IN THE HIGH COURT OF JUSTICE **Claim No. AC-2023-LON-003634**
ADMINISTRATIVE COURT (KBD)
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

CLAIMANT'S SKELETON ARGUMENT

References: *are in the form [CB/A/1/1] (i.e. Core Bundle, Section A, Tab 1, Page 1)*

I. INTRODUCTION

1. On 2 September 2024, as part of the **September Decision**,[1] the Defendant ("**D**") concluded that: (i) Israel is not committed to complying with international humanitarian law ("**IHL**") in the current conflict in Gaza; and (ii) there is a clear risk that any military item exported from the United Kingdom to Israel might be used by Israel to commit or facilitate a serious violation of international humanitarian law in Gaza.

2. On the basis of those conclusions, D decided to suspend export licenses for items that might be used in carrying out or facilitating Israel's military operations in the current conflict (the "**Suspension Decision**") [CB/C].

3. Despite this, the UK continues to export military equipment to Israel. It does so in the form of components used in the manufacture and maintenance of F-35 planes ("**F-35s**") which are transferred from the UK to Israel indirectly.

4. F-35s have been described as "*the most lethal fighter jets in the world*".[2] As described more fully at Andrews-Briscoe 2 [CB/D/27/568-580], and summarised further below, they have been utilised extensively by Israel in its ongoing attacks in Gaza, having been modified by Israel to carry and drop very large ordnance.

5. D decided to exclude licenses for the export of F-35 parts from his Suspension Decision (the "**F-35 Carve Out**"). In so doing, D departed from Criterion 2(c) of the Strategic Export

[1] The term 'September Decision' is used compendiously to refer to the overall decision taken by D on 2 September 2024 in relation to arms exports to Israel. Constituent elements of the September Decision include the Suspension Decision and the F-35 Carve Out, as defined in paragraphs 2 and 5 respectively.
[2] Air Force, Joint Direct Attack Munition GBU-31/32/38 fact sheet: https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104572/ [SB/F/177/2783-2786].

Licensing Criteria (the "**SELC**"), made pursuant to s.9 of the Export Control Act 2002 (the "**2002 Act**"). D departed from Criterion 2(c) of the SELC because of his assessment, made in light of advice from the Secretary of State for Defence, that:

> […] suspending F-35 licences is likely to cause significant disruption to the F-35 programme, which would have a critical impact on international peace and security, including NATO's defence and deterrence.[3]

6. The Claimant (**"C"**) challenges the lawfulness of the F-35 Carve Out on five grounds.

7. **First**, D erred (i) in assessing that continued exports of military equipment would be compatible with Criterion 1 of the SELC ("**SELC 1**"), which requires "*respect for the UK's international obligations and relevant commitments*", whether or not there were grounds for suspension by reference to Criterion 2(c); and (ii) in his self-direction that the F-35 Carve Out was "*consistent with the UK's* […] *international law obligations*". In reaching those conclusions, D misunderstood and misapplied Common Article 1 of the Geneva Convention ("**CA1**"); Arts 6(2)/(3) and/or 7(3) of the Arms Trade Treaty (the "**ATT**"); Art I of the Genocide Convention ("**GC1**"), and rules of customary international law reflected in Arts 16 and 41 of the Articles on State Responsibility ("**ASR**"). These errors are the subject of Gd 8[4] below.

8. **Secondly**, D erred in his conclusion that the F-35 Carve Out is "*consistent with the UK's domestic law* […] *obligations*". It was not, because it breached three customary international law obligations which have been (or should be) received into the common law or are essentially reflected in it. This error is the subject of Gd 9.

9. **Thirdly**, the F-35 Carve Out is ultra vires D's powers under the 2002 Act because it gives rise to a significant risk of facilitating crime. This error is the subject of Gd 10.

10. **Fourthly**, the F-35 Carve Out is irrational (as a matter of process rationality) because the reasoning relied upon in support of it suffers from a *"logical error or critical gap*"[5]. This error is the subject of Gd 11.

11. **Fifthly**, D erred in his approach to the assessment of whether there was a "*good reason*" to depart from his published policy. In particular, in balancing the risks of continuing to export F-35 parts against the risks of suspending those exports, D unreasonably limited his consideration of the former to the existence of a "*clear risk*" of unspecified "*serious violations*" of IHL — without making any attempt to assess the nature, extent or potential gravity of these risks (the exercise referred to as "*calibration*"), whilst adopting a different approach in relation to his consideration of the latter (by calibrating the risks of suspension). This error is the subject of Gd 12.

12. C also challenges a further decision made by D on 2 September 2024, namely his decision not to suspend other licenses for use by the Israeli army. In making that decision, D failed to have

[3] Letter from D's Principal Private Secretary to the SSFCDA's Private Secretary (Exhibit RP2-6) [CB/C/18/284].
[4] C's grounds of challenge begin with Gd 8 because 7 grounds relating to three earlier licensing decisions taken between October 2023 and September 2024 were not permitted to proceed: see ¶¶30-33 below.
[5] *R (KP) v SSFCDA* [2025] EWHC 370 (Admin) (at ¶56).

regard to obviously relevant considerations. This error is the subject of Gd 13 below.

II. FACTUAL BACKGROUND

13. Israel's assault on Gaza is "*a moral stain on the conscience of our collective humanity*".[6] In just over 18 months, Israel has decimated an entire society.

14. Israel's political and military leaders have celebrated the destruction of Gaza and its people; its soldiers have openly recorded and broadcast their crimes; its officials are now calling for the "*voluntary emigration*" of Palestinians from their homeland, having reduced that homeland to a postapocalyptic wasteland.[7]

15. That Israel has acted in this way is demonstrable and incontrovertible. What is happening in Gaza is a live-streamed genocide. What Al-Haq relies upon, however, in these proceedings are primarily the documents that D and those advising him themselves chose to consider in taking the repeated decisions to continue supplying weapons to Israel, including the decision under challenge to continue supplying F-35 parts to Israel indirectly.

16. The skeleton argument filed by Al-Haq on 15 April 2025 (and re-filed with minor amendments on 25 April 2025) contains a detailed account of Israel's attack on Gaza, but an account taken in large part from the work of civil servants tasked by the Secretary of State for Foreign and Commonwealth Affairs ("**SSFCDA**") with compiling and assessing evidence of Israel's actions. It is supplemented by Al-Haq's corroborating witness evidence and findings from international bodies.

A. SUPPLY OF WEAPONS FROM THE UK TO ISRAEL

17. The UK's supply of weapons to Israel drastically increased following 7 October 2023. In 2023, the F-35 Open General Export Licence (OGEL) was used to export equipment directly to Israel on 14 occasions. That is the highest number of exports of any year since the OGEL was issued in 2016; the next highest year was 5.

18. The UK currently contributes to Israel's F-35 fleet in two ways.

    (a) **First**, through the manufacture of new F-35s: the UK contributes parts for new aircraft which account for 15% of the value of the end aircraft.[8]

    (b) **Second**, through exports to the Global Spares Pool or to the central production facilities and assembly plants of spare parts for F-35s.

19. Other than the US, the UK is the largest contributor of spare parts for F-35s to Israel.[9] F-35s require a significant degree of maintenance and Israel is heavily reliant on spare parts to

[6] The United Nations Deputy Emergency Relief Coordinator in Gaza, "Opening Remarks at the Ninth Conference on Effective Partnership for Better Humanitarian Aid," 12 May 2024, available here : https://www.un.org/unispal/document/asg-13may24/.
[7] See Tables of Statements of Israeli government and military personnel at Exhibit DM4-15 [SB/F/156/2356-2439] DM4-16 [SB/F/157/2440-2453] and DM 5-1 [SB/F/163/2556-2568].
[8] Detailed advice from the Defence Secretary to the Business and Trade Secretary, and Foreign Secretary, 18 July 2024. (Exhibit RP2-9) [CB/E/30/589].
[9] Andrews-Briscoe 2 ¶27 [CB/D/27/579]

prosecute its military campaign in Gaza.[10]

20. Israel is vastly expanding its F-35 fleet. In June 2024, Israel signed a letter of acceptance with the US to buy an additional 25 F-35s, marking a 50% increase.[11] On 13 March 2025, Israel received three new F-35s.[12] Following receipt of these planes, the Israeli Air Force said in a press release that *"[t]he expansion of the* [F-35] *Adir fleet constitutes a significant enhancement of the Israeli Air Force's lethal capabilities."*[13] Given that the UK is the sole supplier of certain parts which are critical to the operation of the aircraft, every F-35 delivered to Israel will, by necessity, contain British components.[14]

B. ISRAEL'S USE OF F-35s

21. F-35s are described by their manufacturer as *"the most lethal fighter jet in the world."*[15] Israel has modified its F-35 fleet in order to be able to carry and drop one-ton bombs.[16] Such bombs can be lethal within a 300 metre radius and typically leave a 12 metre wide bomb crater.[17] A UN-appointed commission has previously warned that such bombs can *"rupture lungs and sinuses and tear of people's limbs hundreds of feet from the blast site."*[18]

22. A report dated June 2024 by the UN Office of the High Commissioner for Human Rights found that these bombs have been used in "*emblematic*" cases of indiscriminate and disproportionate attacks by Israel against the civilian population in Gaza. The report concludes that, by using these bombs: *"… the IDF may have repeatedly violated fundamental principles of the laws of war… unlawful targeting when committed as part of a widespread or systematic attack against a civilian population, in line with a State or organisational policy, may also implicate the commission of crimes against humanity."*[19]

23. Israel's use of multi-ton bombs was known to D at the time of the F-35 Carve-Out. The Evidence Base notes: *"There is also reporting of larger 2000lb bombs, for which the use of was analysed [by OCHA OPT] as follows: "'it remains extremely questionable whether a weapon with such a wide impact area allows its operators to adequately distinguish between civilians and civilian objects and the military objective of the attack, when used in densely populated areas. Attacks, which used this type of weapon in densely populated, built-up areas of Gaza, are therefore likely to constitute a violation of the prohibition of indiscriminate attacks.'"* [20]

24. The 7th IHLCAP assessment further notes that "*On 10 May, the Norwegian Refugee Council (NRC) told Lord Ahmad that they were evacuating their staff from Rafah (as were WFP); the*

[10] Ibid. ¶19-21 [CB/D/27/576-577].
[11] Ibid. ¶22
[12] Ibid. ¶23
[13] Ibid.
[14] Ibid. ¶30 [CB/D/27/580]; Bethell 1, ¶22 [CB/D/26/565-566].
[15] Lockheed Martin, "F-35 Lightning II" (accessed on 20 March 2025), available here: https://www.lockheedmartin.com/en-us/products/f-35.html
[16] Andrews-Briscoe 2 ¶11[CB/D/27/572].
[17] https://danwatch.dk/en/major-civilian-casualties-danish-equipped-fighter-jets-behind-bloody-attack-in-gaza/
[18] Danwatch 'Major civilian casualties: Danish-equipped fighter jets behind bloody attack in Gaza', 1 September 2024 [SB/F/161/2544-2551]
[19] UN OHCHR, "Israeli use of heavy bombs in Gaza raises serious concerns under the laws of war," 19 June 2024, [SB/F/138/1746] available at: https://www.ohchr.org/en/press-releases/2024/06/un-report-israeli-use-heavy-bombs-gaza-raises-serious-concerns-under-laws.
[20] Evidence Base 2 of 4 November to 17 November 2023 (Exhibit CH2-7B) [SB/E/45/615].

situation had become untenable, with 2000-pound bombs dropped in densely populated areas, killing hundreds each time. Drones allegedly only give one hour's warning that buildings would be destroyed."[21]

25. By Israel's own account, it is heavily reliant on F-35s to prosecute its military campaign in Gaza. According to the Israeli Air Force, as at March 2025, the F-35 fleet had *"accumulated over 15,000 flight hours across approximately 8,800 sorties throughout the war."*[22] In the same press release, Israel confirmed that it has used F-35s to strike *"in Judea and Samaria* [i.e. the West Bank]."[23] F-35 pilots themselves likewise confirm that *"the [F-35s] are fully involved in the war"*[24] and their squadrons have been working *"around the clock"* and *"non-stop."*[25]

26. It is not generally possible to attribute individual airstrikes to individual types of fighter jets. However, F-35s were found or suspected to have been used in the following specific strikes:[26]

    (a) On 13 July 2024, Israel used an F-35 fighter jet to drop three 2,000lbs bombs on tents sheltering displaced Palestinians in a declared "safe zone" in Al-Mawasi.[27] Israel asserted that the intended target of the strike was Al-Qassam Brigades commander Mohammad Deif. The strike killed at least 90 Palestinians and injured over 300 others.

    (b) On 18 March 2025 (in an incident post-dating the decision under challenge, but nevertheless materially relevant to it), Israel broke the ceasefire with Hamas, killing at least 436 Palestinians, including 183 children in sudden, unannounced strikes across Gaza. This strike was conducted just five days after Israel had received three new F-35s, which as explained above contain British components. *"*[28]

III. PROCEDURAL BACKGROUND

A. THE ORIGINAL CLAIM

27. The parties have agreed a detailed chronology which sets out the procedural background.

28. C issued its claim on 6 December 2023 [CB/A/1/6-21]. D filed Summary Grounds of Defence on 12 January 2024. Permission was initially refused by Eyre J on 19 February 2024. C renewed its application for permission on 23 February 2024. Following agreement with D for a rolled-up hearing and a costs-capping order, on 26 April 2024 Swift J ordered that a hearing be listed in October 2024 [CB/B/5/234-236].

29. On 14 June 2024, Farbey J made a declaration for closed material proceedings under s.6 of the Justice and Security Act 2013 on the application of the D. Closed material applications have since been made by D as to a number of documents which have not been disclosed in OPEN;

[21] 7th IHLCAP Assessment, 24 July 2024 ¶ 27 (Annex 11) [CB/E/51/827].
[22] Andrews-Briscoe 2 ¶4 [CB/D/27/569].
[23] Andrews-Briscoe 2 ¶4 [CB/D/27/569].
[24] Minogue 5 ¶26 [CB/D/25/547].
[25] Andrews-Briscoe 2 ¶6 [CB/D/27/570].
[26] It is not generally possible to attribute individual strikes to F-35s since most modern aircraft can carry a range of munitions and there are no known munitions that can be released *only* by the F-35. (See Andrews-Briscoe 2 ¶26 [CB/D/27/578]. In the Al-Mawasi strike, Israel confirmed in a statement that the F-35 had conducted the strike; in the 18 March strike, the F-35 was visually identified. (See Andrews-Briscoe 2 ¶24-26 [CB/D/27/578].
[27] Minogue 5 ¶25 [CB/D/25/546]; ASFG ¶87 [CB/A/2/57].
[28] Andrews-Briscoe 2 ¶24 [CB/D/27/578].

the Court will consider the submissions of C's Special Advocates as to this material in CLOSED.

B. THE CLAIM AGAINST THE PRE-SEPTEMBER DECISIONS

30. On 30 January 2025, Chamberlain J handed down a judgment refusing to permit C to advance challenges to decisions made by D prior to the September Decision (the "**January Judgment**") [CB/B/11/251-265]. Chamberlain J held that the grounds of challenge relevant to those decisions (Gds 1-7) were not sufficiently linked to the grounds of challenge to the September Decision (Gds 1-8) because D undertook no calibration of the level of risk (January Judgment at ¶¶44-45) [CB/B/11/262]. Chamberlain J noted C's case that the linkage arises because "*the evidence enabled the Secretary of State to say more than just that there was a 'clear risk' of UK-supplied weapons being used to commit a serious violation of IHL and, had he appreciated the true nature and extent of the risk, his decision might have been different*" but held that there was no linkage on the basis of the D's submission that he did not in fact calibrate the level of risk: "*This was because* [the alleged damage to international peace and security] *was "a matter of such gravity* […] *that it would have overridden any such further evidence of serious breaches of IHL" (Grounds of Resistance, para. 19, cited at para. 17 above)*". Chamberlain J granted permission to amend as to Gds 8-12, noting that "*there is a real prospect that a court considering this issue at the permission stage would regard one or more of grounds 8-12 as arguable. If permission were refused on one or more grounds, there is the real prospect of an appeal*": January Judgment at ¶52(b) [CB/B/11/263-264].

31. Chamberlain J ordered a rolled-up hearing as to those grounds and Gd 13 on an expedited basis. Accordingly, the basis on which this claim proceeds is that the Court will not make any determination as to the lawfulness or otherwise of D's approach to assessing Criterion 2(c). This means that, as set out further below, the alleged difficulties presented by an assessment of Criterion 2(c) in the context of these hostilities (relied upon by D at ADGR ¶¶7(b), (g), 123 [CB/A/3/136, 137, 175]) are irrelevant.

32. Pursuant to the January Judgment, C filed a further ASFG on 6 February 2025 [CB/A/2/22-133].[29] D filed his ADGR on 28 February 2025 [CB/A/3/134-179].[30]

33. On 19 March 2025, the court by order varied permission to intervene to allow the Interveners to file certain evidence and written submissions. However, permission to rely on evidence post-dating the September Decision was denied. As explained at paragraph 6 of the reasons [CB/B/15/279]:

> Evidence which post-dates the 2 September 2024 decision, and so was not before the decision-maker at the time when the challenged decision was taken, will not be admitted. Insofar as it casts light on what was available to the decision-maker at the time of the decision, its relevance is not so great as to justify its admission at this stage, given the

[29] The Court granted permission for that version on 14 February 2025, save for a minor change which was implemented by the current ASFG, filed on 17 February 2025.
[30] The D's application to amend his defence by way of the ADGR on 28 February 2025 is pending.

extensive materials already before the court and the burden which it might place on D to respond to it.

C. SEPTEMBER DECISION

34. By **the September Decision**, D decided that:

(a) Israel was not committed to complying with IHL in Gaza.

(b) There was a clear risk that certain items exported might be used by Israel to commit or facilitate serious IHL violations.

(c) On that basis, extant licences for equipment assessed to be for use in military attacks in Gaza would be suspended (i.e. the Suspension Decision).

(d) However, there was good reason to depart from the SELC and to exclude licences for F-35 components from the scope of the suspension, save for licences for F-35 components which could be identified (at the point of export) as going to Israel (i.e. the F-35 Carve Out).[31]

(e) New licence applications would be treated on the same basis; final decisions on all licence applications would continue to be presented to D for review.

(f) According to ADGR ¶6 [CB/A/3/135-136], as at the time of the September Decision, 34 out of 361 extant licences were identified as items which could be used for military operations in the current conflict in Gaza, of which 5 related to F-35 components — such that "*The remaining 29 licences were suspended (or amended to remove Israel as a permitted end-user)*".

(g) As recorded in the ministerial submission dated 24 July 2024, the September Decision proceeded on the basis that the export of licences was consistent with the UK's international obligations and therefore not in violation of SELC 1. That conclusion was based in significant part on an assessment which had been conducted on 11 June 2024 (and was therefore, at that point, significantly out of date).[32]

35. The materials underlying the September Decision (as recorded in a letter from D to the SSFCDA on 2 September 2024 (Exhibit RP2-6) [CB/C/18/284]) are addressed in detail in ASFG ¶¶144-196 [CB/A/2/87-105]. The September Decision was based on advice from the SSFCDA, submissions from ECJU, and Evidence Bases and various other materials.[33] The key materials

[31] Exhibit RP2-5 [CB/C/16/280-281]; Exhibit RP2-6 [CB/C/18/284].

[32] Annex E to the Ministerial Submission dated 24 July 2024 to the SSFCDA states that a "consolidated review" carried out on 11 June 2024 had "concluded that extant licenses remain consistent with the UK's relevant international obligations, including under the Arms Trade Treaty (ATT) and the Genocide Convention" (Exhibit RP2-1c) [CB/E/35/609-610], and that Israel did not harbour genocidal intent, because "negative comments from specific actors" were "not assessed to be representative of the Israel Government overall" and the "areas of most acute concern with respect to compliance with IHL do not relate to Israel making civilians the object of attack". Similarly, the 30 August 2024 Ministerial submission to D asserted that licences were not in violation of any other SELC Criteria, including Criterion 1 — apparently based on the same assessment as the July submission (Exhibit RP2-4) [CB/E/56/899].

[33] Including: ministerial submissions dated 11 July 2024, 24 July 2024, 26 August 2024, and 30 August 2024; an Evidence Base, a letter from the SSFCDA dated 29 August 2024 and various other materials as set out at ASFG ¶144 [CB/A/2/87].

are summarised in the AH Original Skeleton Argument.

IV. THE DOMESTIC LEGAL FRAMEWORK

A. THE EXPORT CONTROL ACT 2002

36. The export of arms and military equipment from the UK to Israel is regulated by the 2002 Act.

37. Section 1(1) of the 2002 Act provides that the Secretary of State may by order make provision for or in connection with the imposition of export controls in relation to goods of any description. Section 1(2) of the 2002 Act provides that, for the purpose of the Act, "*export controls*" means "*in relation to any goods* [...] *the prohibition or regulation of their exportation from the United Kingdom or their shipment as stores*".

38. Section 1(4) provides that the power to impose export controls is subject to section 5. Section 5 provides materially as follows:

> (1) Subject to section 6,[34] the power to impose export controls, transfer controls, technical assistance controls or trade controls may only be exercised where authorised by this section.
> (2) Controls of any kind may be imposed for the purpose of giving effect to any EU provision or other international obligation of the United Kingdom. […]
> (4) Export controls may be imposed in relation to any description of goods within one or more of the categories specified in the Schedule for such controls

39. Paragraph 1(1)(a) of Schedule 1 provides that export controls may be imposed in relation to military equipment.

40. Section 9 provides (emphasis added):

> … (3) But the Secretary of State must give guidance about the general principles to be followed when exercising licensing powers to which this section applies.
> (4) The guidance required by subsection (3) must include guidance about the consideration (if any) to be given, when exercising such powers, to—
> (b) issues relating to any possible consequences of the activity being controlled that are of a kind mentioned in the Table in paragraph 3 of the Schedule; but this subsection does not restrict the matters which may be addressed in guidance.
> (5) Any person exercising a licensing power or other function to which this section applies shall have regard to any guidance which relates to that power or other function. …

41. The Table in paragraph 3 of the Schedule to the 2002 Act refers to the "*possible consequences of the activity being controlled*" which "*must*" be addressed in the statutory guidance. These include:

> Breaches of international law and human rights:
> The carrying out anywhere in the world of (or of acts which facilitate)—
> (a) acts threatening international peace and security;
> (b) acts contravening the international law of armed conflict;

[34] Section 6 provides that section 5 does not apply to (i) control orders which expire no later than 12 months from the date on which they are made and (ii) control orders which amend, revoke, or re-enact an earlier control order without imposing new controls or strengthening controls previously imposed. It is not material for the purposes of this claim.

(c) internal repression in any country;
(d) breaches of human rights.

42. In accordance with s.9 of the 2002 Act, D has given guidance by way of the SELC (addressed in subsection C below).

B. THE EXPORT CONTROL ORDER 2008

43. D exercised his powers under s.1 of the 2002 Act in making the Export Control Order 2008 (SI 2008/3231) (the "**2008 Order**").

44. Art 3 of the 2008 Order provides that, subject to Arts 13 to 18 and 26, no person shall export (inter alia) military goods. Military goods are defined in Art 2 to include all goods listed in schedule 2. Schedule 2 includes at ML10 "'*Aircraft*'[35] [...] *related goods and components, as follows, specially designed or modified for military use*", including at MLA10a "*manned aircraft* [...] *and specially designed components therefor*".

45. The general prohibition on the export of military goods is subject to exceptions, including materially for the purpose of this claim the exception contained in Art 26, which provides:

> (1) Nothing in Part 2, 3 or 4 prohibits an activity that is carried out under the authority of a UK licence. […]
> (6) A licence granted by the Secretary of State may be—
> (a) either general or granted to a particular person;
> (b) limited so as to expire on a specified date unless renewed;
> (c) subject to, or without, conditions and any such condition may require any act or omission before or after the doing of the act authorised by the licence.

46. Art 32 of the 2008 Order confers on D a power to amend, suspend or revoke a license granted by him, or to suspend or revoke a general license as it applies to a particular license user. This is the power pursuant to which the Suspension Decision was taken.

C. THE SELC

47. As set out above, D is required by s.9(3) of the 2002 Act to provide guidance as to the "*general principles to be followed when exercising licensing powers*" under the 2008 Order. He has discharged that obligation by adopting the SELC.

48. The Parliamentary statement introducing the SELC included the following explanation (emphasis added):

> .. <u>Export controls also help ensure that controlled items are not used for internal repression or in the commission of serious violations of international humanitarian law. They are one of the means by which we implement a range of international legal commitments including the Arms Trade Treaty</u> […]

49. The SELC replaced and are materially similar to the "*Consolidated EU and National Arms Export Licencing Criteria*", which implemented EU Council Common Position

[35] Defined in Art 1 to mean a "fixed wing, swivel wing, rotary wing, tilt rotor or tilt wing vehicle or helicopter".

2008/944/CGSP (the "**Common Position**").[36] Art 13 of the Common Position provides that "*the User's Guide to the European Code of Conduct on Exports of Military Equipment*" ("**User's Guide**") shall serve as guidance for its implementation.[37] The continuing relevance of the User's Guide to the interpretation of the SELC is pleaded at ASFG ¶92 [CB/A/2/60] and is not disputed in the ADGR.

