimant contends that the following are CIL obligations that should form part of the English common law[203] (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.[204]

114. There is no blanket rule providing for automatic incorporation of CIL rules into the English common law. CIL is 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. See also *The Law Debenture Trust SC* at §204 (per Lord Reed, Lord Lloyd-Jones and Lord Kitchin, Lord Hodge agreeing).

115. 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.

116. **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.

117. **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. Cf. *The Law Debenture Trust SC*, at §207. See also 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).

118. The Claimant advocates for the wholesale adoption of CIL obligations into English domestic law, apparently solely as restrictions on Government decision-making.[205] 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); also the unanimous judgment of the Supreme Court in *R (Yam) v Central Criminal Court* [2016] AC 771, at §35.

119. **Third,** the Alleged CIL Obligations would interfere with Parliament's choices in the relevant areas: cf. e.g. *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, §117 (per Lord Neuberger, Lord Hughes agreeing) and §151 (per Lord Mance); also *Al-Saadoon v The Secretary of State for Defence* [2016] EWCA Civ 811, §200. 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

[203] 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.
[204] CSkel §281.1; ASFG §237.
[205] ASFG §240; Reply §64(e).

this legislation, Parliament chose not to incorporate into domestic law the Alleged CIL Obligations.

120. The above considerations are not altered by the Claimant's reference to *jus cogens*.[206] 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

121. 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. 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. It is worth noting at the outset that the Claimant does not assert:(i) that there has been the commission of an identifiable criminal offence; (ii) that an identified individual has committed a criminal offence(iii) 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. The Claimant accepts that not every serious violation of IHL will amount to a violation of the international criminal law.[207] The exercise invited by the Claimant is entirely prospective.

The permissibility or appropriateness of the exercise proposed by the Claimant

122. 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, Lord Rodger explained (at §56), citing Viscount Dilhorne in *Imperial Tobacco Ltd v. Attorney General* [1981] AC 718 at 742, 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 factor of great*

[206] Reply §65; CSkel §292.
[207] Such a concession is necessary and relevant: 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), pp. 148 - 149.

importance and most claims for a declaration that particular conduct is unlawful will founder on this ground." (Lord Steyn, at §23).[208]

123. The matters advanced by the Claimant are fact sensitive and controversial. They necessarily involve the prospective consideration of military operations overseas in the context of a complex and contentious conflict. It would be impossible for a court to conclude that the ingredients of a particular offence will be made out. This (civil) court is being asked to engage in a speculative, theoretical exercise involving indeterminate facts and untested issues at the limit of the criminal law. Applying *Rusbridger*, it is clear that this is not one of those "*truly exceptional*" cases where a finding concerning future criminal liability would be appropriate.

124. 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). Staughton LJ described the principle contended for as "*fraught with difficulty*" (403E). This decision does not, on analysis, support the Claimant's case.

125. 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

126. Ground 10 also falls to be dismissed on the ground that it is non-justiciable. An almost identical argument was 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* sought 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 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 that the courts will not sit in judgment on the sovereign acts of a foreign state includes a prohibition against adjudication on 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

[208] 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).

sit in judgment on the conduct of another state would imperil relations between the states: Buttes Gas case [1982] AC 888, 933."

127. As for the matter of discretion, the Court of Appeal declined (at §§36-37) to determine the question invited by the Claimant, on the basis that (even if the question was formulated by reference to a notional UK (rather than a US) operator of a drone bomb), any finding by the Court would be understood by the US authorities as a criticism, and "*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."*

128. 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[209], the Claimant repeats an argument raised, and rejected by the Court of Appeal in *Noor Khan* (at §39 – 43). It is without merit.[210]

129. The Claimant seeks a determination which necessarily involves the Court determining whether the IDF will commit war crimes, grave breaches, 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. It would inevitably be understood as a finding as to the legality of Israeli Government policy – an issue which on which no judicial body has adjudicated. In *Noor Khan*, a specific incident had allegedly caused the deaths of the claimant's family members. Here, no specific incident or deaths underpin the claim. The public policy exception does not apply, for reasons set out above in relation to Ground 8. Contrary to the Claimant's submission,[211] these principles do not bear on the specific statutory jurisdiction under the Geneva Conventions Act 1957 ('**the GCA**') and the International Criminal Court Act 2001 ('**the ICCA**') to prosecute in respect of specific criminal acts, retrospectively.

130. The Claimant seeks to avoid the issue of non-justiciability by suggesting that the Court can avoid making findings as to whether the IDF because "*the significant risk of facilitating crimes is disclosed by the Defendant's own assessment*"[212] That is a mischaracterisation of the Government's Criterion 2(c) assessment.