D. DEPARTURE FROM POLICY

50. Public law requires that policies must, in the absence of a good reason for departure, be followed: *R (Nadarajah) v SSHD* [2005] EWCA Civ 1363, ¶68; *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245, ¶26; *Mandalia v SSHD* [2015] UKSC 59, [2015] 1 WLR 4546, ¶¶29-31. The applicable principles are developed under Gd 12 below.

E. SECTION 31(2A) SENIOR COURTS ACT 1981

51. D relies upon ss.31(2A) and (3C) of the Senior Courts Act 1981 in relation to Gds 12 and 13. Further, in respect of Gd 8 D advances several arguments which (properly assessed) can avail him only via s.31(2A).

52. Section 31(2A) provides that the Court "must refuse to grant relief on an application for judicial review […] if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

53. In applying s.31(2A), the following principles are relevant:[38]

    (a) The Court must consider "the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred": R (Public and Commercial Services Union) v Minister for the Cabinet Office [2017] EWHC 1787 (Admin), [2018] ICR 269, ¶89.

    (b) The counter-factual should proceed on the basis that the public authority would have complied with other relevant principles of public law: see e.g. *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649, ¶141;[39] *R (S) v Camden LBC* [2018] EWHC 3354 (Admin), ¶82, 85.[40]

    (c) The burden is on D to show that, in this counter-factual scenario, it is highly likely that the outcome for the applicant would not have been substantially different: see e.g. *R*

[36] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335 13.12.2008, p. 99. See, in particular, Art 2, which sets out criteria that are similar to those in the SELC.
[37] The 2019 update of the User's Guide is available at https://www.consilium.europa.eu/media/40659/st12189-en19.pdf.
[38] See also the more extensive summary in R (Coulthard) v Secretary of State for the Environment, Food and Rural Affairs [2024] EWHC 3252 (Admin), ¶¶93-94.
[39] Where the error made out involved failure to disclose certain analysis to consultees, the Court – in examining the counter-factual for the purposes of s.31(2A) – assumed not only that the analysis would have been disclosed, but that D would have approached consultees' responses to it with an open mind, this being *"one of the requirements of proper consultation"*.
[40] Where the error made out involved failure to discharge a statutory obligation to consult, the Court — in examining the counter-factual for the purposes of s.31(2A) — assumed not only that consultation would have occurred but that D would have been *"prepared to listen and to apply the principles behind [the relevant Act]"*, and would have *"complied with both the letter and the spirit of the Act, Regulations and Code of Practice."*

(Bokrosova) v Lambeth LBC [2015] EWHC 3386 (Admin), [2016] PTSR 355, ¶88.

(d) The Court will normally expect the public authority to support its reliance on s.31(2A) with evidence, the absence of which may be *"telling"*: *R (Harvey) v Mendip District Council* [2017] EWCA Civ 1784, ¶47;[41] *R (Enfield) v Secretary of State for Transport* [2015] EWHC 3758 (Admin), ¶106.[42]

(e) The threshold is a high one, falling somewhere between the civil and criminal standards: *R (Adamson) v Kirklees Metropolitan Borough Council* [2019] EWHC 1129 (Admin) (at ¶142); *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, ¶273. It requires "*a high degree of confidence that the relief* […] *would not alter the outcome"*: *R (Glencore Energy UK Ltd) v HMRC* [2017] EWHC 1476 (Admin) (at ¶120)

(f) Absent sufficient evidence, the Court should remain mindful of the risk of *"straying, even subconsciously, into the forbidden territory of assessing the merits"* (*Plan B Earth*, ¶273) and of engaging in speculation about the outcome of primary decisions entrusted to others (see e.g. *R (Davison) v Elmbridge BC* [2019] EWHC 1409 (Admin), ¶71).

54. The result is that, if there has been an error of law in a decision-making process, "it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law": *Plan B Earth*, ¶273.

V. THE INTERNATIONAL LEGAL FRAMEWORK

55. The UK's international obligations relevant to the export of arms are addressed in detail under Gds 8(A)-(D) below. As set out there, the rules relevant to the present claim are:

(a) The duty to respect and ensure respect for the Geneva Conventions under Common Art 1 of the Geneva Conventions and the First Additional Protocol ("**CA1**"): The nature of the obligation imposed by CA1 has been clarified by the ICJ on a number of occasions: see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* I.C.J. Reports 1986 ("***Nicaragua v USA***"), p. 392 at ¶220; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, I.C.J. Reports 2004, p. 136 ¶¶158-159; oPT Second Advisory Opinion at ¶279; and specifically in relation to arms transfers to Israel, the Order in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany) (Provisional Measures)* of 30 April 2024 at ¶¶23-24. A number of the obligations imposed by IHL, which the UK is obliged by CA1 to "*ensure respect for*", are set out at ASFG ¶¶102-104 [CB/A/2/65-72]; and see also the summary of the basic rules of IHL in *CAAT1 CA* at ¶¶23-25.

[41] See also *PCSU*, ¶¶90-91, treating evidence provided by someone who had not been involved in the decision under challenge as *"an exercise in speculation about how things might have worked out if no unlawfulness had occurred"*, which fell to be approached with *"a degree of scepticism"*.

[42] Reversed in part on appeal; this statement was not disapproved and was recently cited with approval in *Coulthard* (above).

(b) Arts 6 and 7 of the Arms Trade Treaty (the "**ATT**"): The ATT, ratified by the UK on 2 April 2014, regulates the international trade in conventional arms. Of relevance, in addition to Arts 6 and 7, are the sixth preamble and Arts 1, 5(1), 8 and 26(1).

(c) The duty to prevent genocide under Art I of the Genocide Convention ("**GC1**"). The UK acceded to the Genocide Convention ("**the Convention**") on 30 January 1970. Genocide is defined in Arts II and III of the Convention. The ICJ has clarified the scope of the Art I duty to prevent genocide in *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 ("***Bosnia***") at ¶¶427, 430-431; and its *erga omnes* nature in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening), Preliminary Objections*, ¶108. Furthermore, the ICJ has ordered a number of (binding) provisional measures under the Convention on Israel in relation to the Gaza conflict in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, concluding that such provisional measures were necessary given that there existed a real and imminent risk of irreparable prejudice to the plausible rights of Palestinians not to be subjected to acts of genocide and, in the two latter orders, that the situation inflicted by Israel entailed a further risk of irreparable prejudice to those rights: see Order of 26 January 2024, ¶¶ 54, 74-75, 86; Order of 28 March 2024, ¶¶25, 45; Order of 24 May 2024, ¶¶32, 47, 57.

(d) The customary international law duties, codified in the ASR, not to aid or assist in the commission of an internationally wrongful act nor to render aid or assistance in maintaining a situation created by a serious breach of a peremptory norm of international law Arts 1-3, 12, 16 and 40-41 of the ASR are relevant.

56. The principles governing treaty interpretation as set out at Arts 31-32 of the Vienna Convention on the law of Treaties ("**VCLT**") are relevant to the interpretation of the above treaties and conventions. Art 53 VCLT is also relevant also establishes that peremptory norms of international law include:[43] (i) the prohibition of aggression; (ii) the prohibition of genocide;[44] (iii) the prohibition of crimes against humanity; (iv) the basic rules of international humanitarian law; (v) the prohibition of racial discrimination and apartheid; (vi) the prohibition of torture; and (vii) the right of self-determination.[45]

VI. GROUND 8: ERROR IN D'S ASSESSMENT AS TO THE COMPATIBILITY OF THE F-35 CARVE OUT WITH THE UK'S INTERNATIONAL OBLIGATIONS

A. JUSTICIABILITY

57. In deciding on the F-35 Carve Out, D proceeded on the basis of:

[43] See ILC, Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens).
[44] See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) [2006] ICJ Rep 6, ¶64: it is "assuredly" a peremptory norm. The ICJ in Bosnia Genocide has additionally held that the obligation "to prevent genocide is both normative and compelling" (at ¶427).
[45] See also ICJ in 2024 oPt Advisory opinion ¶233: "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law".

(a) **First**, his prior assessment that the continued transfer of arms to Israel was compatible with SELC 1, and thus with the UK's international law obligations given effect by that criterion (see ¶34 above); and

(b) **Second and in consequence**, his self-direction that the F-35 Carve Out was compatible with the UK's international law obligations.

58. In making his assessment that the F-35 Carve Out was consistent with the UK's international obligations, D misunderstood and misapplied relevant rules of international law. Those errors are the subject Gds 8(A)-(D) below. D contends that the issues raised by Gd 8 are not justiciable. That is wrong, for the reasons set out below.

(i) Domestic Law Foothold

59. The treaty obligations relied upon by C have not been incorporated into domestic law. D says that, because of this, Gds 8(A)-(D) are not justiciable: ADGR¶¶12-14 [CB/A/3/139-140]. There is, D says, no "*domestic law foothold*" for this part of C's challenge.

60. There are two problems with this argument.[46] **First**, it is predicated on a factual mischaracterisation of the F-35 Carve Out. It characterises that Carve Out as involving a departure from the SELC as a whole, when in reality it involved a departure only from Criterion 2(c) and was expressly predicated on compliance with Criterion 1. **Second**, it is contrary to authority as to the justiciability of self-directions regarding compliance with international legal obligations. Properly analysed, the continued applicability of Criterion 1 and D's self-direction each provide a domestic "*foothold*" for adjudication on the international obligations which underpin Gd 8.

(1) Criterion 1

61. A first domestic "*foothold*" for the relevant obligations is supplied by the D's own policy, in the form of SELC 1.

62. As set out at ¶34 above, D proceeded on the basis that the export of military equipment to Israel was compatible with SELC 1, and hence with "*respect for the UK's international obligations*". Accordingly, in making the F-35 Carve Out, D did not purport to depart from Criterion 1. To the contrary — he approached the F-35 Carve Out on the basis that the continued export of F-35 parts would comply with it.

63. Where policy guidance is promulgated with the intention of giving effect to an international legal obligation, an examination of whether D complied with that policy may require consideration of the international law obligation given effect. Such a question is justiciable. As Linden J explained in *R. (on the application of KTT) v SSHD* [2021] EWHC 2722 (Admin); [2022] 1 WLR 1312 ("***KTT***") at ¶36, following a detailed examination of the caselaw:

(a) the source of the public law obligation contended for in such a case is not international law, but rather the declared policy; and

[46] Leaving aside, for the moment, the more fundamental point that C relies upon rules of customary international law which have been received into the common law (the subject of Gd 9).

(b) if D's policy requires compliance with an obligation under international law, it is "permissible for the court, applying conventional public law principles, to consider what the requirements of those articles were with a view to deciding whether the policy correctly stated their effect and whether a given decision, taken in accordance with that policy, was lawful", even if the international law provision has not been incorporated into domestic law (emphasis added). See further ¶¶48-49.

64. Linden J's reasoning was endorsed by the Court of Appeal in *R. (on the application of EOG) v SSHD* [2022] EWCA Civ 307; [2023] QB 351 at ¶34.

65. The principle established in that line of authority is directly applicable here. Indeed, it applies even more forcefully. Not only were the SELC (with Criterion 1 of which D purported to comply in respect of the F-35 Carve Out), like the guidance considered in *KTT* and *EOG*, adopted for the express purpose of giving effect to the UK's relevant international law obligations, but this purpose is central to the underlying statutory scheme.

66. As set out in Section IV above, the D's powers to make licensing decisions derive from the 2002 Act. International law is central to the operation of the regime established pursuant to the 2002 Act. Thus:

(a) The power to grant and suspend licenses for the export of military equipment derives from the 2008 Order (see 34¶¶3443-46 above). That Order was made pursuant to s.5(2) of the 2002 Act, which empowers D to impose export controls for the express purpose of "*giving effect to any* [...] *international obligation of the United Kingdom*".

(b) The 2002 Act also required D to adopt guidance to explain how powers made under the 2008 Order would be exercised in relation to licensing decisions: s.9(3). D was required to address in that guidance the consideration to be given to, *inter alia*, the possibility that exported material might be used in contravention of IHL, in internal repression or in breaches of human rights law: s.9(4) and para 3(2), Schedule 1. The SELC were adopted pursuant to this obligation.

(c) Parliament has therefore: (i) empowered D to impose export controls for the purposes of giving effect to the UK's international obligations; and (ii) required D to introduce guidance which identifies the consideration to be given to IHL and international human rights law ("**IHRL**"**)** in relation to the exercise of that power.

(d) It is in this context that the SELC were expressly adopted as "*one of the means*" by which the Government seeks to implement the UK's international legal commitments.

67. The background to the 2002 Act underscores the centrality of international law to the scheme:

(a) Prior to the entry into force of the 2002 Act, export control was governed by the Import, Export and Customs Powers (Defence) Act of 1939 (the "**1939 Act**"). The 1939 Act made no reference to international law.

(b) By 1998, however, the EU had adopted a number of measures aimed at harmonising arms exports across Member States and ensuring compatibility with international law. Between

1991 and 1992 the European Community adopted common criteria to be applied to arms exports. Those criteria were developed further in 1998, when the EU adopted a Code of Conduct on Arms Exports, which similarly included reference in its first criterion to the international obligations of member states.

(c) The 2002 Act, and in particular the obligation under s.9(4) and the table in para 3 of Schedule 1, mirror the position under EU law at the relevant time. The evident purpose of those provisions was to ensure that the UK's export control regime was compatible with EU and international law.

68. There is therefore a clear domestic law foothold for the international law issues raised by Gd 8 in the form of the D's assessment of compliance with SELC 1.

(2) The Launder principle

69. A second domestic foothold can be found in the D's express self-direction as to the compliance of the F-35 Carve Out with the UK's international obligations.

70. In light of that self-direction, the D's justiciability challenge is impossible to reconcile with the judgments of the House of Lords in *R v SSHD ex parte Launder* [1997] 1 WLR 839 (HL) at p.867F (per Lord Hope) and *R v Director of Public Prosecutions ex parte Kebilene* [2002] AC 326 at p. 367D-F (per Lord Steyn).

71. D contends that *Launder* and *Kebilene* "*represent, at most, highly circumscribed exceptions*" to the general principle that domestic courts lack jurisdiction to construe or apply treaties which have not been incorporated into national law, such that they must be confined to their particular facts: ADGR ¶12 [CB/A/3/139].

72. That contention is without merit. There is nothing in the judgments of *Launder* and *Kebilene* to support the D's narrow reading of the legal principle which they establish. To the contrary, the passages cited above are expressed in broad terms, and the principles are of general application. This is how they have been understood by subsequent courts (see by way of example *R (Barclay) v Lord Chancellor* [2010] 1 AC 464, *R (Tag Eldin Ramadan Bashir) v SSHD* [2018] UKSC 45 at ¶114 and *Heathrow Airport Limited v HMT* [2021] EWCA Civ 783 at ¶¶150-152 and 170).

73. Further, and contrary to ADGR ¶12 [CB/A/3/139]), C does not contend that the *Launder* principle applies in all cases where an unincorporated international obligation has been "considered" (in whatever manner and to whatever extent) as part of a public authority's decision-making. Rather, it applies in relation to decisions which are premised on a self-direction that the outcome is consistent with the relevant international obligation. In *Kebilene*, Laws LJ expressly rejected the argument that this represented an impermissible "opening of the door" (see p.352-353).

74. In *R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756 a self-direction was held not to give rise to a justiciable question of the proper interpretation of an international obligation because the direction was immaterial to the decision (see the judgments of Lord Bingham (¶47) and Lord Brown (¶66)). However, that principle is not relevant here. It is

common ground that the compatibility of the F-35 Carve Out with the UK's international obligations was a matter to which D had regard as a matter of fact. Given the nature of the decision and the legal context in which it was made, there is no basis for any assumption that D would have reached the same decision irrespective of his conclusion as to its compatibility with international law, such that the self-direction could be regarded as immaterial.

(ii) High Policy

75. D separately contends that Gd 8 is not justiciable because it "trespasses onto 'matters of high policy', namely the conduct of foreign affairs and compliance with international law": ADGR ¶15 [CB/A/3/140-141].

76. This objection is without merit. Gd 8 is not a challenge to the UK's conduct of foreign policy. The suggestion at ADGR ¶15 [CB/A/3/140-141] that C seeks to "'*tie the United Kingdom's hands' on the international plane*" is hyperbolic and obviously wrong.

77. There is no analogy between this claim and *R (on the application of Al Haq) v Secretary of State for Foreign and Commonwealth Affairs*) [2009] EWHC 1910 ("***Al Haq 1***"). C there sought declaratory relief in public law proceedings that a foreign nation was in violation of international law. In refusing permission the Court noted that, in contrast to the cases where the courts have pronounced on matters of high policy, C's application lacked "*a domestic foothold*" (¶54). The same is true of *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin) ("***CND***"). That claim was "*nakedly an application for an advisory declaration*"[47] about the legality of the UK's invasion of Iraq in the absence of a further resolution from the UN Security Council. The application concerned "*a pure question of interpretation*" of international law[48] in which "*no decision is impugned, neither an existing decision nor even a prospective decision*".[49]

78. In both cases, it was accepted that the Court may be required to determine a matter of "*high policy*" if doing so was necessary to review the legality of a decision as a matter of domestic law: see ¶54 in *Al Haq 1* and *CND* per Simon Brown LJ at ¶¶36 and 47(i), which treated the *Launder* principle as one of general application.

79. In any event, even if a challenge to a decision does trespass into the conduct of foreign affairs and compliance with international law, this does not automatically render the challenge non-justiciable. Per the Supreme Court judgment in *Belhaj v Straw* [2017] AC 964 that whether it does is so is determined by the application of the foreign act of state doctrine, addressed below.

(iii) Foreign Act of State

80. D contends (at ADGR ¶17 [CB/A/3/141]) that Gd 8 is barred by the foreign act of state doctrine, relying on Lord Neuberger's third rule[50] in *Belhaj v Straw*. This contention is without merit, for

[47] Per Simon Brown LJ at ¶15.
[48] *Ibid* at ¶16.
[49] *Ibid* at ¶15.
[50] As explained by the Supreme Court in *"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57, [2023] AC 156, the *ratio* of *Belhaj v Straw* is to be found in the judgment of Lord Neuberger.

six reasons.

81. **First**, the foreign act of state doctrine, including the third rule, only applies where the court will be required to rule on the lawfulness of a foreign state's sovereign acts in order to determine the claim.[51] C's challenge does not require this Court to make a finding that Israel has breached international law. It requires only a finding that D misunderstood the UK's international obligations and that this error was material to his decision.[52]

82. **Second**, even in cases where the challenge does require the court to determine the lawfulness of a foreign state's action, the doctrine does not automatically apply and "*judges should not be enthusiastic in declining to determine a claim under the third rule*" (¶147). In Belhaj, Lord Neuberger made clear that the ambit of doctrine is limited to those categories of act which are "*of such a nature that a municipal judge cannot or ought not rule on it"* (¶123) and is "*based on judicial self-restraint, in that it applies to issues which judges decide that they should abstain from resolving*" (¶151). This is because the rule is justified "*on the ground that domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels"*. The category of foreign acts to which the doctrine applies will therefore "*normally involve some sort of comparatively formal, relatively high level arrangement, but, bearing in mind the nature of the third rule, it would be unwise to be too prescriptive about its ambit*" (at ¶147).[53] D has failed to identify any basis on which it can be said that Israel's conduct, to the extent that it falls to be considered by this Court, falls within the scope of the "*comparatively formal, relatively high level arrangements*" to which the third rule applies. There is none.

83. **Third**, C is not asking this Court to "*apply international law to the relations between states* [so as to] *give rise to private rights or obligations*", to "*subject the sovereign acts of a foreign state to its own rules of municipal law*", or to "*treat* [Israel's use of force] *as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like*": Belhaj v Straw at ¶234 (Lord Sumption), quoted in Law Debenture Trust v Ukraine [2024] AC 411 at ¶188 and at ADGR ¶17 [CB/A/3/141]. To the contrary, in the context of Gd 8, C is asking the Court to consider the lawfulness of a decision of a UK public authority, by reference to its own policy guidance and self-direction. These are issues which an English court can and should resolve.

84. **Fourth**, the decision under challenge is one in which D has himself, in exercising a power conferred by Parliament for the purposes of (*inter alia*) giving effect to the UK's international obligations, sought to assess Israel's commitment to and compliance with its own international law obligations. Indeed, that is the very essence of the assessment which is required to be carried out under the SELC. The considerations of comity which underpin the doctrine have no role to play in that context since the UK Government is already expressing a position as to Israel's compliance with its obligations. This is further underscored by the myriad other States, international organisations, international and domestic courts, and NGOs that have determined that Israel and/or Israeli officials have breached and/or are at risk of breaching international law

[51] *Belhaj v Straw* at ¶240, quoted in Law Debenture Trust v Ukraine [2023] UKSC 11, [2024] AC 411 at ¶188.
[52] Indeed, to the extent that the claim raises issues concerning the commission of war crimes, it is obviously relevant that such crimes are committed by individuals, not States.
[53] See also at ¶ 167 and ¶171.

in its military offensive in Gaza.[54]

85. **Fifth**, even if the Court were required to rule on the lawfulness of Israel's sovereign acts in order to determine the claim (which, as above, it is not), the foreign act of state doctrine would not apply because any such determination would be incidental — i.e., it is not "*the very subject matter of the action*".[55] The subject matter of the action is the lawfulness of a decision of a UK public authority, and C's challenge does not require this Court to make, nor does the success of Gd 8 require or depend on, a finding that Israel has breached international law.

86. **Sixth**, the doctrine does not apply where the alleged conduct conflicts with fundamental principles of public policy (*Belhaj* at ¶¶153-157, 172), which is almost always the case where the alleged conduct amounts to a breach of a peremptory norm (*Belhaj* at ¶168). This does not mean that a claimant must establish that a peremptory norm has been breached to rely on the public policy exception: the role of international law in this context is to influence the process by which judges identify a domestic principle as representing a sufficiently fundamental rule of English public policy (*Belhaj* at ¶¶168, 257, 261).

87. Applying the foregoing approach in *Belhaj*, Lord Sumption (whose analysis Lord Neuberger endorsed),[56] considered that it would not be consistent with English public policy to apply the foreign act of state doctrine so as to prevent the court from determining the allegations of torture or assisting or conniving in torture, unlawful detention, enforced disappearance and rendition (at ¶¶268-278). Lord Sumption came to this conclusion on the basis that the allegations demonstrated a combination of violations of peremptory norms and inconsistency with fundamental principles of justice in England (see ¶¶266, 278).

---

[54] See, for example: (i) the parallel determination by the ICJ that there is "*a real and imminent risk*" of irreparable prejudice to the rights of Palestinians in Gaza not to be subjected to acts of genocide by Israel, and its reminder to "*all States*", having regard to that fact and to the facts on the ground, "*of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate*" both the Genocide Convention and the Fourth Geneva Convention: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*), Provisional Measures, Order of 26 January 2024, ¶¶65-74 and *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory* (*Nicaragua v. Germany*), Request for the Indication of Provisional Measures, Order of 30 April 2024, ¶24; (ii) the assessment by the Office of the Prosecutor of the International Criminal Court: see ICC Prosecutor, "*Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine*" dated 20 May 2024; (iii) the assessment by the United Nations Commission of Inquiry and other determinations of violations of IHL / breaches of the Genocide Convention: see, for example, most recently, UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 11 September 2024, UN Doc A/79/232, ¶¶89, 91, 94-95, 98, 100, 102, 105, 107-110; (iv) the press release by 37 UN experts voicing concern over "*discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials*": see, OHCHR press release titled "*Gaza: UN experts call on international community to prevent genocide against the Palestinian people*" dated 16 November 2023; (v) the findings of Amnesty International that Israel is committing genocide against Palestinians in Gaza: see, report titled "*You Feel Like You Are Subhuman: Israel's Genocide Against Palestinians in Gaza*" dated 5 December 2024; and (vi) the findings of Human Rights Watch that Israel is responsible for acts of genocide in Gaza: see, report titled "*Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water*" dated 19 December 2024.

[55] *Belhaj v Straw* at ¶240, quoted in *Law Debenture Trust v Ukraine* [2023] UKSC 11, [2024] AC 411 at ¶188. See also *Belhaj v Straw* at ¶241, quoted in part in *Law Debenture Trust v Ukraine* [2023] UKSC 11, [2024] AC 411 at ¶190:
"There are many circumstances in which an English court may have occasion to express critical views about the public institutions of another country, without offending against the foreign act of state doctrine or any analogous rule of law. In deportation and extradition cases, for example, it may be necessary to review the evidence disclosing that the person concerned would be tortured or otherwise ill-treated by the authorities in the country to which he would be sent …".

[56] *Belhaj v Straw* at ¶¶168, 172.

88. The same combination is present in this case:

(a) Even if, contrary to the above, (i) the resolution of this claim requires the Court to determine (non-incidentally) the lawfulness of Israel's sovereign conduct, and (ii) the relevant conduct falls within the scope of the limited categories of sovereign act to which the foreign act of state doctrine might otherwise apply, that conduct is in violation of well-established peremptory norms of international law, including the prohibitions on genocide, crimes against humanity, war crimes and torture, as well as the obligation to comply with the basic rules of IHL.[57]

(b) Having regard to the status of those norms under international law, the alleged conduct is also inconsistent with fundamental principles of justice in England. That is well-established in relation to the prohibition of torture[58] and is obviously also the case in relation to the prohibitions on genocide, crimes against humanity, and war crimes.[59] It follows that, even if the foreign act of state doctrine might otherwise apply to render the claim non-justiciable, its application would not be consistent with English public policy.

89. For these reasons, the foreign act of state doctrine is not engaged. Alternatively, an exception applies due to the nature of the conduct in issue.

B. INTERNATIONAL OBLIGATIONS: CORRECTNESS OR TENABILITY

90. The D's fallback position is that even if Gds 8(A)-(D) are justiciable, the Court is limited when dealing with them to determining whether D took a "*tenable view*" of the meaning of the relevant international obligations. This, D says, is a hard and fast rule which applies wherever a "*Government decision is said to involve a misunderstanding or misinterpretation of unincorporated international law*".

91. No such rule exists. Rather, as the Court of Appeal made clear in R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport [2024] EWCA Civ 1227, where "the Government [has] given effect through policy" to an unincorporated treaty, as mandated by statute, the "situation [will give] rise to a conventional challenge on established public law grounds to the decision-maker's application of policy" (¶145), with the court deciding the meaning of the relevant international obligation for itself. Otherwise, the proper standard of review in cases alleging misinterpretation of unincorporated international law will "depend upon the circumstances of the individual case": ¶146.

92. The tenability standard does not apply in the circumstances of this case. Rather, the Court is required to determine the correct interpretation of the international obligations in issue. This is

[57] See, e.g., ILC, ASR with commentaries, Commentary to Art 40, ¶¶4-5 and Commentary to Art 26, ¶5; ILC, Draft conclusions on identification and legal consequences of peremptory norms of international law, with commentaries, Annex (and in respect of war crimes see Conclusion 22, commentary para. 3); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, ¶79.

[58] *Belhaj* at ¶¶258-262; *A v SSHD (No 2)* [2005] UKHL 71, [2006] 2 AC 221 (at ¶33 *et seq*).

[59] See, e.g., the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Furundzija*, Case No IT-95-17/T 10 (10 December 1998) at ¶147 noting that the prohibition against torture has a status "*in the international normative system … similar to that of principles such as those prohibiting genocide … the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination*", cited with approval by Lord Bingham in *A (No 2)* (above) at ¶33.

so for six reasons.

93. **First**, as set out above, compliance with the UK's international obligations is a central concern of the relevant statutory scheme. Parliament has conferred powers on D under the 2002 Act for the purpose of enabling him to establish and operate an export control regime which gives effect to the UK's international law obligations (s.5(2)) and required that the exercise of those powers involve consideration of the compatibility of export control decisions with the international law of armed conflict and IHRL (s.9(4)). The D's assessment that the F-35 Carve Out was consistent with the UK's international obligations was therefore a matter to which Parliament intended that he should have regard.

94. **Secondly**, the SELC has been adopted for the express purpose of giving effect to international law. Applying the principles identified in *KTT*, the Court must determine the actual meaning of relevant international obligations in order to assess whether D has complied with his policy.

95. **Thirdly,** as in this case, the relevant obligations are referred to in the policy itself, this conclusion is only reinforced by the well settled principle that "*the courts approach to the meaning of policy is to determine it for itself and not ask whether the meaning which the Home Secretary has attributed to it is reasonable*": *R (O) v SSHD* [2016] 1 WLR 1717 at ¶28; see also *Mandalia v SSHD* [2015] 1 WLR 4546 at ¶29; *R (Hemmati) v SSHD* [2021] AC 143 at ¶69.

96. **Fourthly**, the User's Guide (which remains relevant to the interpretation and operation of the SELC) provides at ¶1.3 that "*in order to avoid conflict with their international obligations, Member States should follow the strictest restrictions that are binding or applicable to them*". This further tells against the application of a tenability standard.

97. **Fifthly**, in *CAAT I* and *CAAT II* C's challenge that D misdirected himself as to the distinction between two international law concepts relevant to Criterion 2(c) ('serious violation of IHL' and 'grave breaches of IHL') was dealt with applying a correctness standard by the Court of Appeal and the Divisional Court: see *CAAT II* at ¶¶98-103; *CAAT I CA* and ¶¶155-164.

98. **Sixthly**, the balance of the specific circumstances in relation to each of Gds 8A-D favours the correctness standard in any event. The Court of Appeal summarised a number of the factors relevant to the appropriate standard in *Stonehenge* at ¶147. As is clear from the opening sentence of that passage, the Court of Appeal was not laying down an "*exhaustive or definitive*" list of relevant factors. However, the factors identified by the Court militate against the application of a tenability standard in this case in significant respects:

    (a) The sixth and seventh factors apply generally across Gd 8 and support the application of a correctness standard. For the reasons set out above, it is necessary to determine the obligations under 8A-D in order to decide a justiciable issue, and D is compelled by domestic law to consider the extent to which the F-35 Carve Out is consistent with international law.

    (b) The first to fifth factors fall to be applied in relation to the different obligations addressed in each of Gd 8A-D:

        (i) **First**, as set out below, there is a significant body of judicial and academic material

in relation to each of the obligations relied upon. The Court is not "*undertak[ing] the task of interpretation from scratch*" (per Lord Bingham in *Corner House* at ¶44). Thus, in relation to CA1/Gd 8A, the ICJ has confirmed the meaning of the relevant obligation on four occasions: see ¶¶110(b) below. In relation Gd 8B, there is significant commentary and subsequent practice by state parties in relation to the ATT. It is also relevant that the UK implements its obligations under Arts 6 and 7 ATT via the SELC: see the UK's Initial Report.[60] In relation to Gd 8C, the meaning of the Convention obligation has been adjudicated upon by the ICJ; and in relation to Gd 8D, the relevant obligations under the ASR have been recognised by the domestic courts.[61]

(ii) **Secondly**, the obligations relied upon by C are not subject to "*deep and difficult question[s] of profound importance to the whole working*" of the relevant treaties (*cf Corner House* at ¶66, per Lord Brown), and the Court's interpretation of them will not disincentivise D from having regard to the UK's relevant legal obligations in future decisions made under the SELC (*cf Corner House* at ¶44, per Lord Bingham). Nor should it impede executive conduct of foreign relations (Lord Sumption in *Benkharbouche* at ¶35). D is required to consider and to act compatibly with the relevant obligations: this is a consequence of the statutory scheme taken together with the SELC. In particular, SELC 1 requires D to interpret and apply the international law obligations at issue under Gd 8.

(iii) **Thirdly**, the UK has agreed to the compulsory jurisdiction of the ICJ in relation to disputes under each relevant convention, such that it has accepted the judicial determination of its compliance with the obligations therein.

(iv) **Fourthly**, if D adopts a tenable but incorrect interpretation of the international obligations relied upon at 8A-D, then the UK will be in breach of some of the most significant and fundamental obligations in the international legal order. Guidance from this Court as to the correct interpretation of those obligations is therefore central to the UK's compliance with basic principles of international law.

(v) **Fifthly**, the treaty obligations relied upon are not especially complicated or ambiguous. The Court is well placed to interpret them, particularly in light of the material supplied by the parties as to their proper interpretation.

99. Further, a number of the norms relied upon by C are binding as a matter of customary international law, as well as treaty (see Gd 9 below). By its nature, a norm of customary international law must be clear: a norm of customary international law is established by widespread, representative and consistent practice of states, which is accepted by states on the basis that it is a legal obligation: see *Benkharbouche* at ¶31, per Lord Sumption. The case for applying tenability is therefore weaker in respect to customary norms than it is to unincorporated treaty obligations. (The issue does not arise at all, of course, if the customary

[60] Available at https://thearmstradetreaty.org/download/8b6fb808-d6ba-324f-b3e1-d7e9d14b1c5a.
[61] See e.g., *R (Al-Saadoon) v Secretary of State for Defence* [2015] EWHC 715 (Admin); *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221.

rules are received into common law, as C contends is the case here: see Gd 9 below).

C. INTRODUCTION TO GROUNDS 8(A)-(D)

100. D misdirected himself or otherwise erred in law in concluding that the continued supply of F-35 parts to Israel complies with his obligations and commitments pursuant to:

(a) Common Art 1 to the Four Geneva Conventions ("**CA1**") (Ground 8(A));

(b) the Arms Trade Treaty ("**ATT**") (Ground 8(B));

(c) Art 1 of the Genocide Convention ("**GC1**") (Ground 8(C)); and

(d) customary international law (**"CIL"**) obligations, as reflected in the Articles on State Responsibility ("**ASR**") (Ground 8(D)).

101. D does not dispute that international law compliance of the transfers fell to be assessed against each of the above obligations and commitments. Notably, SELC 1 stipulates in terms that "*[t]he Government will not grant a licence if to do so would be inconsistent with, inter alia:* […] *b) the UK's obligations under the United Nations Arms Trade Treaty*". The Government's decision-making proceeded (correctly) on the basis that transfers of licenced weapons also had to comply *inter alia* with CA1 and GC1.[62] It also recognised the need to ensure that any support provided to Israel did not aid or assist in the commission of an internationally wrongful act.[63]

102. As explained in Section III.D above, D's decision-making was based on the ECJU's assessment of compliance with SELC 1 dated 11 June 2024 (Exhibit CH2-49) ("**the June 2024 SELC 1 Assessment**") [SB/E/102/1422-1430], undertaken at a time when the government considered that Israel was committed to complying with international humanitarian law and that there was no clear risk of serious F-35 parts exported to Israel being used to commit or facilitate a violation of IHL. That assessment was then relied on in the ECJU Submission to the SSFCA of 24 July 2024 ("**Annex E**") (Exhibit RP2-1c) [CB/E/35/609-610]. Some, but not all, obligations relevant to SELC 1 received limited additional comment in Annex E.

D. GROUND 8A: INCOMPATIBILITY WITH THE UK'S INTERNATIONAL LEGAL OBLIGATIONS TO RESPECT AND ENSURE RESPECT FOR IHL UNDER COMMON ART 1 OF THE GENEVA CONVENTIONS ("CA1") AND CIL

(i) D's misdirections / errors of law in relation to CA1

103. D erred in law in three respects, as explained below. A preliminary point concerns the correct interpretation of CA1. CA1 requires a state not only (i) to itself "*respect*" IHL and "*ensure respect*" by all persons subject to its jurisdiction but *also* (ii) to "*ensure respect*" by others outside the state's jurisdiction, such as parties to a conflict. This requires States not to encourage

[62] The June 2024 SELC1 Assessment at ¶3 (Exhibit CH2-49) [SB/E/102/1422]; Annex E to ECJU Submission to SSFCDA dated 24 July 2024 at (Exhibit RP2-1c) [CB/E/35/609-610], largely adopting the analysis in the June 2024 C1 Assessment. For earlier decisions, see, for example, Annex B to the 28 March 2024 briefing to the SSFCA leading up to the April Decision (Exhibit CH2-35) [SB/E/78/975]; and Annex B to the 23 May 2024 briefing to the SSFCA leading up to the May Decision (Exhibit CH2-42) [SB/E/93/1153-1154].

[63] See e.g. Second IHLCAP Assessment (Exhibit CH2-17) [SB/E/46/635] (¶2 "The IHL assessment process was set up to service three key requirements: […] 3) ensuring HMG's overarching support to Israel does not aid or assist the commission of an internationally wrongful act").

or aid and assist violations of IHL (the negative dimension), and to do everything reasonably within the state's power to ensure respect for IHL by others in all circumstances (the positive diemension).[64] D's restrictive interpretation, by contrast, considers the content of CA1 only to apply to (i) above.[65] With that point in mind, D's errors are as follows.

(1) D failed properly to assess the F-35 Carve Out's compliance with CA1

104. First, D failed properly to assess whether the continued export of F-35 components was compliant with CA1 following his conclusion that Israel was not committed to complying with IHL and that there was a clear risk that F-35 parts might be used to commit or facilitate serious violations of IHL.

105. Although the June 2024 SELC 1 assessment had queried — for the first time[66] — whether CA1 did impose an obligation on the UK to ensure that other states complied with IHL, it nevertheless went on to consider the compliance of arms transfers to Israel with CA1 on the basis of that interpretation.[67] It concluded that they "*could be argued*" to comply with that interpretation of CA1, given that D had "*satisf*[ied] *himself that Israel has the* […] *commitment to comply with IHL and will use UK exports accordingly*".[68] That was no longer D's position when considering the Carve-Out: he had concluded as of 24 July 2024 that Israel was *not* committed to complying with IHL overall and that there *was* a clear risk of serious IHL violations.[69] That was a material change in position.

106. The June 2024 SELC 1 assessment of compliance with CA1 relied on the UK's stated adherence to a *"rigorous and transparent licensing regime that carefully considers whether any individual items might be used to commit or facilitate serious violations of IHL (Criterion 2c of the*

[64] Nicaragua v USA, ¶¶116, 220, 256; ICRC Commentary to GC I (2016), ¶¶153-154, 158, 162; ICRC Commentary to GC III (2021), ¶¶186-187, 191, 195.
[65] See ¶¶110-111 below where this is addressed in detail; and ADGR ¶24 [CB/A/3/143-144].
[66] Cf. Annex B to the 28 March 2024 briefing to the SSFCA leading up to the April Decision (Exhibit CH2-35) [SB/E/78/975] and Annex B to the 23 May 2024 briefing to the SSFCA leading up to the May Decision (Exhibit CH2-42) [SB/E/93/1153-1154], both of which record that CA1 has been considered without raising any suggestion that CA1 does not apply externally.
[67] The June 2024 SELC 1 Assessment ¶¶ 27-28 (Exhibit CH2-49) [SB/E/102/1428-1429].
[68] Ibid, ¶28 [SB/E/102/1428-1429].
[69] Ministerial Submission to D dated 30 August 2024 (Exhibit RP2-4 and KB1), ¶8 [CB/E/56/898]. See as regards humanitarian relief: IHL Seventh Assessment, 24 July 2024, ¶108 [CB/E/41/720], ¶131 [CB/E/41/726], ¶137 [CB/E/41/726], referring (at ¶¶22-23 [CB/E/41/696] and ¶92 [CB/E/41/716]]) to the last two IHL Assessments: Fifth IHL Assessment CH2-34, ¶26(i) [SB/E/74/931], ¶56 (unredacted) [SB/E/74/941], ¶77 [SB/E/74/947]; Sixth IHL Assessment, CH2-39 [SB/E/83/991-1018]. Arts 23 and 55 GC IV are reflective of custom: ICRC, CIHL Rule 55. See as regards the treatment of Palestinian detainees: (IHL Seventh Assessment, 24 July 2024, ¶156 [CB/E/41/732], ¶157 [CB/E/41/733], ¶170 [CB/E/41/735], confirming ¶139 [CB/E/41/729] the previous IHL Assessments' conclusions on detainees: Sixth IHL Assessment CH2-39 ¶72 (unredacted gist) [SB/E/83/1009] and ¶75 (unredacted) [SB/E/83/1009]), ¶¶87-88 (unredacted) [SB/E/83/1011]), ¶101 (unredacted) [SB/E/83/1013]), ¶113 (unredacted) [SB/E/83/1015]), ¶115 (unredacted) [SB/E/83/1015-1016]), ¶125 (unredacted) [SB/E/83/1017]). See further earlier finding of possible breaches in connection with the treatment of detainees: Fifth IHL Assessment (Exhibit CH2-34) [SB/E/74/925, 931]. The open IHL Assessments do not disclose the specific IHL violations D considered possible regarding detainees, but they must have included, at a minimum, the (a) obligation to treat detained *hors de combat* humanely including prohibitions on violence to life, health, or physical or mental well-being, including torture, outrages on personal dignity, humiliating and degrading treatment, rape and any form of indecent assault (GC IV, Arts 27, 32 and 147; customary rules codified in AP I, Arts 75(2), 76(1) and 77(1); CIHL Rules 87, 89-90 and 93); (b) prohibition on killing or wounding persons *hors de combat* (customary rule codified in the Hague Regulations, Art 23(c) and AP I, Art 41; CIHL Rule 47); (c) prohibition on reprisals against captured persons *hors de combat* (GC IV, Art 33; CIHL Rule 146); and (d) obligation to detain persons accused of offences in the occupied territory, and, if convicted, to serve their sentences therein, to which no exceptions apply (GC IV, Art 76(1)). Regarding ICRC access see Arts 76 and 143 of GC IV and ICRC, CIHL Rule 124.

SELC)", notably its *"anxious steps, as part of the assessments conducted in relation to Criterion 2c"*.[70] D's decision to depart from this claimed *"rigorous and transparent licensing regime"* in the September Decision constituted a further material change.[71]

107. However, D did not reassess compliance with CA1 accordingly. The assertion in Annex E that the June 2024 SELC 1 Assessment (which predated the above material changes in position) considered all the relevant information therefore constituted a material misdirection. In proceeding on the basis of an out-of-date and erroneous assessment that "*there have been no changes or developments that alter ECJU-FCDO's overall conclusions*",[72] D failed to have regard to an obviously material consideration.[73]

108. To the extent that the September Decision is materially based on D's view that CA1 does *not* require the UK to ensure respect by others for CA1 pursuant to its restrictive interpretation of the obligation, it is further erroneous on that basis also (see further ¶¶110-111 below).

(2) D failed to assess the F-35 Carve Out's consistency with its own restrictive interpretation of CA1

109. The Defendant failed to carry out any assessment of whether the F-35 Carve Out complied with his own restrictive interpretation of the UK's obligations under CA1 after July 2024.[74] That failure was material: transfers of F-35 parts to a state that the UK determined has (at least possibly) violated IHL and is not committed to complying with IHL, and where the UK has found a clear risk that the exported parts might be used to commit or facilitate a further serious violation of IHL, are necessarily capable of breaching the UK's the obligations "*to respect and ensure respect*" for the Geneva Conventions under CA1. That is because licencing decisions are taken by UK officials in the UK, and are carried out by arms exporters that are located within the UK and therefore subject to the UK's jurisdiction and/or control: see Section V.A. The Defendant erred in failing to assess whether the transfer of the F-35 components complied with the UK's obligations under CA1 on that basis, even as regards his own restrictive interpretation of the provision.

(3) D misdirected himself as to the scope of CA1

110. To the extent D seeks to rely on the June 2024 SELC 1 Assessment, it includes a misdirection that "*CA1 does not constitute an obligation ... to ensure that other States also respect the Conventions*".[75] D instead claims that the obligation in CA1 relates *only* to persons within a state's jurisdiction and control.[76] That is wrong as a matter of treaty interpretation and custom,[77]

---

[70] June 2024 SELC 1 Assessment (Exhibit CH2-49), ¶28 [SB/E/102/1428-1429].
[71] See *Nicaragua v. Germany*, Order, ¶17-18, in which the ICJ takes note of Germany's licensing regime.
[72] Annex E to ECJU Submission to SSFCDA 24 July 2024 (Exhibit RP2-1c) [CB/E/35/609-610].
[73] See ¶114(a) below on the point that a finding of a clear risk of serious violations of IHL would automatically engage CA1 and prohibit continued arms exports.
[74] ADGR ¶24 [CB/3/143-144]: "*The obligation "to respect and ensure respect" under CA1 refers to a State's obligation to respect the provisions of the Geneva Conventions and to ensure that all persons within the jurisdiction of that State comply with the Convention.*"
[75] [SB/E/102/1428].
[76] ADGR ¶24 [CB/A/3/143-144].
[77] CA1 is reflective of CIL, the content of which is identical save that it applies to respecting and ensuring respect for all customary IHL, not just the Geneva Conventions. See in particular *Nicaragua v. USA*, ¶220 (which concerned the rule in CA1 as a matter of custom); ICRC, Updated Commentary to Geneva Convention I, 2016, https://ihl-

as is clear from the following:

(a) **Treaty interpretation, per the rule reflected in Art 31(1) VCLT**. Pursuant to CA1 states "*undertake to respect and to ensure respect*" for the conventions "*in all circumstances*". The terms of CA1 are broad, directed at ensuring compliance as comprehensively as possible and contain no limiting qualifiers that would restrict its application in the manner contended for by D. They are consistent with the object and purpose of the Geneva Conventions, which is to mitigate as far as possible the impact of armed conflict on, and to protect, certain categories of people (particularly civilians and persons rendered *hors de combat*).[78] CA1 serves that object and purpose by requiring states to do all that they reasonably can to prevent violations of the Geneva Conventions, and end continuing violations, where possible.[79] It would plainly be inconsistent with that object and purpose for a state to be at liberty to transfer arms to a state (i) which is not committed to complying with IHL and (ii) has (at least possibly) breached provisions of the Fourth Geneva Convention; and (iii) where there is a clear risk that the items transferred might be used to commit or facilitate a further violation of IHL. D does not justify his restrictive interpretation of CA1 by reference to the language of CA1 or the object and purpose of the Geneva Conventions.[80]

(b) **Repeated judicial authority**: The ICJ has consistently confirmed on no fewer than <u>four</u> occasions that CA1 requires states to ensure compliance by others outside their jurisdiction. It has stated that "*every State party to [the Fourth Geneva] Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with*".[81] It has declared, in relation to Israel's conduct in Palestine specifically, that "*all the States parties to the Fourth Geneva Convention have the obligation* […] *to ensure compliance <u>by Israel</u> with international humanitarian law as embodied in that Convention*",[82] and has separately noted that this obligation applies in respect of the "*supply of arms to Israel*".[83] It has further held that there is a customary obligation "*in the terms of Article 1 of the Genva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances'*" which applies in respect of "*persons or groups engaged in the conflict*".[84] D has cited no international judicial ruling in support of his proposed interpretation; he

databases.icrc.org/en/ihl-treaties/gci1949/article-1/commentary/2016?activeTab=, ¶¶120, 126, 173.

[78] VCLT, Article 31(1). ICRC Commentary to GC I (2016), ¶¶30-32; ICRC Commentary to GC III (2021), ¶¶89-91. This is also evident from the titles of the four Geneva Conventions.

[79] ICRC Commentary to GC I (2016), ¶154; ICRC Commentary to GC III (2021), ¶187, dealing with the prevention and cessation of violations; see also Dörmann and Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations" (2015) 95 *IRRC* 707, pp. 715 and 731.

[80] At ADGR ¶25 [CB/A/3/144], D says its interpretation is based on "*the ordinary meaning of the words used in their context*" but then provides no supporting analysis and no reference to such language or context.

[81] <u>*oPT First Advisory Opinion*</u>, ¶158 (emphasis added). See also ¶159.

[82] <u>*oPT Second Advisory Opinion*</u>, ¶279. See also UN Doc. A/ES-10/L.31/Rev.1, 18 September 2024, at ¶12, calling on states parties to the Fourth Geneva Convention "*to enforce the Convention*" in the oPT "*and to ensure respect thereto in accordance with common article 1 of the four Geneva Conventions*".

[83] <u>*Nicaragua v. Germany*</u> *Order*, ¶¶23-24 (emphasis added). C does not understand D's statement at ADGR ¶26(c)(iii) [CB/A/3/146-147] that ¶24 "*did not refer to CA1*" in circumstances where it referred to "*the above-mentioned Conventions*", which is a direct reference to the preceding ¶23 in which "*common Article 1 of the Geneva Conventions*" — in addition to the Genocide Convention — is mentioned in terms. See also Separate Opinion of Judge Tladi, ¶4 and Separate Opinion of Judge Cleveland, ¶¶8 and 13.

[84] <u>*Nicaragua v. USA*</u>, ¶220.

cannot. Rather, D seeks to distinguish the cases factually or contend that the rulings are not binding individually on the UK.[85] This is unpersuasive for at least three reasons. **First**, ICJ rulings are statements of the law of general application by the highest court in the international legal order. **Second**, pronouncements of the ICJ are a subsidiary means for the determination of rules of law, and are treated as such by UK courts, at the very highest level.[86] **Third**, as the UK has accepted the compulsory jurisdiction of the ICJ pursuant to Art 36(2) of the ICJ Statute, including in relation to disputes pursuant to the Geneva Conventions and CIL, the interpretation given by the ICJ would be binding on the UK in any proceedings brought against it.

(c) **Overwhelming state practice**: There is "*overwhelming support in State practice*" relating to the broad scope of CA1.[87] As summarised by the ICRC: "Subsequent practice has confirmed the existence of an obligation to ensure respect by others under common Article 1".[88] This is recognised specifically in the context of Israel / Palestine by Professor Sassóli (on whose selective citation D purports to rely at ADGR ¶25(c)): "*in practice, subsequent to the 1949 Conventions, the UN Security Council, the ICJ, the UN General Assembly and an overwhelming majority of the States parties to Convention IV have relied on this obligation to call on third States to react to Israeli violations of Convention IV in the Occupied Palestinian Territory*".[89] This extensive state practice includes practice of the UK, as set out in detail in the Amended Reply.[90] The statement of a US representative relied on by D in support of his restrictive interpretation[91] does not and cannot detract from the overwhelming state practice in support evidencing the scope of the obligation.