131. Applying *Noor Khan*, it is clear that Ground 10 invites the Court to consider and rule on matters which are non-justiciable. There are powerful reasons why the Court should refrain from so doing.

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[209] CSkel §346.
[210] 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*". That was not the case in *Noor Khan*; nor is it the position here.
[211] CSkel, §345
[212] CSkel, §344

No significant risk of facilitating crime

132. 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 ICCA and GCA, it is submitted that this high threshold is not close to being surmounted.

133. The Claimant seeks to bolster its argument with the contention that it is '*not necessary for the Court to delve into the specifics*'[213] 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. 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 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.

134. <u>*Accessorial liability*</u>: For crimes under the GCA and the ICCA, 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; [214] 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. [215]

135. The Claimant suggests[216] 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.[217]

136. 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

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[213] Reply, §79 [**CB/A/4/223**].
[214] *R v Jogee* [2017] AC 387; [2016] UKSC 8, at §8.
[215] *Blackstone's Criminal Practice* 2025 ed., A4.5 and A4.11, *R v Jogee*, at §10.
[216] CSkel §341
[217] The Claimant makes a like submission in relation to sections 44 to 46 of the Serious Crime Act 2007 (CSkel §315), which must fail for the same reason. 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 (*Jogee* (§90)). No conduct can be identified which comes close to reaching this threshold.

avoid determining whether specific offences will be committed. The Claimant is unable to identify with precision that any such offences will be committed.

137. 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 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. [218]

138. 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. 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 ICCA 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. For completeness, 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 be immaterial to this Ground of claim.

139. <u>*Principal criminal liability under the GCA*</u>: the Claimant asserts the existence of a risk of facilitating crime in relation to principal offences involving grave breaches of the Geneva Conventions. This argument adds nothing to the Claimant's existing case on accessorial liability. It also requires a principal offence with the applicable *actus reus* and *mens rea*. The GCA creates, under domestic law, an offence of committing a *"grave breach"* of the four Geneva Conventions of 1949, as well as under Additional Protocols I and III to the Geneva Conventions (but not Additional Protocol II). The relevant provisions of the Four Geneva Conventions and API apply exclusively to situations of International Armed Conflict ('**IAC'**). Whilst APIII applies also to Non-International Armed Conflict ('**NIAC'**), the relevant section of the GCA relates only to the misuse of the protective emblems of the ICRC, a matter outside of the scope of this claim. Whether offences involving grave breaches are engaged at all will therefore depend on whether relevant conduct will take place in the context of the IAC between

[218] *Jogee*, §12.

Israel and Palestine or the NIAC involved in the fighting between Israel and Hamas.[219] This question can only be assessed on the basis of concrete facts. As matters stand, no specific principal offences, or individuals physically within the jurisdiction of England and Wales can be identified by the Claimant.

140. Even if, contrary to all the above, the Court were to conclude that the F-35 Carve Out creates a significant risk of facilitating domestic crime, it would not follow that the decision was *ultra vires*, given that the decision not to suspend or revoke certain licences is owing to powerful reasons relating to the maintenance of global security.[220]

E. GROUND 11

141. 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."*[221] 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.

142. The only substantive paragraph of the Reply which addresses this Ground[222] 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.

143. The Claimant's Skeleton identifies and challenges three "considerations" relied upon by the Government. As the Claimant acknowledges,[223] the OPEN evidence in relation to 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[224] 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."*[225]

    (2) The Government does not suggest that the UK's obligations under the MOU *"take precedence over its other international obligations"*.[226] In fact, the opposite is the case. As emphasised in the 2 September 2024 letter,[227] the Government remained committed

[219] The ICC and its Chief Prosecutor have recognised that an IAC and a NIAC are running in parallel: https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges and https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[220] ADGR §102 **[CB/A/3/169-170].**
[221] ASFG, §§258-259 **[CB/A/2/126]**; CSkel§§350-351.
[222] Reply §85 **[CB/A/4/225]**.
[223] Reply §86 **[CB/A/4/225]**.
[224] CSkel §351.
[225] ADGR §114 **[CB/A/3/172]**, citing the Detailed Advice from the Defence Secretary **[CB/E/30/589]**.
[226] Cf CSkel §354.
[227] **[CB/C/18/284]**.

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

144. 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: see Reply, §89, §90 and §92 **[CB/A/4/227]** and CSkel, §357.

145. 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 reason" to depart from a policy – are consequently no longer relevant.[228] The reference to those authorities at CSkel §§109 and 366 is otiose.