(d) **The ICRC Commentaries**: The ICRC Commentaries to the four Geneva Conventions are an authoritative statement of the meaning and scope of the Conventions and have been referred to as an "*elaboration of the official travaux*".[92] The ICRC Commentaries reject a restrictive interpretation of CA1.[93] The most recent updates confirm that states "*must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict*" including "*to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions*".[94] D's attempts to downplay the significance of the ICRC Commentaries or argue that they are not binding are entirely unpersuasive given their authoritative status and the special role of the ICRC in connection with the Geneva

[85] ICJ Statute, Article 59 provides that ICJ judgments are only binding on parties to the case. Advisory Opinions by definition are not binding.
[86] ICJ Statute, Article 38(1)(d); *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at ¶48.
[87] Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869, p. 881 (and detailing of such practice). See also Dörmann and Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL violations"(2015) 95 *IRRC* 707, pp. 716-722.
[88] ICRC Commentary to GC I (2016), ¶156; ICRC Commentary to GC III (2020), ¶189.
[89] Sassóli, *International Humanitarian Law* (2nd ed., 2024), ¶5.156.
[90] Amended Reply ¶24 [CB/A/4/191-194].
[91] ADGR ¶25(b) [CB/A/3/144-145].
[92] Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869, p. 899.
[93] Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (ICRC, 1958), p. 16.
[94] ICRC Commentary to GC I (2016), ¶¶153, 158, 162; ICRC Commentary to GC III (2021), ¶¶186, 191, 195.

Conventions.[95]

(e) **Overwhelming majority of academic commentary**: The scope of CA1 is also clear from the overwhelming majority view of academic commentators.[96] The writings of highly qualified publicists are a subsidiary means for the determination of rules of international law.[97] D points to three authors who support his view[98] but that is not an answer. C does not need to establish unanimity among commentators; minority support for D's interpretation cannot overcome the extensive support in favour of the broader interpretation.

111. D's other arguments regarding CA1 are similarly without merit:

(a) D's assertion at ADGR ¶27 (and fn 17) [CB/A/3/147-148] that it is the UK's "*long-standing and consistent position*" that CA1 does not require state parties to ensure respect for the Geneva Conventions by others outside its jurisdiction is incorrect. See the examples set out at paragraph 24 of the Amended Reply, which illustrate the contrary. D's failure to identify these examples is regrettable, and incompatible with his duty of candour in these proceedings.

(b) D purports to rely on the *travaux préparatoires* to the four Geneva Conventions to suggest that "*negotiating States did not intend CA1 to have an external aspect*" (ADGR ¶25(a) [CB/A/3/144]). However, D is wrong to suggest that any conclusive position can be drawn from *travaux*. As other detailed analyses of the *travaux* make clear, "*contrary to the claims of some,* […] *there was no 'original [restrictive] meaning' of common Article 1 agreed by the parties*".[99] Further, *travaux* are in any event merely a "*supplementary*

[95] ADGR ¶26(b) [CB/A/3/145-146]. The ICRC Commentaries are the product of extensive collaboration by renowned scholars of international law, which have taken place over many years. They are regularly cited in international courts and tribunals and domestic courts as an authoritative aid to the interpretation of the Geneva Conventions. The ICJ has recognised the ICRC's "*special position*" with respect to the Fourth Geneva Convention and taken into account its opinion on the interpretation of that Convention: *2004 oPT Advisory Opinion,* ¶97; see also *Korbely v Hungary* (2010) 50 EHRR 48 at ¶¶51 and 90 (fn 28). In the domestic courts, see e.g. *Mohammed v Ministry of Defence* [2017] UKSC 2 at ¶264; *Al Seran* [2019] QB 1251 at ¶240 *per* Leggatt J (as he then was). The ILC has also recognised "*the significance of the acts of the ICRC in exercise of the special functions conferred upon it, in particular by the Geneva Conventions*" (ILC, conclusions on the identification of customary international law, with commentaries (2018), UN Doc. A/73/10, commentary ¶9 to conclusion 4, and footnote 698).

[96] See, eg, Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869; Wiesener and Kjeldgaard-Pederson, 'Ensuring Respect by Partners: Revisiting the Debate on Common Article 1' (2022) 27 *JC&SL* 135; Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 *IntlLStud* 621; Massingham and McConnachie (eds), *Ensuring Respect for International Humanitarian Law* (Routledge, 2020); Boisson de Chazournes and Condorelli (n 15); Demeyere and Meron, 'How International Humanitarian Law Develops: Towards an Ever-Greater Humanization? An Interview with Theodor Meron' (2022) 104(920-921) *IRRC* 1523, 1547-9; Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, 2015); Dörmann and Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 95 *IRRC* 707; Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *GYIL* 491; Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law' (1997) 66(1) *ActScandJurisGent* 55.

[97] Article 38(1)(d), ICJ Statute.

[98] ADGR ¶26(a) [CB/A/3/145].

[99] Hill-Cawthorne, Common Article 1 of the Geneva Conventions and the Method of Treaty Interpretation (2023) 72 *ICLQ* 869, pp. 898-899. The fuller remarks of the ICRC during the negotiations of the four Geneva Conventions are set out in Dörmann and Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent IHL

means of interpretation" and may only be relied upon to determine the meaning of a treaty where its meaning is otherwise "*ambiguous or obscure*", or "*leads to a result that is manifestly absurd or unreasonable*": Art 32 VCLT. That is not the position here.

(c) D argues against the proper interpretation of CA1 on the asserted basis that it would render the obligation "*more extensive*" than the CIL obligation not to aid or assist another state in the commission of an internationally wrongful act.[100] This argument appears to confuse two distinct rules: (1) a state's *own primary obligation* under CA1 to respect and ensure respect for the Geneva Conventions; and (2) the secondary rule contained in Art 16 of the ASR that describes when responsibility will arise consequential upon having assisted *another* state's breach of *their obligation*.[101]

(ii) D cannot succeed on a 'makes no difference' basis

112. For completeness, D has failed to establish that, had he not misdirected himself in the ways set out above, it would have made no difference for the purposes of ss.31(2A) and (3C) of the Senior Courts Act 1981. He is unable to do so because his *ex post facto* justifications for his decision-making have no merit, as addressed below.

(1) CA1 cannot be 'read down' by reference to Arts 6(3) and 7 ATT

113. D introduced a new argument in his amended ADGR that CA1 must be 'read down' in light of ATT. [102] The argument appears to suggest that the CA1 duty to "ensure respect" for the Geneva Conventions by others should only be read as so applying where a relevant transfer would contravene D's interpretation of Art 6(3) or Art 7 ATT. This argument is unmeritorious for the following five reasons:[103]

(a) **It is contrary to established principles of treaty interpretation**: D cites Art 31(3)(c) VCLT in support of his argument, but the conditions for its application are not satisfied.[104] Art 31(3)(c) is limited to where the other rules of international law are "*applicable in the relations between the parties*"; that is, between *all* the parties to the treaty being interpreted[105] (here, all the parties to the Geneva Conventions). This ensures that states' treaty obligations are not interpreted by reference to rules of international law to which they did not consent. The Geneva Conventions have been ratified by 196 states; the ATT

violations"(2015) 95 *IRRC* 707, pp. 712-713.

[100] ADGR ¶23-24 [CB/A/3/143-144].

[101] This distinction is recognised in, for example, the ICRC Commentary to GC I, ¶¶159-160; ICRC Commentary to GC III, ¶¶192-193. See also Nicaragua v. USA, ¶255 ("*The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State*"). On Article 16 ASR, see Gd 8(D) below.

[102] ADGR ¶27 [CB/A/3/147-148].

[103] See Amended Reply ¶26 [CB/A/4/196-198].

[104] ADGR ¶27, fn 31 [CB/A/3/147].

[105] McLachlan "The Principle of Systemic Integration and Art 31(3)(c) of the Vienna Convention" (2005) 54 *ICLQ* (2005) 279, pp. 313-315; Linderfalk, "Who are 'the Parties'? Article 31, paragraph 3(c) of the 1969 Vienna Convention and the 'principle of systemic integration' revisited" (2008) *Netherlands International Law Review* 55, pp. 343-364. See, e.g., judicial application: *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, p. 299, ¶7.68. See also as to "*the parties*" meaning all of the parties in Article 31(3)(a)-(b): ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, UN Doc. A/73/10, conclusion 4, commentary ¶¶4 and 16.

by 116 states.[106]

(b) **D ignores Art 6(2) ATT**: Art 6(2) ATT is self-evidently the most relevant provision in respect of state parties' other treaty commitments. CA1 cannot be 'read down' in circumstances where Art 6(2) gives full effect to CA1.

(c) **D ignores Art 26(1) ATT**, which provides that the implementation of the ATT shall not prejudice other obligations undertaken by states parties where those obligations are consistent with the ATT.[107] D does not suggest that CA1 is inconsistent with the ATT.

(d) **D's argument is illogical and leads to perverse consequences**: D's position would mean that a broad and protective humanitarian obligation, binding on all states as a matter of custom and owed *erga omnes*,[108] could be 'read down' by reason of a smaller group of states agreeing a narrower obligation in a treaty on a particular topic and in a situation where the treaty does not indicate an intention to depart from an important rule of custom.[109]

(e) **D's argument is in any event premised on D's own misinterpretation of Arts 6(3) and 7(3) ATT**: That interpretation, which has no support in state (including UK) practice, is wrong (see VI.E(iv)-(v) below).

(2) D's "very small" risk argument

114. D advances a further new argument at ADGR ¶28 to the effect that the continuing export of F-35 parts to the global F-35 pool neither engages nor breaches the duty under CA1 because the likelihood of the indirect transfers ending up in "*existing*" Israeli F-35s is "*on a broad analysis*" "*very small*", and because Art 7 ATT permits international peace and security considerations to be taken into account.[110] This argument has no merit:

(a) **It is based on a flawed legal premise**: The indirect nature of the transfers is immaterial as a matter of law to the UK's obligations under CA1, as is the distinction between "*existing*" F-35 jets already in Israel as of the date of the September Decision and ones yet to be delivered, and the purportedly "*very small*" risk of UK-exported parts ending up in existing Israeli F-35s. All that is required for CA1 to be triggered is that the UK is "*aware of, at the least, allegations that the behaviour of* [the recipient] *in the field was not consistent with international humanitarian law*".[111] As soon as the obligation is

[106] While CA1 therefore cannot be interpreted by reference to the ATT, the ATT can be interpreted by reference to the customary duty to respect and ensure respect for IHL because that *is* a rule that is binding between all the parties to the ATT. On the customary status of the rule in CA1 see ¶¶177-180. The way in which CA1 is relevant to the interpretation of the ATT is through Article 6(2).

[107] (emphasis added). See Kobecki and Pittmann, "Article 26" in da Silva and Wood, 409: "In essence, Article 26(1) provides that obligations already undertaken by States Parties in other international agreements or created in future agreements are not affected by the existence of the ATT, to the extent that those obligations are 'consistent' with the ATT. Those obligations are subject to 'prejudice' only where they are inconsistent with the ATT."

[108] ICRC Commentary to GC I (2016), ¶19; ICRC Commentary to GC III (2020), ¶152.

[109] Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989, ¶50 ("the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so").

[110] ADGR ¶28 [CB/A/3/148].

[111] Nicaragua v. USA, ¶¶116, 256; ICRC Commentary to GC I (2016), ¶162; ICRC Commentary to GC III (2021), ¶195 ("Common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation,

triggered, the UK "*may neither encourage, nor aid or assist in violations of the Conventions*" and "*must do everything reasonably in [its] power to prevent and bring such violations to an end*".[112] This includes "*refrain*[ing] *from transferring weapons*".[113] There is no leeway whereby the UK is permitted by CA1 to assist IHL violations to a "*very small*" degree, and/or pursuant to "*a broad analysis*". [114]

(b) **It is at odds with on its face D's evidence of the UK's role in the F-35 programme**, including the material that was before D in making the Carve-Out decision. That provides inter alia that the F-35 programme depends significantly on the UK, that the UK is the largest provider of parts outside of the USA and provides unique, critical components that amount to 15% of the airframe.[115]

(c) **It contradicts information in the public domain regarding the UK contribution to the F-35 programme**: As the UK is the sole supplier of critical parts that account for approximately 15% by value of every F-35 jet produced,[116] it follows that every new F-35 jet will, by definition, include UK parts. Israel received three additional new F-35 fighter jets in March 2025,[117] and has ordered 25 new F-35 fighter jets as of June 2024.[118] F-35s used in combat require frequent repair and therefore likely require a constant level of spare parts, including those which the UK supplies to the global pool.[119] UK-exported F-35 parts are therefore being used and will be used in any and all F-35 Israeli fighter jets, including in F-35s requiring repair due their heavy use in bombing missions in Gaza.

(d) **D's reliance on Art 7 ATT is not to the point**: The proposed reliance at ADGR ¶28(b) [CB/A/3/148] on his (erroneous) interpretation of Art 7 (but notably not Art 6) is wrong for the same reasons as his argument regarding 'reading down' CA1.[120]

E. GROUND 8B: INCOMPATIBILITY WITH THE UK'S INTERNATIONAL LEGAL OBLIGATIONS UNDER THE ARMS TRADE TREATY

115. D erred in law in relation to the UK's obligations under the ATT. His errors relate both to his misdirection as to the assessment required by the ATT, and to his compliance with his obligations under each of the relevant ATT articles.

(i) The ATT's operation

116. Arts 6 and 7 are "the 'heart' of the ATT […] the life of the treaty is dependent on these articles

based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions").
[112] ICRC, Commentary to GC I (2016), ¶¶153-154; ICRC Commentary to GC III (2021), ¶¶186-187.
[113] ICRC Commentary to GC I (2016), ¶162; ICRC Commentary to GC III (2021), ¶195.
[114] The position is the same as the automatic prohibition of exports upon the obligation to prevent genocide being triggered: D appears to recognise that an argument that exports will assist a state in committing genocide to a "very small" degree cannot avail it in relation to its obligation under the context of the Genocide Convention, and has not made this new "small risk" argument in relation to that obligation. Neither is the point legally relevant to CA1.
[115] Letter from Defence Secretary 11 June 2024 (Exhibit RP2-8) [CB/E/29/586-588]; Bethell 1 ¶22 [CB/D/26/565-566].
[116] Advice from Defence Secretary, 18 July 2024 (Exhibit RP2-9) [CB/E/30/589]; Andrews-Briscoe 2 ¶30 [CB/D/27/580].
[117] Andrews Briscoe 2 ¶23 [CB/D/27/577]. See also Detailed advice from Defence Secretary, 18 July 2024 (Exhibit RP2-9) [CB/E/30/589] referring to expected delivery of F-35s to Israel at the end of 2024.
[118] Andrews Briscoe 2 ¶23 [CB/D/27/577].
[119] Andrews Briscoe 2 ¶¶19-21 [CB/D/27/576-577].
[120] See ¶¶113-113.

functioning properly". [121]

117. Art 6, entitled "*Prohibitions*", strictly prohibits an ATT state party from transferring licenced items: (i) where the transfer: "*would violate its obligations under measures adopted by the United Nations Security Council*", pursuant to Chapter VII of the UN Charter ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"[122]) such as arms embargoes, (Art 6(1)); (ii) where the transfer "*would violate its relevant international obligations under international agreements to which it is a Party*" (Art 6(2)); and (iii) "*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*" (Art 6(3)).

118. Insofar as transfers are not strictly prohibited under Art 6, a state party must, applying the procedure set out in Art 7(1), assess the "potential" that the items: (i) "would contribute to or undermine peace and security"; "could be used to commit or facilitate" (ii) "a serious violation of [IHL]", (iii) "a serious violation of [IHRL]"; (iv) an act relating to terrorism; or (v) an act relating to international organised crime; taking into account the risk of the items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children (Art 7(4)). Pursuant to Art 7, an ATT state party is also required to consider measures that could be undertaken to mitigate risks identified in Art 7(1)(a) or (b) "*such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States*" (Art 7(2)). However, 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 Section 1, they "*shall not authorize the export*".

119. Arts 6-7 therefore require an assessment by the UK of all the evidence to establish the extent, level and nature — including the legal characterisation — of the risk(s) in issue, and whether the export of the item is to be strictly prohibited, or whether mitigating measures (where permitted) would be capable of mitigating those risks, such that the export could be authorised.

(ii) Failure to conduct the assessment required by the ATT

120. D's asserted rationale for why an analysis of his methodology was irrelevant to C's present challenge was as follows (see further Section III):[123]

> The premise for the F-35 Carve Out was thus that there was a clear risk that Israel might commit serious violations of IHL in the conduct of hostilities including through the use of F-35s. The F-35 Carve Out accepts that there is clear risk that F-35 components might be used to commit or facilitate a serious violation of IHL but determines that in the exceptional circumstances outlined by the Defence Secretary, these exports should nonetheless continue. The risk was therefore taken as established, including in relation to the conduct of hostilities. Moreover, there was no need to seek further to finesse or calibrate that clear

[121] Clapham et al, *The Arms Trade Treaty: A Commentary* (2016) ("**the ATT Commentary**"), ¶6.02.
[122] UN Charter, Chapter VII.
[123] DGR, 20 December 2024, ¶14(c)-(d) now removed from the ADGR.

risk, even leaving aside the difficulties of trying to do so. In those circumstances, the F-35 Carve Out decision making did not turn on any such finessing or calibration of risk.

121. D similarly explained that his "*good reason*" for departing from SELC 2(c), namely the interests of international peace and security, was "*a matter of such gravity* […] *that it would have overridden any such further evidence of serious breaches of IHL*".[124] and that "*given the forward-looking nature of this assessment, this element of risk 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*".[125]

122. That approach by D to the assessment of risk, including his determination that it was not necessary further to assess the nature, extent or legal characterisation of the risk to which the continuing export of F-35 parts to Israel gave rise, constituted a fundamental misdirection as to his obligations under the ATT. The ATT *requires* a state to assess *all relevant evidence* to ascertain the nature of the risk to which an export gives rise in order for a state to comply with its obligations under Arts 6 and 7. Those obligations required D to do more than consider whether the 'clear risk' threshold had been met for the purposes of SELC 2(c). D was required to undertake a good faith, objective assessment of the nature, gravity and/or extent of the risk of continuing to transfer of F-35 parts to Israel. He failed to do so. By adopting a position that the asserted interests of international peace and security "*would have overridden any* […] *further evidence of serious breaches of IHL*" D erred in law in relation to the interpretation of Arts 6(2), 6(3) and 7 ATT. This amounted to a material misdirection in the context of both the D's assessment of compliance with Criterion 1 and his self-direction as to the compatibility of the F-35 Carve-Out with the UK's international obligations.

(iii) Article 6(2)

123. As set out at Gds 8(A) and 8(C), the position at the time of the decision was (as it still is) that the continued export of F-35 parts "*would violate*" the UK's obligations under CA1 and GC1. The F-35 Carve-Out was therefore inconsistent with the UK's obligation under Art 6(2) ATT.

124. D failed to reach that conclusion, however, because he erred in two key respects as regards his assessment that the continued supply of F-35 parts complied with Art 6(2).

125. **First**, as with CA1 (see ¶¶104-107 above), D failed to carry out any updated analysis of Art 6(2) following his highly significant conclusions that (i) Israel was not committed to complying with IHL, and (ii) there was a clear risk that items exported might be used to commit or facilitate serious violations of IHL. D's reasoning in the July 2024 SELC 1 Assessment (Annex E) erroneously recorded that "*there have been no changes or developments that alter*" the conclusions in the June 2024 SELC 1 Assessment.[126] But the June 2024 SELC 1 Assessment's reasoning on Art 6(2) had been based on the analysis that "*transfer of the relevant items* […] *to*

[124] DGR, 20 December 2024, ¶19. And further that "given the forward-looking nature of this assessment, this element of risk would not have weighed more heavily in the balance even if D 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": DGR, 20 December 2024, ¶140.

[126] Exhibit RP2-1c [CB/E/35/609]

Israel would not violate [the UK's] relevant obligations [...] *to prevent genocide, [or under] CA1*",[127] a finding which was in turn based on an assessment of compliance with CA1 and the GC1 which predated the change in D's position on Israel's commitment to comply with IHL and the existence of a clear risk that arms exported to Israel might be used to commit or facilitate serious violations of IHL.

126. As a result, D's self-direction on Art 6(2) was unlawful, as it was premised on a failure to have regard to an obviously material consideration. Further, to the extent that the September Decision is materially based on D's errors of law as set out in relation to CA1 and GC1, D misdirected himself in determining that F-35 exports were consistent with his obligations under Art 6(2), in circumstances where they would (and do) violate the UK's "*relevant international obligations under international agreements to which it is a Party*" (for the reasons set out in Gds 8(A) and 8(C)).

127. **Second**, D erred in construing the words "*would violate*" in Art 6(2) as requiring actual knowledge that a relevant international obligation would, with certainty, be breached:[128]

(a) There is no reference to knowledge (let alone actual knowledge) in Art 6(2).

(b) If the export *would* violate the obligation in question, authorising the transfer would breach both that international agreement and Arts 6(1) or (2). There is no additional knowledge element. The question under Art 6(2) is answered only by reference to the content of the international obligation in question. This is made clear: (i) when Art 6(2) is read in conjunction with Art 6(1), which prohibits an export where it would violate a state's obligations in relation to measures adopted under Chapter VII of the UN Charter (in particular arms embargoes); and/or (ii) by reference to the French version of the ATT, on which D elsewhere relies,[129] which uses the conditional tense of the verb to violate ("*violerait*"[130]) in both subclauses.

(c) D's proposed interpretation would instead *permit* arms transfers that *would* violate a state's relevant international obligations, so long as the exporting state did not have actual knowledge of the breach. That is inconsistent with: (i) the objects of the ATT, which include establishing the "*highest possible common international standards*" for regulating the arms trade; (ii) the purposes of the ATT, which include "[r]*educing human suffering*"; (iii) the guiding 'principles' of the ATT, which include the "*responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms*";[131] and, importantly, (iv) the purpose behind Arts 6(1) and (2), which was not to create any *new* substantive obligations but rather to *prevent* transfers that violate the treaty obligations by which a state is already bound. [132]

[127] Exhibit CH2-49 [SB/E/102/1429].
[128] ADGR ¶30 [CB/A/3/148]; the June 2024 SELC 1 Assessment (Exhibit CH2-49) [SB/E/102/1429].
[129] ADGR ¶44(h) [CB/A/3/152].
[130] Arms Trade Treaty (French). Per Article 33(1) VCLT, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language (and see Article 28 ATT). The ATT is authenticated in: Arabic, Chinese, English, French, Russian and Spanish.
[131] ATT, Article 1 and preamble ("*Principles*").
[132] And to subject such transfers to the regulatory mechanisms in the ATT such as reporting requirements in Article 13(1). See da Silva and Neville, p. 113.

That an exporting state that was ignorant of its relevant international obligations, including because it had refused to undertake any proper assessment as to breach or had otherwise wilfully closed its eyes, could thereby seek to avoid the strict prohibition of Art 6(2) (or Art 6(1)) is contrary to the object and purpose of the treaty and 'principle' set out above.

(iv) Article 6(3)

128. D also misdirected himself in relation to Art 6(3). He did so in two main respects: (i) he erred in interpreting Art 6(3) as requiring actual knowledge, and (ii) he erred in concluding that he did not have the requisite knowledge, whether actual or constructive, that F-35 parts would be used in the commission of the specified wrongs in Art 6(3).

(1) The knowledge threshold

129. D erroneously interprets Art 6(3) as requiring "*actual knowledge (i) that the relevant atrocity crime is taking place or would take place, and (ii) that the items transferred would be used in its commission*" and considers that this "*is a higher threshold than there being a clear risk that the item might be used to commit of [sic] facilitate a serious violation of IHL*".[133] This is an error of law in at least three respects.

130. **First**, Art 6(3) does not require actual knowledge that future events would certainly occur; it requires knowledge of a risk of such events occurring.

(a) Art 6(3) is concerned with preventing the transfer of arms where the sending state has "*knowledge at the time of the authorization that the arms or items would be used in the commission*" of genocide, crimes against humanity and certain war crimes.[134] It is logically impossible to have actual knowledge that a future event will occur with certainty (which is the test implied by D's position).[135] Accordingly, Art 6(3) is concerned with knowledge of a risk that the items will be so used, with knowledge reflecting an evidentiary threshold. Per the ICRC guide to the ATT, the use of "*would*" rather than "*will*" indicates "*a lower burden of evidence to deny the transfer*".[136] The French and Spanish texts of the ATT posit the same risk test for both Arts 6(3) and 7(1)(b).[137]

(b) This good faith interpretation is consistent with the context in which the word appears in Art 6(3), with an object and purpose of the ATT being to "[r]*educ*[e] *human suffering*" and with the purpose of Art 6(3) being to prevent the specified wrongs listed therein.[138]

(c) It is also consistent with state practice.[139] The ATT states parties have confirmed that

[133] The July 2024 SELC 1 Assessment (Annex E) (Exhibit RP2-1c) [CB/E/35/609]. See also the June 2024 SELC 1 Assessment (Exhibit CH2-49) [SB/E/102/1430].
[134] No such wrongful act (genocide, crimes against humanity or certain war crimes) needs to have been committed in order for Article 6(3) to be breached. See ATT Commentary, ¶¶6.89 and 6.85. See also *CAAT I DC* at ¶¶29 and 201 regarding the predictive and prospective nature of the judgements. This distinguishes Article 6(3) from Article 16 ASR.
[135] ADGR ¶33, 35 [CB/A/3/149-150].
[136] ICRC, *Understanding the Arms Trade Treaty* (2016), p. 29.
[137] Using the same terms to translate "*would*" for the purposes of the former and "*could*" for the latter (respectively: "*pourrai*[en]*t servir à commettre*"; and "*Podrían utilizarse para* […] *cometer*").
[138] Good faith interpretation: VCLT, Article 31(1). ATT, Article 1. As to the purpose of Article 6(3), see ATT Commentary, ¶6.99; da Silva and Neville, p. 134.
[139] Article 32 VCLT; and ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the

under Art 6(3) they "*need to make a prospective assessment of the future behaviour of a recipient, how they are likely to behave and how the arms to be transferred will likely be used*".[140] A number of states parties have confirmed that the "*knowledge*" threshold will be satisfied for the purposes of Art 6(3) where they have "*clear and reasonable grounds to believe*" or "*reliable information providing substantial grounds to believe*" that the arms would be used to commit the specified wrongs.[141]

(d) This interpretation is also confirmed by leading commentators,[142] who recognise that a state party "*has an obligation not to transfer where there is a certain risk of a future event and it has to evaluate that risk"*,[143] and that the relevant knowledge threshold is met when there is "*real risk*" of commission of one of the specified wrongs.[144] They consider that arms "*would be used*" for the prohibited activities where "*there is sufficient information, or reasonable grounds, or a reasonable basis for believing the arms would be used for that purpose*".[145]

(e) These knowledge thresholds draw on prospective risk assessments that are well-known in other relevant rules of international law which seek to prevent the occurrence of international crimes and human rights violations, in particular rules relating to torture and prohibition on refoulement (which in their customary form are relevant per Art 31(3)(c) VCLT).[146] Such an analogy is apt given the nature and the seriousness of the specified wrongs Art 6(3) seeks to avoid.

(f) If Art 6(3) instead required actual knowledge of the certain occurrence of a future event, it would be impossible to satisfy and therefore meaningless. That would be inconsistent with the terms of Art 6(3), the context in which the term "*knowledge*" appears, the object

---

interpretation of treaties, with commentaries, 2018, UN Doc. A/73/10, Conclusion 2(4) (*"Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32"*).

[140] Working Group on Effective Treaty Implementation, Voluntary Guide to Implementing Articles 6 & 7 of the Arms Trade Treaty, 19 July 2024, ¶54 (which is *"endorsed"* by the state parties: see Executive Summary).

[141] See Joint Statement of Argentina, Chile, Colombia, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, and Uruguay to the effect Article 6(3) should apply where there were "*clear and reasonable ground*[s] *to believe that the weapons would be used for a prohibited act*"; and the Interpretative Declaration of Switzerland and Lichtenstein on ratification that the state shall not authorise the transfer "*if it has reliable information providing substantial grounds to believe that the arms or items would be used in the commission of the crimes listed*": da Silva and Neville, pp. 134-135.

[142] Art 38(1)(d), ICJ Statute.

[143] ATT Commentary, ¶6.95. An analogy is drawn with the inquiry made by a state when a refugee claims that expulsion would mean that their life 'would be threatened': ibid.

[144] ATT Commentary at ¶¶6.99 (and footnote 148), 6.104, 6.105, 6.146, 6.149, 6.154, 6.165, 6.183.

[145] Da Silva and Neville, p. 134. The ICRC considers that Article 6(3) is engaged where the state party *"has substantial grounds to believe, based on information in its possession or that is reasonably available to it, that the weapons would be used to commit genocide, crimes against humanity or war crimes"*: ICRC, *Understanding the Arms Trade Treaty* (2016), pp. 26 and 29.

[146] See the Convention Against Torture, Article 3(1) (prohibition on expulsion where "*there are substantial grounds for believing that he* [i.e. the expellee] *would be in danger of being subjected to torture"*). Article 3(2) records the requirement for competent authorities to take into account, *inter alia*, "*the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights*". On the customary status of Article 3 of the Convention Against Torture see: Ammer and Schuechner, "Article 3" in Nowak et al (eds), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary* (OUP, 2nd ed, 2019), ¶72. See similarly *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at ¶91 ("*real risk of being subjected to*" treatment contrary to Article 3 of the European Convention on Human Rights). See further ATT Commentary ¶¶6.95-6.99 and footnote 148. See also as regards prospective risk assessments in relation to the prevention of genocide: Bosnia Genocide, ¶432 ("*aware, or should normally have been aware, of the serious danger that acts of genocide would be committed*"); Nicaragua v. Germany, ¶23 ("*aware, or* […] *should normally have been aware, of the serious risk that acts of genocide would have been committed*").

and purpose of the ATT, and the purpose of Art 6(3) itself.

(g) Against all of that, D purports to rely on what is said to be the "*ordinary meaning*" of Art 6(3),[147] without any reasoned analysis of the terms of Art 6(3), or indeed of any other aspect of the rules of treaty interpretation,[148] without reference to state practice (including the UK's), and while ignoring the obvious consequences of his position, as set out above. D's reliance on the "*significant restrictions*" Art 6 places on states by requiring the prohibition of transfers[149] does not assist him: the very purpose of Art 6(3) is to prevent atrocity crimes by imposing such significant restrictions where the requisite standard is met.

131. **Second**, "*knowledge*" for Art 6(3) purposes includes constructive knowledge. [150]

(a) This follows from the fact that the test is concerned with a process of risk-analysis carried out by a state, explained above. Moreover, a requirement of actual knowledge would mean a (deliberately) deficient risk-analysis exercise would comply with Art 6(3); that would create a perverse incentive for states wilfully to fail to consider material evidence, so as to continue exporting weapons: see ¶127(c) above.

(b) Subsequent practice confirms that "*knowledge*" includes constructive knowledge: see the Voluntary Guide to the ATT, endorsed by the states parties to the ATT.[151]

(c) It is also supported by leading commentators.[152] The ATT Commentary describes the knowledge requirement "*as a test related to what a state can be expected to know*".[153] Per da Silva and Neville, knowledge includes cases where *"the contracting party must have known… that the arms would be used for genocide etc"*.[154] The ICRC confirms that knowledge means "*what a State Party can normally be expected to know, based on information in its possession or reasonably available to it*".[155]

---

[147] ADGR ¶¶33, 35 [CB/A/3/149-150].
[148] The Government has before recognised that the concern is to identify risk that is more than purely theoretical. In announcing the SELC, the Government stated: *"While the Government recognises that there are situations where transfers must not take place, as set out in the following Criteria, we will not refuse a licence on the grounds of a purely theoretical risk of a breach of one or more of those Criteria*".
[149] ADGR ¶¶33, 39 [CB/A/3/149-150].
[150] ADGR ¶34 [CB/A/3/149].
[151] ATT Voluntary Guide, ¶¶41-42, 56 and Executive Summary. The ATT Voluntary Guide records that most states interpreted knowledge as "*as (sufficiently) reliable facts or information that are available to the State at the time it authorizes the transfer of arms*", some states indicated that knowledge included "*information that the State is aware of or should (normally) have been aware of ('and thus establishes an obligation to actively seek out information')*", and other states indicated that it included information that could be reasonably obtained, that was public, facts at the state's disposal at the time of the authorisation, "*information in its possession or that is reasonably available to*" the state party, facts or information "*that are or become available at the time of assessing the authorization request'* and *"information that is 'normally expected to be known by the importing States*". There was also reference to a need to assess the current and past behaviour of the recipient. On the ATT Voluntary Guide being endorsed by the states Parties, see the Executive Summary ("*endorsed by States Parties at the Tenth Conference of States Parties*").
[152] Article 38(1)(d), ICJ Statute.
[153] The ATT Commentary at ¶6.82.
[154] "[e.g.] where the circumstances are notorious and widely known, or there was a due diligence failure to check readily available and credible information (e.g. information published by reliable sources) or the State official had reasonable suspicions … but turned a blind eye": da Silva and Neville, pp. 133-134.
[155] ICRC, "Understanding the Arms Trade Treaty" (2016), pp. 26 and 29; ICRC's expert presentation at the Sub-working Group on Articles 6 &7 ATT (26 April 2022) that formed the basis for the ATT Voluntary Report: cited at ¶¶53-54, ATT

132. **Third**, and consequential upon the first point above, D misdirected himself that the Art 6(3) threshold is much higher than a clear risk of serious IHL violations and/or that the Art 6(3) threshold was not capable of being met on a finding of clear risk: he asserts that "*[t]he UK has assessed that there is a 'clear risk' that Israel might commit a serious violation of IHL, but that is a much lower threshold than actual knowledge*" (emphasis added).[156] That approach was erroneous in two respects.

133. Even on D's own case, this approach is circular. On the one hand, D asserts that clear risk is too low a threshold to satisfy Art 6(3). On the other hand, after concluding that there have been possible violations of IHL, such that there is a 'clear risk' of further serious violations of IHL,[157] D does not consider it necessary to go any further, i.e. properly to assess on the basis of all available evidence the risk of exported items being used in the commission of genocide, crimes against humanity or certain war crimes (*viz* the prohibitions relevant to Art 6(3)).[158] This failure was laid bare in the original DGR (see 120 above), which stated, inter alia that the "*there was no need to seek further to finesse or calibrate that clear risk*" of serious IHL violations.[159] A failure to go any further than assessing a clear risk of serious violations of IHL constitutes a failure to conduct the risk assessment exercise that the ATT required.[160]

134. In any event, D's position on the distinction between Art 6(3) and the 'clear risk' conclusion is wrong. As follows from the errors addressed in the first two points above, a conclusion that Israel is not committed to complying with IHL and that the SELC 2(c) threshold has been met can satisfy the requirement of knowledge in Art 6(3) if D's finding is of a clear risk of one of the atrocity crimes listed in Art 6(3). D misdirected himself in determining that Art 6(3) was not capable of being met on his conclusion that there was a 'clear risk' that F-35 parts might be used by Israel to commit a serious violation of IHL.

(2) D's assessment of his own knowledge

135. It follows from the foregoing that D cannot assert that he did not possess the requisite knowledge to engage Art 6(3),[161] as any asserted absence of knowledge is entirely reliant upon

---

Voluntary Report.

[156] ADGR ¶34 [CB/A/3/149]; reflected in the July 2024 SELC 1 Assessment (Annex E) (Exhibit RP2-1c) [CB/E/35/609].

[157] Some of which were obviously serious violations of IHL and war crimes, despite D not acknowledging that: see fn 69.

[158] It would also appear to give no place to Article 6(3) in a SELC analysis, despite the fact that the relevant ATT provisions must be assessed through the lens of the SELC: see, for example, the fact that the SELC are intended to give effect to the ATT (¶48 above). Article 6(2) ATT is relevant to SELC 1; Article 6(3) is relevant to SELC 1 and SELC 2(c); Article 7(1)(b) is relevant (as regards IHL) to SELC 1 and SELC 2(c); and peace and security considerations as reflected in ATT Art 7(1)(a) relate to SELC 3-4 (*cf* ADGR ¶44 [CB/A/3/152-153]).

[159] DGR, 20 December 2024, ¶¶14(c)-(d) (emphasis added), which has now been removed from the ADGR. It is also implicit in D's position on Gd 12, i.e. that he did not need to go beyond an assessment of whether or not there was a clear risk to carry out a lawful assessment. This is an implicit concession that, whatever the substance of the exercise carried out purportedly under Article 6(3) was, it did not involve a risk assessment beyond that already carried out in relation to SELC 2(c).

[160] See also ¶119 above. This appears to be confirmed by the statement in the July 2024 SELC 1 Assessment (Annex E) (Exhibit RP2/1c) [CB/E/35/609] that the Seventh IHLCAP Assessment (24 July 2024) and Israel's lack of commitment to complying with IHL do not "*provide actual knowledge*" for the purpose of Article 6(3). The use of the word *"provide"* is strongly indicative of an underlying view that the answer to the question posed by Article 6(3) should be expected to be answered directly by the contents of the Seventh IHLCAP Assessment; in other words, that no further evaluation or analysis was required. That error is all the more glaring in circumstances where D has chosen to design the assessment process around an inferential assessment of Israel's commitment to IHL, which would appear even to hinge SELC 1 assessments on the existence of a 'clear risk' of IHL conclusion.

[161] ADGR ¶40 [CB/A/3/150-151].

D's failure to conduct the risk assessment required by Art 6(3). D's denial of knowledge also relies on his broader methodological failings that led to a purported inability to make specific findings of certain serious violations of IHL.[162] Yet D argued that such evidence and/or methodology was not relevant to C's Gds 8-13, and the Court accepted that.[163] D cannot now rely on that same evidence and/or methodology to make good an assertion that he had no "knowledge" of for the purpose of Art 6(3): such reliance would be plainly wholly unfair to C, C having been precluded from arguing its case on these points.

136. In any event, D *did* have material before him evidencing the requisite knowledge[164] that one or more of the specified crimes would be committed:

(a) **The ICC Prosecutor's application for ICC Arrest Warrants in respect of Israel's Prime Minister and (now former) Defence Minister for war crimes and crimes against humanity**.[165] First, there is no consideration in Annex E of the *cumulative* effect, for the purposes of the Art 6(3) analysis, of the application for the ICC Arrest Warrants and D's conclusion that there is a clear risk that arms exported to Israel might be used to commit a serious violation of IHL. The analysis of the ICC Prosecutor's request for Arrest Warrants in the June 2024 SELC 1 Assessment (¶11) [SB/E/102/1425] is not updated in Annex E.[166] This is despite the June 2024 SELC 1 Assessment's finding on knowledge of war crimes being predicated on the lack of a finding of clear risk of serious violations of IHL and the SSFCA having subsequently come to a diametrically opposite conclusion on the question of clear risk.[167] Second, there is no consideration of the totality of the material before D, including his conclusion on clear risk, with reference to the specific war crimes / crimes against humanity cited in the application for the ICC Arrest Warrants.[168] This failing is all the more glaring in circumstances where the June 2024 SELC 1 Assessment records that "*we do share some of the concerns outlined by the prosecutor, namely around poor humanitarian access*".[169] D's plea that the application for the arrest warrants was

[162] Which were the subject of C's Gds 2-5.
[163] DGR, 20 December 2024, ¶¶14(e); Judgment of Mr Justice Chamberlain dated 30 January 2025 at ¶¶ 41-50 [CB/B/11/262-263].
[164] Whatever the precise framing of the test — i.e. sufficient information or reasonable grounds to believe or substantial grounds to believe or a real risk: see ¶130(d) above.
[165] An application is made (and granted) on the basis of "*reasonable grounds to believe*" that the person has committed the crimes listed therein (Article 58, Rome Statute). The warrant was ultimately issued for the Israeli Prime Minister and Former Defence Minister by Pre-Trial Chamber I on 21 November 2024. D suggests this is a lower standard than constructive knowledge (ADGR ¶40(a) [CB/A/3/150-151]) but that is not correct based on the above discussion of the knowledge threshold. On 13 December 2024, the ECJU commented that the ICC's conclusions on there being reasonable grounds to believe Prime Minster Netanyahu and former Defence Minister Gallant committed war crimes and crimes against humanity "*demand respect*", "*track HMG's longstanding serious concerns*" in relation to humanitarian aid and "*corroborates out extant assessments that there is a clear risk*" in respect of "*intentionally directing attacks against civilians*" [SB/H/195/3069].
[166] The level of risk would require the UK to arrest the sitting Prime Minister of Israel (when such arrest warrants are issued, per the UK's obligations under the Rome Statute) but, on D's analysis, it would not stop F-35 part exports.
[167] The June 2024 SELC 1 Assessment had posited that "*if it is assessed there is currently no clear risk that items might be used to commit or facilitate a serious violation of IHL (including all grave breaches) under C2c, it is not the case the UK has actual knowledge its items will be used to commit grave breaches*": ¶35(c) [SB/E/102/1430].
[168] Being those war crimes set out in the following Articles of the Rome Statute: 7(1)(a); 7(1)(b); 7(1)(h); 7(1)(k*);* 8(2)(a)(i); 8(2)(a)(iii); 8(2)(b)(i); 8(2)(b)(xxv); 8(2)(c)(i); 8(2)(e)(i). *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine* 20 May 2024.
[169] ¶11 [SB/E/102/1425]. Such concerns had also been expressed in the Government's decision-making documents since late 2023: First IHLCAP Assessment dated 10 November 2023 (Exhibit CH2-12) at [SB/E/44/587] notes "*... the lack of adequate humanitarian access*"*;* Second IHLCAP Assessment dated 20 November 2023, (Exhibit CH2-17) see ¶30

not of itself determinative because it involves a different test is therefore not an answer.[170]

(b) **Numerous UN statements and reports, including in particular the UN Commission of Inquiry Reports published in early June 2024**. This concluded that through its "*total siege*", Israel weaponised the withholding of life-sustaining necessities (including humanitarian assistance) for strategic and political gains, which constituted collective punishment and reprisal against the civilian population in direct violation of international humanitarian law. It also found that Israel's use of "*starvation as a method of war*" would affect the entire population of the Gaza Strip for decades to come, with particularly negative consequences for children.[171] The Government disregarded such evidence principally on the basis that it was unable to verify the allegations due to limitations in accessing information in Israel's possession[172] and also raised a narrow point concerning partial and potentially misleading quotations.[173] Yet there was no *cumulative* assessment of this report alongside the finding of clear risk, nor the Prosecutor's application for ICC Arrest Warrants — despite those warrants including the war crime of using starvation as a method of warfare[174] — for the purpose of assessing whether the Art 6(3) was engaged.

(c) The ICJ conclusions in *South Africa v. Israel* that there is a real and imminent risk of irreparable prejudice to the plausible rights of Palestinians not to be subject to acts of genocide.[175] Consequent on D's error of law in failing to ask the central question of whether there was a relevant risk specifically of the prohibited conduct under Art 6(3), there was no consideration by D of the relevance of the ICJ determination to the risk-analysis required by Art 6(3), in light of the SSFCA's conclusion on clear risk.

(3) D's "very small" likelihood argument

137. Following amendment of the DGRs, D advanced an argument that "*a broad analysis shows that the likelihood of UK manufactured components ending up in existing Israeli F-35 is very small"*, relying on the Witness Statement of Keith Bethell.[176] The argument is wrong and/or D

[SB/E/46/639]; Third IHLCAP Assessment (Out of Cycle Assessment) dated 30 November 2023 (CH2-8) see ¶25 [SB/E/49/669]; Fourth IHLCAP Assessment dated 29 December 2023 (Exhibit CH2-25) ¶¶9, 18 [SB/E/61/813, 815].

[170] ADGR ¶40(a) [CB/A/3/150-151].

[171] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 14 June 2024, UN Doc A/HRC/56/26, ¶102. See also the more detailed report into specific attacks that informed the summary report: Commission of Inquiry, Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023 (10 June 2024, issued on 12 June 2024) A/HRC/56/CRP.4, ¶¶274-299, 300-340, 451. Indeed, since the September Decision, more UN bodies have found that war crimes, crimes against humanity and genocide are actually being committed by Israel in Gaza: Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 11 September 2024, UN Doc A/79/232, ¶¶89, 91, 94-95, 98, 100, 102, 105, 107-110 (as regards war crimes and crimes against humanity); Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/79/363, 20 September 2024, ¶69 (Israel's policies and practices since October 2023 "*were consistent with the characteristics of genocide*"); Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 13 March 2025, UN Doc A/HRC/58/CRP.6, ¶178 ("*The Commission concludes that the ISF caused serious bodily and mental harm to members of this group, and deliberately inflicted conditions of life that were calculated to bring about the physical destruction of Palestinians in Gaza as a group, in whole or in part, which are categories of genocidal acts in the Rome Statute and the Genocide Convention*").

[172] A key methodological error that C has been shut out from challenging by the linkage judgment.

[173] IHL Seventh Assessment, 24 July 2024, (¶¶81-82) [CB/E/41/711]; ADGR ¶40(b) [CB/A/3/151].

[174] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[175] *South Africa v. Israel*, Provisional Measures, Order of 26 January 2024, ¶¶35 and 74.

[176] ADGR ¶¶ 28(a), 31(c), 40(b), 63(c) [CB/A/3/148-149, 151, 157-158]; reliance is not placed on s.31(2A) or (3C) of the

cannot rely on it for the following reasons. **First,** the "*very small*" likelihood argument was not the basis of the September Decision in relation either to Arts 6(2) or 6(3). **Second,** the argument itself appears to betray a misunderstanding of Art 6 ATT, specifically a misunderstanding of the risk being assessed: it is the risk of the end use occurring which is relevant to the analysis. Put differently, even if the risk of UK manufactured parts ending up in Israeli F-35s were only "*very small*" (which is denied), that would suffice to meet the Art 6(3) threshold in circumstances where the UK has knowledge that Israel would use F-35s to commit one or more of the international crimes listed in Art 6(3). **Third**, the relevance of the distinction between existing and new F-35s is not understood. The question is as to the assessment of risk posed to Palestinians in Gaza by Israeli F-35 fighter jets, whether that is via new or existing jets. **Fourth**, the argument is not made out on the facts, for the reasons set out above in relation to CA1: ¶114.

(v) Article 7

138. Art 7 only arises if the transfer does not breach Art 6. It applies where: (i) the evidence of genocide, crimes against humanity or war crimes is not sufficiently clear cut to establish the requisite "knowledge" under Art 6(3), Art 7 being concerned with 'potentiality'; (ii) the risk is of the *facilitation* rather than *commission* of such an atrocity crime; and/or (iii) the risk is of the commission *or* facilitation of a serious violation of IHL that does not amount to a crime listed in Art 6, or, inter alia, of (iv) a serious violation of IHRL. Art 7 encompasses a wider range of negative consequences arising from arms transfers than Art 6. It also requires states to consider the potential *positive* contribution of an export to peace and security.

139. D's interpretation of Art 7 ATT is wrong for the following reasons.

140. **First**, subsequent practice is uniformly against D's approach and interpretation:

(a) States interpret "*overriding risk*" to mean one of: "*substantial risk*"; "*clear risk*"; "*high potential*"; "*'very likely' or 'more likely than not' to occur even after the expected effect of any mitigating measure has been considered*": see the ATT Voluntary Guide; [177]

(b) Canada has implemented Art 7 by legislation providing that a transfer shall not be authorised if *"there is a substantial risk that the brokering or export of the goods or technology would result in any of the negative consequences described above"*; [178]

(c) New Zealand interprets overriding risk as "*substantial*" risk;[179]

(d) The position of Lichtenstein and Switzerland is that overriding risk entails "*an obligation not to authorize the export whenever the State Party concerned assesses the likelihood of any of the negative consequences set out in its paragraph 1 materializing as being higher than the likelihood of them not materializing, even when having considered the expected*

Senior Courts Act 1981. The Witness Statement of Keith Bethell at ¶20 [CB/D/26/565] does not refer to existing Israeli F-35s, while the ADGR does. Israel received three new F-35s in March 2025 (see ¶20 above).

[177] Which was endorsed by the states parties: ATT Voluntary Guide, Executive Summary.

[178] Section 7.4 of the Export and Import Permits Act RSC 1985 E019, available at https://laws-lois.justice.gc.ca/eng/acts/e-19/FullText.html.

[179] The ATT Commentary ¶7.94, citing Declaration of New Zealand upon ratification ATT, 2 September 2014, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf.

effect of any mitigating measures";[180] and

(e) Per the adoption statement of 98 states at the UN General Assembly: "*Any transfer that has the potential to lead to negative consequences, such as serious violations of human rights or international humanitarian law, shall not be authorized*".[181]

(f) None of the above formulations allow for a contribution to peace and security to be balanced against a clear risk of the arms being used to commit serious violations of IHL, much less for the former to prevail against the latter. D has not been able to point to any state practice, *any prior interpretations by the United Kingdom* in the ATT context or anything else of substance to support its interpretation of Art 7 ATT. D cites the French version of the text (ADGR ¶44(h) [CB/A/3/153]) but the Arabic version of the text, which is also an authentic version of the treaty,[182] uses a word that means 'great' or 'substantial', that does not imply any form of 'balancing'.

(g) The EU's longstanding position is that the 'clear risk' threshold reflects and implements the 'overriding risk' threshold in Art 7(3): see ATT Voluntary Guide;[183] User's Guide.[184] The UK has adopted the 'clear risk' threshold for Criterion 2(c) since at least 2008 (while an EU Member State) on the basis of the EU Common Position; and thus on the basis of an EU position that interprets Art 7 ATT.