146. 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."*

147. 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*

[228] As the Claimant appears to accept at CSkel, footnote 510.

for the executive, should command considerable respect in any review and is capable only of rationality challenge."[229]

148. 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

    (2) To *"identify or calibrate other potential risks associated with departing from Criterion 2(c)"*.[230]

149. 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"*[231] 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.[232] 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.

150. 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

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[229] *Ibid.*
[230] ASFG, §269 **[CB/A/2/129]**; Reply, §90 **[CB/A/4/227]**.
[231] 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.
[232] Reply, §90 **[CB/A/4/227]**; CSkel §370.

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.[233]

151. 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, there is a clear risk of a serious violation of IHL by Israel in Gaza, including in the conduct of hostilities."*[234] 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.

152. 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."[235]

    (2) The broad scope of allegations regarding Israel's conduct of hostilities has been a central focus of the IHL Compliance Assessment Process.[236] 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.[237]

    (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,

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[233] Oxfam submissions, §49.
[234] *R (Al Haq) v Secretary of State for Business and Trade* [2025] EWHC 173 (Admin). Emphasis in original.
[235] Oral Statement of the Foreign Secretary to the House of Commons, 2 September 2024 **[CB/C/20/290]**
[236] 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]**.
[237] 7th IHLCAP Assessment at §47 **[CB/E/41/702]**.

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 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).[238]

153. 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.[239] 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.

154. 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.[240] The risks identified in the Detailed Advice provided by the Defence Secretary on 18 July 2024[241] 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

[238] ECJU Submission of 24 July 2024, § 9 **[CB/E/31/595]**.
[239] Cf ASFG, §269 **[CB/A/2/129]**
[240] 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).
[241] **[CB/E/30/588]**.

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 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.

155. 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.[242]

(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.[243]

(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"*.[244]

(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.[245]

[242] Cf ASFG, §275 **[CB/A/2/130]**; CSkel §386.1.
[243] Cf CSkel §386.4.
[244] Cf ASFG, §274 **[CB/A/2/130]**; CSkel §386.2.
[245] Cf ASFG, §272 **[CB/A/2/130]**; CSkel §386.3.

156. 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.[246] In the ADGR, the Government confirmed that this was not its position.[247]

157. The Claimant now complains that this is inconsistent with the Government's position at the time of the judgment of Chamberlain J of 30 January 2025[248] refusing the Claimant permission to amend to plead Grounds 1 to 7 ("**the Linkage Judgment**").[249] 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[250] 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"*;[251] 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."*[252]

158. 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.[253]

Conclusion on Ground 12

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

160. 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 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,

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[246] ASFG, §268 **[CB/A/2/128]**.
[247] ADGR, §121 **[CB/A/3/174]**.
[248] **[CB/B/11/262]**
[249] Reply, §87(c) **[CB/A/4/226]**.
[250] In the version of the RASFG filed on 23 October 2024.
[251] §19 of the version of the DGR filed on 20 December 2024.
[252] *Ibid,* §140.
[253] 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.

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.[254]

G. GROUND 13

161. 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.[255]

162. 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.[256] 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."*[257] 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;[258] IED disposal equipment; security scanners for crossing points and printed circuit boards and other components for dual use goods.

163. 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 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.

164. 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

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[254] 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.

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

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

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

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

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…"*[259]

(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."*[260] The Claimant did not raise any objection in its Reply.

165. 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: see CSkel, §§388.2, 388.4, 389 and 390.

166. 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 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.

167. 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.

168. 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.[261] 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.

169. 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

[259] ASFG, §280 **[CB/A/2/131]**.
[260] ADGR, §132 **[CB/A/3/177]**.
[261] ASFG §280(a) **[CB/A/2/131]**; Reply §98 **[CB/A/4/231]**.

concluded that no current licences were in violation of the other relevant Criteria. [262]

(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.[263]

170. 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).[264] This assessment emphasised the need to manage the UK's relationship with 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.

171. 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 §147 above.)

172. 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.

173. 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. 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.

6 May 2025

SIR JAMES EADIE KC
SAM WORDSWORTH KC
RICHARD O'BRIEN KC
MELANIE CUMBERLAND KC
JASON POBJOY KC
JESSICA WELLS
KATHRYN HOWARTH
JACKIE McARTHUR
JONATHAN WORBOYS

[262] ECJU Submission to the Foreign Secretary, 24 July 2024, Annex E **[CB/E/35/609]**.
[263] Cf ASFG §280(b) **[CB/A/2/132]**; CSkel, §389.4.
[264] ECJU Submission to the Foreign Secretary, 26 August 2024, Annex D **[CB/E/54/877]**.