141. **Second**, moreover, D's approach to Art 7 is contrary to the process required by Art 7:

(a) The centrepiece of Art 7 is that a state party, following the process described, comes to a conclusion as to the *risk* of the negative consequences in Art 7(1) eventuating. That involves: (i) an assessment of the potential that conventional items (a) would contribute to peace and security; or (b) would undermine peace and security; and/or (c) could be used to commit/facilitate a serious violation of IHL or IHRL; (ii) if there is the potential of negative risks, a consideration of measures capable of mitigating those risks; and then (iii) in light of those analyses, drawing a conclusion in terms of Art 7(3) as to whether the risk remains 'overriding', notwithstanding the mitigation measures considered. Step (iii) in the analysis Art 7(3) is concerned with drawing a conclusion as to the state of the risk following the analyses at steps (i)(b), (i)(c) and (ii); not with a balancing exercise as

[180] Article 5 and 20 of the Swiss Federal Act on War Material, which applies in Lichtenstein: see Lichtenstein's Initial ATT Report of 19 May 2016 at section 3, available at https://thearmstradetreaty.org/download/37a0dd9c-d62c-36aa-b2ae-640644e4f29a . See also the Swiss Interpretation Declaration for the ATT, which states: "*It is the understanding of Switzerland that the term "overriding risk" in Article 7, paragraph 3, encompasses, in light of the object and purpose of this Treaty and in accordance with the ordinary meaning of all equally authentic language versions of this term in this Treaty, an obligation not to authorise the export whenever the State Party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered"*, available at https://www.newsd.admin.ch/newsd/message/attachments/38166.pdf.

[181] Adoption ATT by the General Assembly Political Declaration delivered by Mexico on behalf of 98 states, 2 April 2013, available at https://controlarms.org/wp-content/uploads/2018/04/Mexico.pdf.

[182] See fn 130 above.

[183] ATT Voluntary Guide, ¶39.

[184] Both the 2015 and 2019 version of the User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment record that the obligations set out in the Common Position are consistent with Article 7(3) ATT: p. 55, 10858/15 (2015 version); p. 56, 12189/19 (2019 version). See also the judgment of the Hague Court of Appeal in Oxfam (and others) v the Netherlands at ¶3.10.

contended by D. If a transfer of relevant items would contribute to peace and security, without the potential for any of the negative risks identified, it may be permitted without more. If negative risks are identified, they must be capable of being mitigated, in order for a transfer of the items to be permissible pursuant to the ATT.

(b) That is necessarily the case. An item *cannot* "*contribute to*" peace and security if there is a clear risk that it could be used in the commission or facilitation of a serious violation of IHL or IHRL. As the preamble to the ATT reaffirms, "*peace and security, development and human rights are pillars of the United Nations system and foundations for collective security*" and "*development, peace and security and human rights are interlinked and* ***mutually reinforcing***". This is clear also from the structure of Art 6 ATT, which makes clear that peace and security (per Art 6(1)) and fundamental rights (per Art 6(3)) are not to be balanced against each other. Art 1 ATT further confirms the ATT's purpose to "*[r]educ[e] human suffering*". That indicates precisely the opposite of D's submission at ADGR ¶44(f) [CB/A/3/153]. Consequently, if, at step (iii), a state finds that, notwithstanding mitigation measures considered, there is an overriding risk that the item would be used to commit or facilitate a serious violation of IHL or IHRL (or could undermine peace and security), it cannot supply the means by which such a violation might be committed or facilitated.

(c) On D's approach, D instead *first* comes to a conclusion on the risk of exporting a given item, i.e. "clear risk" of a serious violation of IHL (or IHRL); and *then* layers in counterweights that are not directly relevant to the risk of exporting the given item, but which nonetheless purportedly justify the transfer of the item. That misunderstands the nature of the analysis mandated by Art 7(1), which concerns the potential that *the exported item* itself (i) would contribute to or undermine peace and security and/or (ii) could be used to commit or facilitate a serious violation of IHL or IHRL. If the risk remains overriding, notwithstanding mitigation measures considered, then the export is to be prohibited.

(d) This correct interpretation of Art 7 conforms squarely with the SELC: (i) SELC 2 provides that the Government will not grant a licence if it determines that there is a clear risk of a violation of IHL and/or IHRL; while (ii) SELC 3 and SELC 4 provide that the Government will *additionally* not grant a licence if it determines that the export would undermine peace and security. None of these criteria permit D to 'balance' a contribution to peace and security against a risk that arms could be used to commit a serious violation of IHL or IHRL: they are alternative (and distinct) reasons for prohibiting exports. A state party must have regard to peace and security,[185] but not for the purposes of balancing against the risks of negative consequences under Art 7(1).

(e) There is also no indication in D's analysis of mitigating measures being considered on the determination of clear risk, as required by Art 7(2).

142. **Third**, were D's interpretation to be accepted, the practical consequence would be to render the

[185] And additionally not to export if an item would undermine peace and security, even if other negative consequences were absent and/or could be mitigated. See Amended Reply ¶44(e) [CB/A/4/206-207].

ATT ineffectual and discriminatory. D's argument is to the effect that one group of people can lawfully be subjected to a risk of a serious violation of IHL (and/or IHRL) and the consequences thereof by a state assessed not to be complying with or committed to IHL, in order purportedly to ensure peace and security generally or for another group of people in other parts of the world. That is contrary to the requirement that Art 7(1) be complied with in "*an objective and non-discriminatory manner*"[186] and to the universality of fundamental rights.

143. **Finally,** D also erred in relation to Art 7 in failing (i) properly to consider Art 7 at all; (ii) to conduct an assessment of the risk that exports made pursuant to the F-35 Carve Out could be used to commit or facilitate a serious violation of IHRL, as required under Art 7(1)(b)(ii) (of particular relevance in this context were the rights to life and to food,[187] and the prohibitions on cruel, inhuman and degrading treatment and torture[188] — such assessment was critical, in particular, in circumstances where D had concluded that Israel was not complying with its obligations in relation to humanitarian assistance and the treatment of detainees); and (iii) failed to take into account the risk of F-35 parts being used to commit or facilitate serious acts of violence against women and children, as required pursuant to Art 7(4) (notwithstanding clear evidence of large numbers of women and children being violently killed).[189] Neither the June 2024 SELC 1 Assessment nor Annex E include Art 7 in the list of relevant legal obligations: see ¶3 at [SB/E/102/1422] and [CB/E/35/610]. Neither are the relevant considerations addressed in substance. This was a mandatory relevant factor. D's failures amounted to a fundamental error in D's assessment of compliance with SELC 1 and in his self-direction of compliance with the UK's international legal obligations.[190]

F. GROUND 8C: INCOMPATIBILITY WITH THE UK'S INTERNATIONAL LEGAL OBLIGATION TO PREVENT GENOCIDE UNDER GC1 AND CIL

144. D erred in law in two respects: first, in relation to the substance of the obligation to prevent genocide, pursuant to GC1 and CIL, and second, in his assessment of whether Israel's conduct gave rise to a serious risk of genocide.

(i) D erred in considering that the UK's conduct could not be inconsistent with the obligation to prevent genocide without genocide having occurred

145. Art I of the Convention imposes on the UK an obligation to prevent genocide, which binds the UK as a matter of treaty[191] and CIL.[192] A state's obligation to prevent, and the corresponding

[186] ATT, Articles 5(1) and 7(1), and see also preamble, final 'principle' ("Implementing this Treaty in a consistent, objective and non-discriminatory manner").
[187] ICCPR Article 6(1) (right to life); ICESCR Article 11(1) (right to food). The applicability of the ICCPR in the oPT was most recently recorded by the ICJ in the *Second oPT Advisory Opinion*, ¶¶97-100). The applicability of ICESCR Article 11(1) in the oPT was specifically recorded by the ICJ in *2004 oPT Advisory Opinion*, ¶¶130-134, and the applicability of ICESCR in the oPT generally was confirmed in *Second oPT Advisory Opinion*, ¶¶97-100.
[188] As reflective of customary international law, and enshrined in UNCAT (ratified by the UK on 20 May 1976 and by Israel on 3 October 1991) and ICCPR Article 7 (ratified by the UK on 20 May 1976 and by Israel on 3 October 1991).
[189] See e.g. [SB/E/85/1041, 1064]; [SB/E/56/772-773]; [SB/E/67/893]. See further obligations under CRC Article 6.
[190] For completeness, D has failed to establish that, had he not misdirected himself in the ways set out above in this Gd 8(B), it would have made no difference for the purposes of Section 31(2A) or (3C) of the Senior Courts Act 1981.
[191] The UK is a state party to the Genocide Convention, see the UNTS entry available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4.
[192] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, ¶95 (referring to the "obligation under customary international law to prevent those acts [genocide] from occurring"); see also *Reservations to the Genocide Convention, Advisory Opinion, I.C.J. Reports 1951*,

duty to act, arise at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.[193] From that point in time the state has a duty to "*employ all means reasonably available to them, so as to prevent genocide so far as possible*". [194]

146. It follows that the F-35 Carve-Out *viz* the continued export of military parts for use by a state committing or at risk of committing genocide — is inconsistent with the UK's obligation to prevent genocide: ceasing supply of military parts for use by a state committing or at risk of committing genocide is obviously a reasonably available means that *must* be employed *as soon as* the obligation to prevent genocide is engaged.[195] The only question relevant to whether the continued export of F-35 parts was "*consistent with*"[196] the obligation to prevent genocide for the purpose of SELC 1 and D's self-direction, was whether that obligation was engaged.

147. D's case in response is that the obligation to prevent genocide by preventing the supply of weapons capable of being used to commit or facilitate genocide is not engaged unless and until genocide occurs and/or until there has been a conclusive determination of genocide by a court.[197] Until such time, D says, GC1 imposes no duty on it at all with respect to its arms transfers with which it could act inconsistently. This approach is also evident in the underlying decision-making documentation: while the June 2024 SELC 1 Assessment correctly stated that the obligation to prevent genocide is "*engaged when the UK is aware or should have been aware that there is a 'serious risk that genocide will occur'*",[198] it went on to assess Israel's conduct only to the extent that genocide had in fact occurred,[199] apparently on the rather circular basis that "*technically, a determination that this duty has been violated cannot be made until genocide actually occurs*".[200] The conclusion that "*Israel <u>is not</u> harbouring genocidal intent*"[201]

---

p. 23 (the "principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation").

[193] <u>*Bosnia Genocide*</u>, ¶431; <u>*Nicaragua v. Germany Order*</u>, ¶23.

[194] <u>*Bosnia Genocide*</u>, ¶431; <u>*Nicaragua v. Germany Order*</u>, ¶23. The content of the obligation to prevent genocide is notably absent from D's decision-making documents.

[195] Presumably in recognition of the fact that "*all means*" must be employed *as soon as* the obligation is triggered, D does not make his "*very small*" risk argument regarding UK-exported F-35 parts ending up in "*current*" Israeli planes in relation to Gd 8(C) which he makes in relation to Gds 8(A), (B) and (D).

[196] SELC 1; Letter from Defendant's Principal Private Secretary to SSFCDA's Principal Private Secretary (Exhibit RP2-6) [CB/C/18/284].

[197] ADGR ¶49 [CB/A/3/154], ¶54 [CB/A/3/155] ("no international court or tribunal has found that genocide has been committed by Israel"; "this Court would need to determine that genocide has actually been committed").

[198] Exhibit CH2-49 ¶4 [SB/E/102/1422-1423]. This passage also referred to a need for the UK to have "*sufficient influence to contribute to the prevention of the genocide*". On arms exporting states being particularly influential (cf. ADGR ¶56(a) [CB/A/3/155]) see: CAAT I CA, ¶121: "*Arms producing and exporting states can be considered particularly influential in 'ensuring respect' for international humanitarian law due to their ability to provide or withhold the means by which certain serious violations are carried out. They should therefore exercise particular caution to ensure that their export is not used to commit serious violations of international humanitarian law*". The same reasoning necessarily applies to genocide.

[199] Exhibit CH2-49 (¶¶12-13) [SB/E/102/1425] accepting that (i) conduct capable of constituting the physical elements of genocide was taking place in Gaza; and (ii) identifying the relevant question as whether such conduct was accompanied by genocidal intent — that is to ask whether genocide *is* occurring, not whether there was a *serious risk* of genocide occurring. This is notwithstanding the reference to "*risk*" in ¶13. See also CH2-49 ¶9 [SB/E/102/1424-1425]: "*the evidence does not demonstrate that Israel's conduct in the conflict, including action in Rafah, amount to genocide*", ¶19 [SB/E/102/1427]: "*our assessment [is] that Israel is not harbouring genocidal intent*" and ¶ 22: "*to not necessarily demonstrate genocidal intent*", ¶25 [SB/E/102/1428]: "*has not demonstrated genocidal intent*".

[200] Exhibit CH2-49, ¶4 [SB/E/102/1422-1423]; ADGR ¶49 [CB/A/3/154], ¶54 [CB/A/3/155].

[201] Exhibit CH2-49, ¶19 [SB/E/102/1427] (emphasis added). This approach was replicated in Annex E to the ECJU Submission to SSFCDA 24 July 2024, which assessed genocidal intent afresh by asking whether Israel "*<u>is</u> harbouring*

(irrespective of whether there was nonetheless a serious risk of genocide, which is the true test[202]) was then the basis for D's conclusion that the F-35 Carve Out was *"consistent with"* the obligation to prevent genocide.

148. D's approach is plainly wrong for the following reasons.

149. **First**, D's proposed interpretation, which would permit weapons to be exported for use in the commission or facilitation of genocide, is wholly contrary to the object and purpose of the Convention.[203] The Convention's title confirms its focus on *prevention.*[204]

150. **Second**, it is irreconcilable with the nature of the obligation to *prevent* genocide which necessarily arises *before* genocide occurs,[205] and would render meaningless the fact that the obligation arises when a state *ought to have known* of the serious risk of genocide.[206]

(a) Per the ICJ in *Bosnia*: "[to find that] the obligation to prevent genocide only comes into being when perpetration of genocide commences […] would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".[207] Once the obligation is triggered, the "due diligence" obligation requires a state to "employ all means reasonably available" to prevent genocide as far as possible and thus "do their best to ensure that such acts do not occur";[208] "the obligation in question is one of conduct and not one of result",[209] and consequently "a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed".[210]

(b) The ICJ in *Bosnia Genocide* further made clear that even where UN organs (such as the ICJ) are seized, "this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring".[211] This is consistent with the ICJ in *Nicaragua v. Germany* "remind[ing] all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the [Genocide]

genocidal intent" (emphasis added) (Exhibit RP2-1c), [CB/E/35/609-610].

[202] Or more specifically in the present case, whether there was a serious risk of Israel possessing genocidal intent, that being the only outstanding element given the physical elements of genocide were accepted (see fn 199 above).

[203] VCLT, Article 31(1).

[204] The Convention was "manifestly adopted for a purely humanitarian and civilizing purpose" — namely to "safeguard the very existence of certain human groups and […] to confirm and endorse the most elementary principles of morality": *Reservations to the Genocide Convention, Advisory Opinion*, p. 23; *Bosnia Genocide*, ¶161. The ICJ has confirmed treaty parties' "duty not to deprive [a treaty] of its object and purpose": *Nicaragua v. USA*, ¶280; see also ¶275 ("certain activities […] are such as to undermine the whole spirit of a[n] […] agreement").

[205] The same is the case for the obligation to prevent any of the other acts under Article III (*Bosnia Genocide*, ¶166).

[206] *Bosnia Genocide*, ¶432 ("it is enough that the State was aware, or should normally have been aware").

[207] *Bosnia Genocide*, ¶431.

[208] *Bosnia Genocide*, ¶¶430, 432 (emphasis added).

[209] *Bosnia Genocide*, ¶430.

[210] *Bosnia Genocide*, ¶432 (emphasis added). This conforms with the general definition of breach in Article 12 ASR, which does not imply any requirement beyond (even partial) non-conformity with a state's own primary obligations: ILC, ASR, Article 12 and commentary ¶2.

[211] Bosnia Genocide, ¶427.

Convention[]"where it had not yet ruled that genocide was occurring.[212]

151. **Third**, D's assertion is also contrary to the UK's own submissions in other *fora*. The UK recently emphasised states' duty to take action in good faith prior to the commission of genocide in its submissions in *Ukraine v. Russia* before the ICJ, concluding that "*a State must act diligently, reasonably and in good faith in carrying out an assessment of whether genocide is occurring or at serious risk of occurring*".[213] The Government cannot advance in good faith different positions before domestic and international courts.

152. **Fourth**, D's argument depends on a misinterpretation of an isolated statement in *Bosnia Genocide*, namely that "*a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed*".[214] That statement self-evidently concerns the circumstances in which a court may hold a state responsible for the effects of its breach *a posteriori*. It does not dictate when the obligation itself arises or what conduct it requires of the state when it is engaged. On those questions, the ICJ was clear (see ¶150(a) above). The sentence extracted by D from *Bosnia Genocide* refers to a *secondary* rule of international law (relating to responsibility for breach), not the primary obligation in question (the duty to prevent). SELC 1 and D's self-direction are concerned with the primary obligation.[215]

153. **Fifthly,** the proposition that the UK is permitted to supply weaponry where there is a serious risk that it could be used in the elimination of an entire human group provided a court has not yet conclusively determined that genocide has occurred undermines the very purpose of the duty to prevent genocide, rendering it devoid of any practical or protective effect. This is particularly so in circumstances where D: (i) asserts in parallel that conclusive findings of genocide require "*a very difficult exercise, which could take many years*";[216] and (ii) has himself taken no steps to obtain any such judicial determination at the international level, while actively opposing such determination at the national domestic level.[217]

154. In summary, the UK's obligation under GC1 is engaged *as soon as* there is a serious risk of genocide, irrespective of whether the UK could yet be held responsible for a failure to prevent genocide. From that moment, the UK is required to employ "*all means*" reasonably available to prevent genocide, which includes ceasing the export of military parts that might be used to commit or facilitate the genocide. A failure to suspend such exports is therefore inconsistent with the UK's obligation to prevent genocide.

(ii) D's limitations and misdirections in connection with the risk of genocide

155. D asserts that "*there is no serious risk that genocide will occur on the facts and/or no evidence*

[212] *Nicaragua v. Germany Order*, ¶24. See also Declaration of Judge Cleveland, ¶8.
[213] *Ukraine v. Russia*, Declaration of intervention of the UK, 5 August 2022, ¶57. See also ¶¶53-54.
[214] *Bosnia Genocide*, ¶431 (emphasis added); ADGR ¶50 [CB/A/3/154]. This was repeated (but always tied to responsibility) in *Croatia v. Serbia* and *Ukraine v. Russia* as quoted in ADGR ¶51-52 [CB/A/3/154-155].
[215] SELC 1 requires "[r]*espect for […] international obligations and relevant commitments*" and D's direction proceeded on the basis that the F-35 Carve Out was "*consistent with the UK's […] international obligations*": Letter from D's Principal Private Secretary to SSFCDA's Principal Private Secretary (Exhibit RP2-6) [CB/C/18/284].
[216] ADGR ¶54 [CB/A/3/155].
[217] ADGR ¶54 [CB/A/3/155] ("no international court or tribunal has found that genocide has been committed by Israel"; "this Court would need to determine that genocide has actually been committed").

that genocide has been committed".[218] This assessment is highly contested. However, C has been precluded from challenging the methodology through which D arrived at this assessment. The points as to the unfairness that arise from this approach apply here: see above at ¶135.

156. Were the Court to entertain D's factual assertion, fairness would require that C be entitled to develop its full factual case as to why a conclusion that there was no serious risk that genocide would occur was wrong, including (i) on the basis of the evidence available to D generally; and (ii) because of the methodological errors that had been the subject of Gds 2-5 of C's claim, in particular (a) the incomplete and flawed assessment of statements of intent to commit genocide by Israeli officials; and (b) the erroneous conclusion that it was not possible to assess whether Israel had deliberately targeted civilians absent direct evidence from Israel in relation to individual strikes. [219]

157. In any event, where D has proceeded on the basis of a misdirection as to the legal test, any factual submission on the existence of a serious risk of genocide could only be relevant to s.31(2A)/(3C) of the Senior Courts Act. D cannot show that it is highly likely that, following a lawful assessment not vitiated by the errors identified in C's previous pleadings, D would have concluded that there was no serious risk of genocide.

158. Even setting aside errors predicated on methodological flaws in assessing Israeli statements and IHL compliance, D misdirected himself in assessing whether there was a serious risk of genocide. The approach of the June 2024 SELC 1 Assessment was as follows:[220]

    (a) It examined the ICJ provisional measures orders in *South Africa v. Israel* and *Nicaragua v. Germany* and found that they did not give rise to a serious risk of genocide, as the ICJ's findings "*do not automatically equate with a finding that there is a 'serious risk' that genocide or other prohibited acts will occur*". [221]

    (b) It then assessed whether genocide was *actually* occurring by asking whether genocidal intent could be inferred from Israel's statements and conduct, including "*possible*" IHL breaches.[222] The July 2024 SELC 1 Assessment (Annex E) asked whether Israel possessed genocidal intent by (i) examining a limited number of recent Israeli statements, and (ii) addressing the asserted lack of evidence that Israel was "*making civilians the object of attack*" or "*deliberately targeting civilian women [or] children*", concluding that there was no evidence that Israel "*is harbouring genocidal intent*". [223]

159. This approach was marred by a series of errors. **First**, D erred in misinterpreting the ICJ's

[218] ADGR ¶55 [CB/A/3/155].
[219] Exhibit RP2-1c [CB/E/35/609-610].
[220] [SB/E/102/422-1428]; adopted in the 24 July 2024 ECJU Submission [CB/E/35/609].
[221] Exhibit CH2-49 [SB/E/102/1423-1425].
[222] Exhibit CH2-49 [SB/E/102/1425-1428]. As addressed at Section VI.F.(i) above, this was the wrong question for the purpose of ascertaining whether there was a serious risk of (not commission of) genocide.
[223] Exhibit RP2-1c [CB/E/35/609-610]. It is noteworthy that by 13 December 2024, the ECJU appears to have accepted the ICC's position on there being reasonable grounds to believe that Israel may have intentionally directed attacks against civilians: "*[t]he ICC also concluded, on the evidence available to it, that there were reasonable grounds to believe Israel may have intentionally directed attacks against civilians in relation to two of the incidents referred by the prosecutor. Again, this corroborates our extant assessment that there is a clear risk items might be used to commit or facilitate a serious violation of IHL in the conduct of hostilities*" [SB/H/195/3069].

provisional measures orders in South Africa v. Israel. Accordingly, he failed to appreciate that the serious risk threshold had been found by the Court to have been met:

(a) The conclusion of the ICJ on 26 January 2024 (reaffirmed on 28 March 2024 and 24 May 2024) was that there existed "*a real and imminent risk*" that "*irreparable prejudice*" will be caused to the rights of Palestinians to not be subjected to genocide.[224] In circumstances where *any* infringement of the rights of Palestinians not to be subjected to genocide constitutes genocide, a finding of a "*real and imminent risk*" of "*irreparable prejudice*" is tantamount to a finding of serious risk of genocide.

(b) This is confirmed by the ICJ's Order considering it necessary to require Israel (and, by extension, given the *erga omnes* nature of the obligation, all states) to employ all means reasonably available to prevent genocide.[225]

(c) By the March 2024 Order, the position was so clear that Judge Yusuf highlighted the seriousness of the risk of genocide: "*[t]he alarm has now been sounded by the Court. All the indicators of genocidal activities are flashing red in Gaza*".[226]

(d) D's assertion that the ICJ only found that the rights are "*plausible*", not that the commission of genocide is "*plausible*"[227] is misconceived and leads him wrongly to compare a "*plausibility*" threshold with that of "*serious risk*". The relevant finding by the Court is not plausibility, but the real and imminent risk of irreparable harm to the right not to be subjected to genocide, i.e. the serious risk of genocide.[228]

(e) D failed to take into account evidence relevant to the ICJ's decision, including statements and actions by states such as Germany[229] and South Africa[230] that the obligation to prevent genocide was triggered, and reports of international bodies expressing concern about and calling on states to take action to prevent genocide.[231]

---

[224] South Africa v. Israel, Provisional Measures, Order of 26 January 2024, ¶¶74-75. This Order was transmitted to all members of the UN SC — of which the UK is a permanent member — on 26 January 2024: Letter dated 26 January 2024 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2024/116.

[225] South Africa v. Israel, Order of 26 January 2024, ¶86(1). See similarly the Court's reminder in Nicaragua v. Germany to all states of their obligation under the Genocide Convention in respect of arms transfers to Israel at ¶150(b) above.

[226] South Africa v. Israel, Order of 28 March 2024, Separate Declaration of Judge Yusuf, ¶12.

[227] ADGR ¶¶57 and 40(c) [CB/A/3/151, 156].

[228] D purports to rely on an extra-curial statement by the former President of the ICJ that the Court "*didn't decide that the claim of genocide was plausible*" fn 7 [SB/E/102/1423], but fails to consider that she had subsequently explained that the Court had found "*a risk that the right of this Palestinian population to be free of genocide would be harmed irreparably before the Court delivered its judgment*": Donoghue, Behind the Bench with ICJ's Former President Joan Donoghue, Berkley Law Border Lines (3 June 2024).

[229] Nicaragua v. Germany, Verbatim Record 2024/16, 37 (the obligation was one "*of conduct that is incumbent upon all States*" and that, in that context, it was continuously using all reasonable means at its disposal to exert its influence on Israel in order to improve the situation).

[230] On 29 May 2024, South Africa provided to all UN Security Council members a dossier urging urgent action to prevent genocide, on the basis of extensive evidence: Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419.

[231] UN Committee on the Elimination of Racial Discrimination, Decision 2 (2023) (found that Israel's actions "*raise[d] serious concerns regarding the obligation of Israel and other State parties to prevent crimes against humanity and genocide*"; "*call[ed] upon all State parties […] to cooperate to […] prevent atrocity crimes, particularly genocide*"); HRC Resolution, A/HRC/RES/55/28, 5 April 2024 ("*expresse[d] grave concern at statements by Israeli officials amounting to incitement to genocide, and demands that Israel uphold its legal responsibility to prevent genocide and fully abide by the provisional measures issued*").

160. **Second**, in addition to determining as a consequence of his flawed methodology that "*no evidence has been seen that Israel is deliberately targeting civilian women [or] children*"[232] (no assessment is made in relation to other persons), D failed to take into account that genocidal *intent* can be inferred from Israeli conduct other than the targeted killing of civilians. The UK's submissions to the ICJ in *The Gambia v. Myanmar* stressed that genocide is not limited to killings and other forms of genocide must be considered.[233]

(a) D failed in particular to consider Israel's (at least possible[234]) violations in respect of humanitarian relief that had been repeatedly found.[235] The context in which those violations took place was particularly relevant, including the "*disastrous humanitarian situation*" and "*catastrophic living conditions*"[236] to which the population of Gaza were being subjected.[237] D excluded[238] consideration of whether these matters indicated a serious risk of genocide committed by "*[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*". [239]

(b) D similarly failed to have regard to the repeated forced displacement of Palestinians, despite the possibility of such displacement constituting a "*significant factor*" which, "*in parallel to acts falling under Article II of the Convention may be 'indicative of the presence of a specific intent*".[240] That is notwithstanding the UK's own position in its intervention in *The Gambia v. Myanmar* in the ICJ underscoring the relevance of forced displacement to the inference of genocidal intent. [241]

161. **Third**, D failed to take into account statements by senior Israeli officials that are relevant to establishing genocidal intent. It is insufficient to distinguish between "*political rhetoric*" and strategy,[242] particularly when the statements are repeated by senior Israeli officers commanding soldiers in Gaza and those soldiers themselves, and are reflected in the effects of the

[232] Exhibit RP2-1c [CB/E/35/609].
[233] Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, 15 November 2023 ("Joint Declaration, *The Gambia v. Myanmar*"), ¶¶23-25.
[234] See CH2/¶19 [SB/B/14/117-118]. Following the approach taken in the *CAAT II*, "*incidents that fall into category (1) [i.e. a possible breach] are treated as constituting a violation of IHL for the purpose of assessing Israel's record of past compliance with IHL*".
[235] IHL Seventh Assessment, 24 July 2024, ¶108 [CB/E/41/720], ¶131 [CB/E/41/726], ¶137 [CB/E/41/726 referring (at ¶¶22-23 [CB/E/41/696] and ¶92 [CB/E/41/716]]) to the last two IHL Assessments: Fifth IHL Assessment CH2-34 ¶26(i) [SB/E/74/931], ¶56 (unredacted) [SB/E/74/941], ¶77 [SB/E/74/947]; Sixth IHL Assessment, CH2-39 [SB/E/83/991-1018]. See further earlier findings of possible breaches in Third IHL Assessment ('Out of Cycle Assessment') ¶31 CH2-8 [SB/E/49/671-672]; Fourth IHL Assessment CH2-25 ¶24 [SB/E/61/816]. Articles 23 and 55 are reflective of custom: ICRC, CIHL Rule 55.
[236] *South Africa v. Israel,* Order of 24 May 2024, ¶¶27-28.
[237] See, in particular, Minogue 4 Part I ¶¶3 to 70 [CB/D/22/299-336] and Minogue 5 [CB/D/25/531-556].
[238] See also Exhibit RPS-1c/014 [CB/E/35/609]: "the areas of most acute concern with respect to compliance with IHL [i.e. humanitarian relief and detainees] do not relate to Israel making civilians the object of attack" and so were wrongly presumed not to be relevant (emphasis added).
[239] Genocide Convention, Article II(c).
[240] *Croatia v. Serbia*, ¶434 (emphasis added). See also *Prosecutor v. Tolimir* (Case No. IT-05-88/2-A), Appeal Judgment, 8 April 2015, ¶254. Similarly in *Bosnia Genocide*, the ICJ recognised that "*acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent*".
[241] Joint Declaration, *The Gambia v. Myanmar*, ¶¶72-74.
[242] First IHLCAP Assessment dated 10 November 2023 (Exhibit CH2-12) [SB/E/44/588].

campaign.[243] Moreover, the June 2024 SELC 1 Assessment was wrong to state that apart from Israeli Minister of National Security Ben Gvir and Minister of Finance Smotrich (who were curiously assessed to have little influence, given that they were at that time in Israel's Security Cabinet, which collectively determines strategic goals and military objectives and provides policy guidelines[244]) "*senior government figures have not made such inflammatory comments since the start of the conflict*".[245] The Annex E assessment was similarly wrong to conclude that "*concerning Israeli statements seen towards the start of the conflict have not been repeated in the same vein*".[246] At that date, the Israeli Prime Minister had continually referenced one of the goals of the military operation (distinct from "*eliminating Hamas*") as "*ensuring that Gaza never again constitutes a threat to Israel*", stating "*[w]e will not withdraw the IDF from the Gaza Strip and we will not release thousands of terrorists. None of this will happen. What will happen? Total victory*".[247] The then-Minister of Defence, Yoav Gallant confirmed that the military was "*taking apart neighbourhood after neighbourhood*".[248] Other members of the Security Cabinet had stated *"Uninvolved? Big-time involved! We will reckon with the third circle of Gazans as well — the same ones who rejoiced and cheered the massacre"*;[249] and *"The tens of thousands of welcomers who were waiting in Gaza for their heroes […] whom some define as 'uninvolved.' Each and every one of these many thousands is a terrorist for all intents and purposes. His blood will be on his head and the pursuit of him will be until his last day in prison or in the grave"*;[250] and advocated for reducing humanitarian aid to Gaza.[251] High-ranking military officials supported *"a war on Gaza. In all of Gaza! […] because all of Gaza is one big terror, including the bathers on the beach"*;[252] stated: *"There are no civilians in this war"*;[253] and called to *"not allow humanitarian supplies and the operation of hospitals within Gaza City"*.[254]

162. **Fourth**, D failed take into account the fact that genocidal intent can arise alongside independent motives. The June 2024 SELC 1 Assessment suggested that Israel was withholding humanitarian relief (and inflicting related conditions of life) in order to pressure Hamas to release hostages, and that this necessarily precluded the existence of genocidal intent.[255] That is wrong as a matter of law. It is not necessary that destruction of the Palestinian people be the

[243] See Tables of Statements of Israeli government and military personnel at Exhibit DM4-15 [SB/F/156/2356-2439] DM4-16 [SB/F/157/2440-2453] and DM 5-1 [SB/F/163/2556-2568].
[244] See https://en.idi.org.il/articles/51509.
[245] Exhibit CH2-49, (¶14) [SB/E/102/1425-1426].
[246] Exhibit RP2-1c [CB/E/35/609].
[247] Israel Prime Minister's Office, PM Netanyahu to the Students of the Bnei David Institutions in Eli: "The testament of the fallen is our mission – total victory" (30 January 2024), https://www.gov.il/en/departments/news/event-visit300124 (in part at Exhibit DM4-15 entry 16 [SB/F/156/2358-2359]). See generally, Letter dated 29 May 2024 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc S/2024/419, pp. 20-22 ("**South Africa Dossier**").
[248] Exhibit DM4-15 entry 99 [SB/F/156/2378], also in South Africa Dossier, p. 24.
[249] Exhibit DM4-15 entry 41 [SB/F/156/2364], also in South Africa Dossier, p. 37.
[250] Exhibit DM4-15 entry 37 [SB/F/156/2363], also in Letter dated 27 February 2025 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council (28 February 2025), UN Doc S/2025/130, https://docs.un.org/en/S/2025/130, p. 94.
[251] Exhibit DM4-15 entry 217 [SB/F/156/2404], also in South Africa Dossier, p. 25.
[252] Exhibit DM4-15 entry 38 [SB/F/156/2363], also in South Africa Dossier, p. 52. See generally pp. 47-76 in that letter regarding statements by members of the military.
[253] Exhibit DM4-15 entry 43 [SB/F/156/2365], also South Africa Dossier, p. 54.
[254] Exhibit DM4-15 entry 227 [SB/F/156/2405], also in South Africa Dossier, p. 51.
[255] CH2-49/901 (¶21) [SB/E/102/1427].

sole motivator for Israel's conduct.[256] Indeed, individual motives may support an inference of genocidal intent when these motives are consistent with an intent to destroy the group.[257]

163. Each of the above errors arose alongside to D's fundamental misdirection, addressed above,[258] that the question was not whether there was a *serious risk* of genocide, but instead whether genocide *was occurring.*

G. GROUND 8D: INCOMPATIBILITY WITH THE UK'S CIL OBLIGATIONS NOT TO AID OR ASSIST THE COMMISSION OF AN INTERNATIONALLY WRONGFUL ACT AND NOT TO RENDER AID OR ASSISTANCE IN MAINTAINING A SITUATION CREATED BY A SERIOUS BREACH OF A PEREMPTORY NORM

(i) D's failure to take into account his CIL obligations reflected in Arts 16 and 41 ASR

164. Despite being aware that exports could constitute aiding and assisting the commission of an internationally wrongful act,[259] D failed to have regard in his decision-making to the compliance of the F-35 Carve Out decision with his relevant obligations in CIL specified in the ASR:

(a) the CIL obligation as reflected in Art 16 not to aid and/or assist the commission of an internationally wrongful act, including a breach of fundamental rules of IHL. These were particularly relevant in circumstances where D was proceeding on the basis that Israel had breached[260] relevant provisions of international law in Gaza and was not committed to complying with IHL;[261] and

(b) the CIL obligation as reflected in Art 41 not to aid and/or assist in the maintenance of a situation created by a serious breach of one or more peremptory norms. As relevant to the present facts, these include basic rules of IHL (see ASFG ¶¶100-104 [CB/A/2/64-72], ¶233 [CB/A/2/118-119] and *CAAT CA* at ¶¶23-25), genocide (see ASFG ¶116 [CB/A/2/76-77]), torture (see ASFG ¶233 [CB/A/2/118-119]), and the denial, impairment and frustration of the right to self-determination, including as a result of Israel's unlawful presence in the occupied Palestinian territory (*Second oPT Advisory Opinion*, ¶233; ASFG, ¶233 [CB/A/2/118-119])).

165. There is no evidence at all in OPEN of D having assessed the compatibility of the Carve-Out with these legal obligations. Nor has D raised any argument to the contrary: instead, he denies that the relevant legal obligations have been breached on the interpretations he advances, as addressed below.

---

[256] See e.g. Prosecutor v. Jelisić, Appeal Judgment, ¶49; Croatia v. Serbia, Separate Opinion of Judge Bhandari, ¶50; Croatia v. Serbia, Dissenting Opinion of Judge Cançado Trindade, ¶144. See also Second oPT Advisory Opinion, ¶205; Second oPT Advisory Opinion, Separate Opinion of Judge Tladi, ¶40 (mutatis mutandis as regards apartheid), ¶44.

[257] Mettraux, International Crimes: Law and Practice: Volume I: Genocide (OUP, 2019) p. 244 (citing the ICTR Appeal Chamber in Kayishema & Ruzindana at ¶160).

[258] Section VI.F.(i).

[259] See e.g. Second IHLCAP Assessment (Exhibit CH2-17) [SB/E/46/635] (¶2 "The IHL assessment process was set up to service three key requirements: […] 3) ensuring HMG's overarching support to Israel does not aid or assist the commission of an internationally wrongful act").

[260] CH2¶19 [SB/B/14/117-118] Following the approach taken in the CAAT II, "incidents that fall into category (1) [i.e. a possible breach] are treated as constituting a violation of IHL for the purpose of assessing Israel's record of past compliance with IHL".

[261] Including Articles 23 and/or 55, as well as Articles 76 and 143 of the Fourth Geneva Convention: see fn 69.

(ii) Incompatibility of the F-35 Carve-Out with the UK's CIL obligations as reflected in Art 16 ASR

166. As the wording of Art 16 ASR indicates, a state acts inconsistently with its customary obligation where: (i) it provides aid or assistance to a state committing an internationally wrongful act; (ii) it transfers this aid with knowledge of the circumstances of the internationally wrongful act; and (iii) the act would have been wrongful if done by the assisting state.

167. The foregoing requirements are met in circumstances where the UK (i) continues to authorise the export of F-35 components to the F-35 Programme in the knowledge that Israel is participating in the Programme; (ii) is doing so knowing that there is a clear risk that the F-35 components are, or might be used, to commit or facilitate serious violations of IHL; and (iii) such violations would be unlawful if committed by the UK. D's contentions to the contrary are without any merit.

168. **First,** D wrongly contends that "*it has not <u>been established</u> that Israel is committing any internationally wrongful acts*" (ADGR ¶62 [CB/A/3/157], emphasis added). This assumes that the CIL obligation reflected in Art 16 has no application unless and until there is a judicial determination that Israel's acts were internationally wrongful. That is not a correct approach, as confirmed by the ILC in the ASR itself,[262] and by Lord Mance in <u>*Belhaj v Straw*</u>:[263] the assessment is to be made by the aiding or assisting state for itself.[264] On the facts of this case, applying his approach to the assessment of the compliance of licenced exports with the SELC more generally, D had concluded that it was necessary to proceed on the basis that Israel was in breach of IHL, treating its findings of possible breaches as breaches.[265] The UK's obligation under Art 16 was capable of being engaged on that basis; and D erred in failing to consider that obligation.

169. To the extent D's case is instead that his CIL obligation not to provide aid or assistance to another state in the commission of an internationally wrongful act does not apply because he had not reached a <u>firm</u> conclusion on Israel's compliance with IHL, that is an argument which cannot succeed in circumstances where his failure to reach a settled conclusion was entirely a consequence of his own methodological errors. See the points made above at ¶135.

170. **Second,** the CIL obligation articulated in Art 16 in any event only requires "*knowledge of the <u>circumstances</u> of the internationally wrongful act*", i.e. awareness of the circumstances in which the aid or assistance would be used by the receiving state,[266] *not* knowledge that an

[262] ILC, ASR, commentary to Article 16, ¶11 ("States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge").
[263] <u>*Belhaj v Straw*</u>, ¶77 (Lord Mance).
[264] The UK frequently affirms the right to itself assess whether an internationally wrongful act has occurred. See e.g., its sanctions regime, where the UK has "*imposed and implemented sanctions in situations where the UN has chosen not to act, but where the UK has considered an international response was still necessary*" (explanatory memorandum to the Sanctions and Anti-Money Laundering Act 2018); ("*differing viewpoints on such issues* [involving what amounts to a prohibited intervention] *should not prevent States from assessing whether particular situations amount to internationally wrongful acts and arriving at common conclusions on such matters")*. See also Attorney General's speech, "Cyber and International Law in the 21st Century" 23 May 2018.
[265] As noted above, the "*possible*" breach findings are treated as breaches for the purpose of the Government's assessment: CH2/¶19 [SB/B/14/117-118], following <u>*CAAT II.*</u>
[266] ILC, ASR, commentary to Article 16, ¶4: "the circumstances making the conduct of the assisted State internationally wrongful"; Lanovoy, Complicity and its Limits in the Law of International Responsibility (Bloomsbury, 2020)

internationally wrongful act will certainly occur. This is satisfied where the assisting state has "*credible evidence of present or future illegality*".[267] D's conclusion that Israel is not committed to complying with IHL, and that there was a clear risk of F-35 components being used to commit internationally wrongful acts, means that D had knowledge of the relevant circumstances.[268]

171. **Third,** D contends that the contribution must constitute "*substantial involvement*" in the wrongful act (ADGR ¶63 [CB/A/3/165-166]), a threshold which D argues is not met on the facts. Art 16 does not specify any such threshold, and D's argument appears to instead rely on an erroneous interpretation of a statement in the commentary to Art 16 to the effect that "*[t]here is no requirement that the aid or assistance should have been essential* […] *it is sufficient if it contributed significantly to that act*" (emphasis added).[269] The commentary does not thereby suggest that some high threshold of involvement is required: indeed, it expressly makes clear, to the contrary, that the assistance's role in the commission of the act need only be incidental or minor.[270] In any event, D's suggestion that there is a threshold which is not met is unsustainable in circumstances where: (i) Israel is relying heavily on F-35s in its attacks on Gaza,[271] requires spare parts to service existing F-35s, and is indeed expanding its fleet (¶20 above); and (ii) the UK is a unique supplier of critical F-35 parts (which account for 15% of the value of each new aircraft) (¶18(a) above).

172. **Fourth**, D asserts that the CIL obligation as framed in Art 16 includes an additional requirement of intent (ADGR ¶65 [CB/A/3/158]), on the basis that the commentary states that "*aid or assistance must be given with a view to facilitating the commission of the wrongful act*". That is incorrect.

    (a) Art 16 makes clear that "*knowledge of the circumstances of the internationally wrongful act*" is sufficient — not intent. Put differently, the state must provide aid despite it being foreseeable that it will be used for the commission of an internationally wrongful act.[272] The commentary seeks to elaborate on those terms but cannot alter the substance of the CIL obligation, and indeed later confirms that the reference to "*knowledge*" in Art 16 means "*notice of the commission of a serious breach by another State*".[273] No evidence of an additional requirement of intent emerges from state practice;[274] and indeed such a requirement would be inconsistent with the general exclusion of fault/intent from the ASR and the specific exclusion of intent from the terms of Art 16.[275] Moreover, given the near-impossibility of proving a state's true purpose or intention, adding this requirement would

("**Lanovoy**"), p. 100.

[267] See Moynihan, "*Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*" at ¶43.

[268] In any case, as acknowledged by the UK Parliament's Joint Committee on Human Rights, constructive knowledge is sufficient for complicity: *Allegations of UK Complicity in Torture* (2008–09) HL Paper 152 HC 230 ¶35: "*complicity means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place*."

[269] ILC, ASR, commentary to Article 16, ¶5.

[270] ILC, ASR, commentary to Article 16, ¶10: "the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered".

[271] See CAB2, ¶¶3 to 18 [CB/D/27/569-576]. See also 'Israeli Air Force Press Release' dated 13 March 2025 (Exhibit CAB2-2) [SB/F/168/2746] *"[the F-35] has even conducted an airstrike in Judea and* Samaria [i.e. the West Bank]".

[272] Lanovoy, p. 100; ILC, ASR, commentary to Article 16, ¶4.

[273] ILC, ASR, commentary to Article 41, ¶11.

[274] Lanovoy, p. 101.

[275] Lanovoy, pp. 101-102; ILC, ASR, commentary to Article 2, ¶10.

render the CIL obligation provided for under Art 16 illusory. [276]

(b) Even if (contrary to the plain wording of Art 16) some form of intent is required, the term "*facilitate*" in the commentary does not require that the assisting state intend to "*collaborate*" in the commission of an internationally wrongful act (as asserted by D at ADGR ¶65 [CB/A/3/158]). Rather, any necessary degree of intent may be imputed where aid or assistance is given with certain or near-certain knowledge as to its intended use to commit an internationally wrongful act.[277] This is clear from *Bosnia Genocide* in which the ICJ required that "*at the least the organ or person acted knowingly, that is to say, in particular, was aware of the specific intent* […] *of the principal perpetrator*". [278]

(c) Moreover, even if D's proposed interpretation of the customary law obligation were to be applied, it would be satisfied here: (i) the UK has concluded that Israel *is not committed to complying with IHL*, including in its conduct of hostilities and use of F-35 parts; and (ii) Israel's reliance on F-35s in its assaults on Gaza is extensive and well-known, with Israel recently receiving new F-35s and placing orders for more.[279] It follows that the UK intends for the F-35 components it supplies to be used in functional F-35 fighter jets, knowing Israel is and will continue to use such F-35 jets in its attacks on Gaza, and knowing Israel is not committed to complying with IHL, including in its use of those F-35s. As such, the continued supply of F-35 parts by the UK is done with at least near-certain knowledge as to their intended use in the commission of IHL violations. An interpretation of the customary law obligation not to aid and/or assist the commission of an internationally wrongful act that would exclude such a situation would devoid the obligation of any practical meaning or application.

(iii) Incompatibility of the F-35 Carve-Out with the UK's CIL obligations as reflected in Art 41 ASR

173. Art 41 ASR sets out the duty on a state not to aid or assist in the maintenance of a situation arising out of a serious breach of a peremptory norm of international law. Such a situation pertains on the facts of this case: the ICJ in the *Second oPT Advisory Opinion* affirmed that Israel's presence in the oPT is illegal and characterised by serious breaches of peremptory norms (including the annexation of territory and a continuing violation of the right of Palestinians to self-determination),[280] and that all states are obliged "*not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory*".[281] Moreover, the authorisation of F-35 exports is, or would be, capable of maintaining Israel's unlawful presence in the oPT, including both Gaza and the West Bank.[282]

---

[276] Lanovoy, pp. 101-102.
[277] Crawford, *State Responsibility*, p. 408, see also p. 407 ("*has arguably been accepted into the customary ambit of complicity by the International Court, […] in Bosnia Genocide [in considering complicity under the Genocide Convention]*") and *Bosnia Genocide*, ¶451 ("*at the least the organ or person acted knowingly, that is to say, in particular, was aware of the specific intent […] of the principal perpetrator*"), ¶432.
[278] Ibid. D also relies on *Bosnia Genocide* and academic commentary in relation to it.
[279] See ¶20.
[280] *Second oPT Advisory Opinion*, ¶¶179, 233, 243.
[281] Ibid, ¶279.
[282] See, for example, CAB2/¶4 [CB/D/27/569], quoting from 'Israeli Air Force Press Release' dated 13 March 2025 (Exhibit CAB2-2) [SB/F/168/2746] ("[the F-35] *has even conducted an airstrike in Judea and Samaria* [i.e. the West Bank]"); "Israeli fighter jets bomb West Bank coffee shop, killing 18 Palestinians", *Middle East Eye*, 3 October 2024,

As such, the provision of F-35 components constitutes unlawful aid and assistance.

174. D does not assert that he considered this obligation in assessing the compliance of the F-35 Carve Out with his international obligations but relies on erroneous interpretations of the UK's relevant legal obligations:

(a) First, D relies again upon his incorrect interpretation of Art 16, which he argues should be cross-applied to the CIL obligation as reflected in Art 41. It is clear from the ILC's commentary that the provision of assistance in circumstances where the UK has knowledge that breach/es of peremptory norms are occurring necessarily satisfies the requirements of Art 41; there is no requirement of any further intention to assist[283] (and D's assertion that "*it has not been shown that the UK intends* […] *to assist Israel to maintain that situation*" (*viz* the situation in the oPT) (ADGR ¶66 [CB/A/3/158-159]) is therefore irrelevant).

(b) Second, D seeks to rely upon his professed intent that the F-35 components are to be used "*in an armed conflict in defence against a terrorist organisation*" (ADGR ¶67 [CB/A/3/159]). This is irrelevant to the assessment under Art 41: F-35s are used to maintain Israel's unlawful presence in the oPT, in violation of the right to self-determination and prohibition on annexation, and it is therefore a breach of the customary rule reflected in Art 41 to continue to provide their parts to Israel.

H. THE "MAKES NO DIFFERENCE" ARGUMENT

175. For completeness, D has not adduced any evidence or made any argument that the above errors and misdirections in relation to Gds 8(A) to (D) would have made no material difference such that relief should be denied pursuant to s.31(2A)/(3C) of the Senior Courts Act. He should not be permitted to do so at this late stage. This point is addressed for completeness and insofar as relevant to D's response, also at ¶¶112**Error! Reference source not found.**,156, 169 and footnote 190.

VII. GROUND 9: MATERIAL MISDIRECTION / ERROR OF LAW IN DETERMINING THAT THE F-35 CARVE OUT IS CONSISTENT WITH THE UK'S DOMESTIC OBLIGATIONS

A. THE CUSTOMARY NATURE OF THE OBLIGATIONS RELIED UPON BY CS

176. The obligations relied upon for the purpose of Gds 8A, 8C and 8D bind the UK as a matter of CIL, as well as treaty.

(i) Common Article 1

177. In relation to CA1, the ICJ held as long ago as 1986 in *Nicaragua v USA* that:

> there is an obligation on [states], in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from

available at https://www.middleeasteye.net/news/least-over-dozen-killed-massive-strike-tulkarm-occupied-west-bank.
[283] ILC, ASR, commentary to Article 41, ¶11.

> the general principles of humanitarian law to which the Conventions merely give specific expression. [states are] thus under an obligation not to encourage persons or groups engaged in the conflict…to act in violation of the provisions of [customary rules of IHL].

178. The ICJ has reaffirmed that position in two subsequent decisions: the *2004 oPT Advisory Opinion* (¶139) and the *oPT Second Advisory Opinion* (¶279).

179. The 2016 ICRC Commentary to the First Geneva Convention (and the 2020 ICRC Commentary to the Third Geneva Convention[284]) confirms, further, that:

> 120 The interpretation of common Article 1, and in particular the expression 'ensure respect', has raised a variety of questions over the last decades. In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in Pictet's 1952 Commentary. Developments in CIL have since confirmed this view. In support of that view, the ICRC cites its own Study on CIL (2005), which at Rule 144 provides:
>
> > Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

180. The ICRC provides extensive practice in support of that rule in Volume II of its study.[285] Further relevant state practice includes the User's Guide and UN HRC Resolution 24/35, which only the United States voted against (Kuwait, Mauritania, Qatar and the UAE having abstained).

(ii) Duty to prevent genocide

181. Genocide has been described as the "*crime of all crimes*". Its prohibition is foundational to the modern legal order. As the ICJ explained in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

> … the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality…The high ideals which inspired the

[284] See ICRC Commentary to the Third Geneva Convention (2020), ¶¶153, 159, 206.
[285] https://ihl-databases.icrc.org/en/customary-ihl/v2/rule144#a149b055-e7b0-49e6-8c14-3eb389591435.

> Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[286]

182. It is axiomatic that the prohibition on genocide is both a norm of CIL and peremptory in character. The ICJ has made this clear on several occasions: see, for example, *Congo v Rwanda* I.C.J. Reports 2006 at ¶64 (noting the *jus cogens* nature of the prohibition on genocide) and *Croatia v Serbia* I.C.J. Reports 2015 at ¶87 (emphasising the customary and *jus cogens* nature of the norm).

183. The ICJ has also made clear that the duty to prevent genocide is customary. In *Bosnia, Preliminary Objections* (1996), when considering the territorial scope of the duty to prevent and punish genocide, the ICJ quoted the above passage from *Reservations to the Genocide Convention* (including that "*the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation*") and declared that the obligations "*enshrined in*" GC1 are binding on states *erga omnes*: see ¶31. The ICJ drew no distinction in this respect between the duty to prevent and the prohibition on genocide.[287] The two rules go hand in hand.

184. Even absent an independent norm of CIL as to the prevention of genocide, the position would be analogous to that underpinning the prohibition against torture, in respect of which the courts — in recognition of the particular horrors of torture,[288] and of the *jus cogens* and *erga omnes* nature of the central prohibition — have been willing to recognise ancillary rules of prevention as part of the common law even where these are not themselves customary: see *A v SSHD No. 2* [2006] 2 AC 221 , ¶¶34, 112.

(iii) Articles 16 and 41 of the ASR

185. The ASR are widely considered to *"represent the modern framework on state responsibility*".[289] The ICJ has acknowledged the customary nature of the rules relied upon by C in this case (see Bosnia Genocide at ¶420 and the 2004 oPT Advisory Opinion at ¶159, and see also *R (Mohamed) v SSFCA* [2008] EWHC 2048 at ¶173 and *A (No2)* [2006] 2 AC 221 at ¶41.

B. RECEPTION INTO THE COMMON LAW

186. If the Court accepts the customary status of these norms, the question becomes whether they have been received into the common law in any of the respects identified above or are essentially reflected in it. As noted above, this is important (*inter alia*) because if the answer is "yes", the question of whether D has misunderstood and misapplied them — leading to an error of law vitiating the F-35 Carve-Out — unquestionably falls to be determined on a correctness standard.

187. The principles governing common law reception are settled and appear to be common ground.

---

[286] See pp. 23-24.
[287] In fact, it was not until the merits judgment in *Bosnia Genocide* (2008) that the ICJ confirmed that Article I (the duty to prevent and punish genocide) contains within it a prohibition on States committing genocide (see *Bosnia Genocide* I.C.J. Reports 2008, [166]). Comments as to the *erga omnes* nature of obligations in Article I made at the preliminary objections stage (1996) were therefore likely directed specifically at the duty to prevent genocide.
[288] Recognised also, and unsurprisingly, in respect of genocide: see ¶192 below.
[289] See Crawford, *State Responsibility* (2014); §2.1.1, p.45.

Rules of CIL are taken to shape the common law unless there is some positive reason based on constitutional principle, statute law or common law that they should not: see *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2019] QB 1075 at ¶117, and *Ukraine v Law Debenture Trust Corp Plc* [2024] AC 411 to similar effect at ¶204. There is accordingly a presumption in favour of reception which D would need to displace: *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 (at ¶150, per Lord Mance); *Law Debenture Trust v Ukraine* (at ¶204 per Lords Reed, Lloyd-Jones and Kitchin).

188. D relies on three "constitutional principles" to displace this presumption: ADGR ¶¶71-74) [CB/A/3/160-161]. That reliance is misplaced.

189. The D's first objection is that reception of the customary rules would infringe the principle that Parliament alone can create criminal liability: ADGR ¶¶71-72 [CB/A/3/160]. However, none of the relevant customary rules give rise to criminal liability, whether on the part of a state actor or otherwise. Nor do they have any direct analogue in international criminal law. Further and in any event, C does not suggest that the consequence of the reception of these norms into the common law is to create domestic criminal liability. Rather, the effect of reception is to condition the scope of the D's public law powers.

190. The D's second objection is that common law reception would contravene the foreign act of state rule. That is wrong.

191. The position here is *a fortiori* that set out above in the context of Gd 8, because the Court is concerned not with the consequences of adjudicating on an alleged misdirection as to (or alleged breach of) a relevant norm in a particular case, but with (at most) the consequences of recognising the relevant norms as limits on public law decision-making. Reception of this kind would leave the courts entirely free to conclude that particular cases were non-justiciable due to the application of the foreign act of state rule, or to tailor or refuse relief in light of that rule. Furthermore, in many or even most cases the rule would simply not be engaged. For example:

    (a) Many cases would not invite — still less necessitate — an adjudication on the lawfulness of a foreign state's conduct. The focus would (necessarily) be on the UK's obligations, not those of another state. The error alleged may well be procedural in character (or, as in this case, involve a misdirection in law), and/or a finding of breach on the UK's part may flow merely from a risk of such conduct,[290] obviating any need for definitive adjudication.

    (b) Even in cases where the court was asked to adjudicate substantively on breach of a foreign state's obligations, this may well be incidental to a ruling on the UK's own obligations (and not the *"very subject-matter of the action"*).

192. Further and in any event, even if the foreign act of state doctrine might otherwise apply to preclude reception, the norms relied upon by C would fall squarely within the public policy exception as articulated by the Supreme Court in *Belhaj*. As set out above, those norms are fundamental as a matter of international law and reflect basic principles of English public policy. They are akin to the CIL and *jus cogens* prohibition on torture. In *R (Bow Street*

[290] As C contends is the case in respect of the obligation to prevent genocide.

Magistrates, Ex P Pinochet (No.3) [2001] 1 AC 147, Lord Millet described genocide and torture together as "*the most serious crimes against humanity*" (p.275C-D). Lord Hoffman observed to similar effect in *A v SSHD (No.2)* at ¶84.[291] The same is true of the basic rules of IHL. Rules of distinction and proportionality, together with rules concerning the protection of civilians and detainees, reflect elementary principles of morality which have long informed the development of the common law. Just as the doctrine of foreign act of state does not preclude the reception into the common law of the prohibition of torture (or unlawful detention or rendition), neither does it preclude the reception of obligations concerning genocide or the fundamental principles of IHL.

193. Indeed, the effect of the reception of these norms into the common law is analogous to the effect of the reception into the common law of the prohibition on torture. Just as common law principles "*standing alone"* preclude the admissibility of evidence tainted by torture in the absence of express statutory authorisation *(A (No 2*) at ¶52), so too does the common law preclude decision-making by public authorities which is inconsistent with the fundamental norms in issue in this case. Far from authorising any derogation from these norms, Parliament has conferred on D powers which are designed to facilitate compliance with the UK's international obligations (*a fortiori* these particular norms)*:* see ¶41 above.

194. In circumstances where D has (i) made an express finding that Israel is not committed to complying with international law, and (ii) identified possible breaches of IHL relating to the mistreatment of detainees (which incidents are, on the D's own underlying evidence, properly characterised as torture, see ASFG ¶251) [CB/A/2/124], the continued supply of F-35 parts to Israel gives rise to (at least) a real risk of facilitating, sanctioning or otherwise rendering aid and assistance to torture. This is because detention operations in Gaza are generally preceded by campaigns of aerial bombardment: see Andrews Briscoe 2 [CB/D/27/568-580].

195. D's third objection to the reception of these norms is that Parliament has already intervened through legislation to determine what aspects of international law relevant to the prevention of genocide and war crimes should form part of domestic law. However, the statutes upon which D relies (the Geneva Conventions Act 1957 and the International Criminal Court Act 2001) do not address the preventative duties relied upon by C in Gds 8(A) and 8(C). Further and in any event, the authorities support the proposition that where Parliament has enacted legislation criminalising conduct to reflect a norm of CIL, that does not preclude reception of related rules or norms: see e.g. *A (No. 2)*, where the fact that Parliament had criminalised torture by statute did not preclude recognition of a common law rule excluding evidence obtained via torture.

196. In addition to those three objections, D appears to suggest (at ADGR ¶¶75-78) that the customary norms relied upon by Claimant cannot be received into the common law because there is no relevant common law rule which they can shape. But there is an obvious common law rule that those norms are apt to shape: that of judicial review of executive action. Judicial review is of course "*a remedy invented by the judges to restrain the excess or abuse of power*" (*R v SSHD ex p. Brind* [1991] 1 AC 696, 751B (per Lord Templeman); it is "*a development of the common law, to ensure regularity in executive ... activity and so compliance with the rule of*

[291] See further ¶ 33, and the passage of the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (unreported) 10 December 1998, Case No IT-95-17/T 10 cited there.

law" (*R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at ¶56, per Lord Mance). Moreover, judicial review is "*not at base about rights, even though abuses of power may ... invade private rights; it is about wrongs — that is to say misuses of public power": R v Somerset County Council ex p Dixon* [1998] Env LR 111, 121 (Sedley J, as he then was). Thus a claim brought on the basis of the received (or essentially reflected) customary norms in issue here would precisely be one "*brought on the basis of existing common law rules, even if it look[ed] to CIL to guide the courts in the development or application of those common law rules*" (ADGR ¶76 [CB/A/3/162]).

197. More specifically, the customary norms in issue would *"guide the courts in the development or application of"* judicial review:

(a) for illegality at common law (such that breach of the relevant customary norms, received by or reflected in analogous common law rules, constrain the exercise of state power; *cf.* the common law prohibition of torture *(A (No 2))* or the common law protection of freedom of speech (*Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551); *R v SSHD ex p Simms* [2000] 2 AC 115));

(b) for illegality as a matter of vires (such that the scope of the relevant statutory or prerogative power is conditioned by the relevant common law rule, cf. the principle of legality (*Simms*, at 131E-G (Lord Hoffman)); or see Donaldson LJ (as he then was) in *R v SSHD ex p Puttick* [1981] QB 767, 773 ("*statutory duties which are in terms absolute may nevertheless be subject to implied limitations based upon principles of public policy*"));

(c) for rationality (as a matter of both process and outcome, such that the relevant customary norms, received by or reflected in analogous common law rules, limit the range of reasonable responses open to the decision-maker: *cf. R v SSHD ex p McQuillan* [1995] 4 All ER 400, 422f-j (per Sedley J as he then was)); or

(d) for want of good reason for departure from departing from policy (both as a matter of process, where the decision-maker must conduct a rational balance, and outcome, where the Court is the ultimate arbiter: *R (Nadarajah) v SSHD* [2005] EWCA Civ 1363 at ¶68 (per Laws LJ)).

198. There is thus no constitutional, statutory or common law reason to hold that the CIL rules relied upon by C do not form part of the common law or are not essentially reflected in it. To the contrary, there are compelling reasons that they do. The statutory framework is designed to facilitate HMG's compliance with its international obligations (*a fortiori* the fundamental norms in issue here). If the rules are not received, then there is a risk that the UK would breach its international obligations (a point that tells in favour of reception: see Lord Reed, Lloyd-Jones and Kitchin in *Law Debenture Trust* at ¶205). Further, in the case of the prevention of genocide, the norm is of such fundamental importance — as in the case of torture — that the case for reception (or essential reflection) is uniquely powerful. Adapting Lord Cooke's words in *R v SSHD ex parte Daly* [2001] 2 AC 532 at ¶30, the customary norms in issue here are "*inherent and fundamental to democratic civilised society. Conventions ... respond by recognising rather than creating them"*: Lord Reed in *R (Osborn) v Parole Board* [2014] AC

1115 at ¶58.

199. Accordingly, the customary rules in question should be received by and are essentially reflected in common law. The F-35 Carve Out was premised on a material misdirection as to the status of the customary rules under domestic law and/or was inconsistent with one or more of those norms and was therefore unlawful.

VIII. GROUND 10: ULTRA VIRES BECAUSE OF RISK OF FACILITATING CRIME

200. C submits that the D's exercise of his powers under Art 32 of the 2008 Order to enable the export of F-35 parts is *ultra vires* that Order and the 2002 Act pursuant to which it was made. This is because there is a significant risk that such exports will facilitate the commission of serious crimes.

A. FACILITATING CRIME AS ULTRA VIRES

201. The export of F-35 parts is being permitted in the face of a "clear risk" that those parts might be used to commit or facilitate serious violations of IHL. This in turn gives rise to a clear and significant risk that the policy may facilitate crimes contrary to the Geneva Conventions Act 1957 and the International Criminal Court Act 2001, which enshrine in domestic law the most serious violations of IHL.

202. Section 1 of The Geneva Conventions Act 1957 ("**GCA**") creates an offence in respect of grave breaches of the Geneva Conventions, wherever in the world they occur and whatever the nationality of the perpetrator. Art 147 of the Fourth Schedule to the GCA sets out the relevant grave breaches.

203. In accordance with Section 51 of The International Criminal Court Act 2001, ('**ICCA**') it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime. Section 51 applies to acts committed in England or Wales, and to acts committed outside of the UK by a UK national, resident or person subject to UK service jurisdiction. Section 52 creates an offence in respect of conduct ancillary to the commission of such crimes and applies to conduct inside the UK where it is ancillary to crimes committed outside of the UK.

204. Any conduct encouraging or assisting the commission of an offence under the ICCA or the GCA would constitute an offence under Section 44-46 of the Serious Crime Act 2007, regardless of where the conduct itself takes place.

205. It is a principle of statutory interpretation that Parliament is presumed not to require the performance of an ostensibly absolute statutory duty where to do so would facilitate the risk of serious crime, unless Parliament has made the contrary plain. The principle applies *a fortiori* to the exercise of statutory power. The 2002 Act, pursuant to which the 2008 Order was made and which confers the powers exercised by the D, does not expressly sanction such a use of executive power. It follows that the F-35 Carve Out which facilitates the risk of commission of serious crimes is precluded by the 2002 Act.

206. This principle of statutory interpretation was established by the Court of Appeal in *R v Registrar General ex p Smith* [1991] 2 QB 393 (approving the submissions of the amicus, Mr John Laws

as he then was). The Court held (applying an earlier case decided in a different context, R v SSHD ex p Puttick [1981] QB 767) that performance of an apparently absolute statutory duty should not be enforced, because there was a significant risk that to do so would facilitate crime resulting in danger to life and "*Parliament is presumed not to have intended that, unless it has said so in plain terms"* (at p.404C).

207. Staughton LJ observed that "*a principle that statutory duties, although apparently absolute, will not be enforced if performance of them would enable a person to commit serious crime or even serious harm is fraught with difficulty"* (as D notes at ADGR ¶98) [CB/A/3/168]), but concluded that *"Nevertheless, I am persuaded that some such principle exists … it seems to me that Parliament must … be presumed not to have intended to promote serious crime in the future."* Contrary to the approach of the lower court, Staughton LJ held that the principle was not a matter of curial remedial discretion, but was rather *"a rule of law"* (at p.404D).

208. Staughton LJ emphasised (p.404C) that the principle is not limited to cases where performance of the statutory duty is required for the purpose of a serious crime which the applicant intends to commit, but must be a matter of degree. The likelihood of future crime and the seriousness of the consequences if crime is committed must both be taken into account. *"For present purposes, it is sufficient to hold that a statutory duty is not to be enforced if there is a significant risk that to do so would facilitate crime resulting in danger to life."*

209. As to the question of factual evaluation, Staughton LJ held (at p.404E) that it is a rule of law to be applied in the interpretation of Acts of Parliament, on the facts of each case.

210. Sir Stephen Brown also accepted the submission that *"if the court would interpret a statute so as to prevent a grave crime being rewarded, a fortiori it should interpret statutes in a way which will prevent grave crimes from being committed":* 401C-F.

211. D's reliance on R (Hicks) v SSHD [2005] EWHC 2818 (Admin) (at AGDR ¶100 [CB/A/3/169]) is misplaced. Hicks did not concern any question of whether executive power could be exercised to facilitate crime, but rather the Secretary of State's refusal to grant citizenship on the basis of C's past criminality. Collins J found on the facts of the case before him that there was no causal link between the applicant's past criminal behaviour and the grant of citizenship. As D himself notes at AGDR ¶100 [CB/A/3/169], the applicant *"had not done anything wrong to establish the necessary conditions to be registered as a British citizen*."[292]

212. D also appears to seek to distinguish Smith on the basis that the principle of statutory interpretation in question applies to a statutory duty but not a statutory discretion: AGDR ¶99 [CB/A/3/168]. This is obviously wrong: the principle applies *a fortiori* to the exercise of discretionary power. The purpose of the principle is to promote public policy so that the performance of a statutory duty (*a fortiori* the exercise of executive power) does not lead to a risk of facilitating crime unless Parliament has made the contrary plain.

213. D asserts that the operation of the principle "*will depend on the interpretation of the legislation*

[292] R (CPS) v Registrar General [2003] QB 1222 is also distinguishable. There the Court held that there is no principle of statutory interpretation that Parliament is presumed not to require the performance of an ostensibly absolute statutory duty where to do so would facilitate the **avoidance of liability for serious crime**. That is not the issue here.

in question and the facts of the case": ADGR ¶98 [CB/A/3/168]. C agrees. Critically, there is nothing in the legislation to show that Parliament made it "*plain"* that the D's exercise of power extends to and encompasses the facilitation of the commission of serious crime. In the present case, there is no question that the criminal conduct identified is of the most serious nature, extending far beyond the danger to life identified in *Smith*. There is also a high likelihood of future crime, for the reasons set out further below.

214. D argues that several general principles, including the need to consider any adverse effect on global security, bear on the exercise of executive power in relation to licensing AGDR ¶102 [CB/A/3/169]. However, it is clear from the legislative scheme that such principles which include preventing threats to international law and human rights, are matters required to be considered under the legislative scheme as reasons **not to** grant a licence (see ¶41 above).

215. D is wrong to suggest (AGDR ¶102 [CB/A/3/169]) that there is a tension between the purposes of the legislation and the relevant policy principle on which he relies. However, to the extent the Court holds that there is anything legitimately to be weighed against the public interest in preventing the facilitation of crime, the special nature of the crimes in issue here is decisive and the balance must be struck in favour of preventing crime. The conduct Parliament has criminalised reflects rules of CIL. These rules have been received into domestic law to prevent UK nationals from engaging in their commission. In this particular circumstance, the related CIL norm imposed by CA1 can and should shape the application of the rule of public policy that statutory duties/powers should not be exercisable so as to facilitate crime thereby trumping any competing considerations.

B. THE NATURE OF THE COURT'S ASSESSMENT OF RISK

216. D asserts that in order to assess the significant risk of crime, "the court must engage in the details of who it is that would allegedly be committing the offences, and how; the basis of their liability and the applicable actus reus and mens rea of the crimes": ADGR ¶78 [CB/A/3/162]. Indeed, D appears to take the point further, claiming that the Court must assess the prospects of success of the prosecution of a specific person for a "threshold" of risk to be met: ADGR ¶90 [CB/A/3/166-167].

217. No authority is cited in support of that proposition. It is wrong, and runs contrary to the approach taken in *Smith*. There the appellant had argued that a pre-requisite for the operation of the principle should be that a person intended to commit the relevant crime (at p.403A). This argument was expressly rejected by the Court of Appeal, which found that there was no requirement to show an intent to commit crime (at p.404C, 405B).

218. The question for the Court in the present case is a general one, which requires no gloss. In circumstances where D has accepted that there is a clear risk of Israel committing serious violations of IHL utilising components for F-35s, and in light of the factual background underpinning the D's assessment, does allowing the export of F-35 components create a significant risk of facilitating serious criminal conduct?

C. THE SIGNIFICANT RISK OF FACILITATING CRIME

219. The starting point for the Court in assessing the risk of facilitating crime should be the

likelihood of crimes contrary to the GCA or ICCA being committed using F-35s in Gaza. Firstly, because if there is a significant risk of such crime, that is sufficient for Gd 10 to succeed. Secondly, if there is a significant risk of such crime then it follows that there is a significant risk that conduct which assists in the provision of F-35 parts would itself be criminal, depending on the mindset of any given individual.

220. C submits that the evidence before the Court shows clearly that there is a significant risk of F-35 parts being used in the commission of crimes. Seven important features of the evidence in this regard are set out below.

221. **First**, it is common ground that there is a clear risk that any items exported to Israel for use in offensive military operations, including F-35 components, might be used to commit serious violations of IHL. D has accepted this risk with no calibration or caveat. As set out at above, serious violations of IHL are not synonymous with criminal conduct. However, there is no doubt that there is a large overlap between actions which would constitute a serious violation of IHL and actions which would constitute crimes.[293] There is no basis in D's evidence for drawing a distinction between risk in relation to serious violations which would not constitute crimes, and those which would. To the contrary, it is clear from the ECJU's own analysis that it considers that the risk encompasses criminal conduct (emphasis added): "*The ICC also concluded, on the evidence available to it, that there were reasonable grounds to believe Israel may have intentionally directed attacks against civilians in relation to two of the incidents referred by the prosecutor. Again, this corroborates our extant assessment that there is a clear risk items might be used to commit or facilitate a serious violation of IHL in the conduct of hostilities."*[294](emphasis added)

222. **Second**, D assesses that Israel is fully capable of complying with IHL, but is not committed to doing so, including in relation to the conduct of hostilities. This is obviously material to the assessment of the likelihood of culpable, rather than mistaken, serious violations of IHL.

223. **Third,** much of the conduct in relation to detainees which led to the D's conclusion that Israel is overall not committed to complying with IHL itself constituted conduct which was criminal in nature, contrary to GCA s.1.[295]

---

[293] This is clear from ¶2.11 of the "*The User's Guide to the European Code of Conduct on Exports of Military Equipment*" ('the User's Guide') which provides that "Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non- international armed conflict, which it defines as war crimes (Article 8 sub-sections b, c and e…)" Whilst The User's Guide is no longer applicable in this jurisdiction following the UK's departure from the EU, D accepts that its provisions continue to be relevant insofar as they offer guidance in respect of a materially identical set of export licensing criteria.

[294] Ministerial Submission from ECJU to SSFCDA 13 December 2024 ¶9 [SB/H/195/3069].

[295] By way of example, from a large volume of reports (i) On 29 April 2024 BCG Jerusalem received a report that the vast majority of Palestinian female detainees in Israeli prisons alleged that they had been physically assaulted, and in some cases sexually assaulted, including through rape (¶71 [CB/E/52/869]) (ii) On 2 May 2024, among the detainees returned by Israeli authorities via the Karem Abu Salem crossing was the dead body of 33 year old prisoner Ismail Abdelbari Khader. The Director of the Abu Youssef al-Najjar Hospital in Rafah assessed that the prisoner died inside the prison under torture. (¶69 [CB/E/52/868-869]) (iii) In mid-May 2024, FCDO officials received information that released detainees had made credible claims of disappearances, mistreatment, torture, and instances of sexual violence. They assessed the situation to be deliberate and instruction-based: in their opinion, the ministers in charge of detention had

224. **Fourth,** as noted within D's own evidence, the assessment of the risk of facilitating crime takes place against the backdrop of a multiplicity of findings and concerns, expressed by UN expert bodies, the ICC, the UN CoI and numerous NGOs, that Israel has engaged in criminal conduct in Gaza. Of particular relevance in this context, the Chief Prosecutor of the ICC applied[296] for arrest warrants against the Israeli Prime Minister in relation to a number of war crimes and crimes against humanity (which warrants have since been issued by the Court). Whilst D did not have access to the Prosecutor's evidence base, it was noted that *"an independent panel of legal experts reviewed the… evidence and findings… concluding unanimously that the offences were 'systematic' and that there were reasonable grounds to believe the suspects had committed them".*[297]

225. **Fifth,** the particular nature of the use of F-35s, as set out in C's evidence and summarised at ¶21-26. above, adds to the significant risk that the carve out will facilitate crime. Almost every serious violation of IHL which could be carried out or facilitated using an F-35 will amount to a violation of international criminal law.

226. **Sixth,** as recognised within the D's own assessments, the risk in relation to the use of exports in violation of IHL has been steadily escalating throughout the period of assessment, not diminishing.

227. **Seventh**, the sheer scale of (i) the reported incidents of criminal conduct; (ii) the destruction of civilian infrastructure and infrastructure necessary for survival; (iii) civilian causalities; and (iv) attacks on deconflicted and humanitarian targets, and objects indispensable to the survival of the civilian population.

228. In relation to accessorial liability, it is clear that the *actus reus* of assistance can be fulfilled by the provision of components, as provided by the example of an arms supplier in *R v Jogee* [2017] AC 387 (at ¶9). For the reasons set out above, there is no need for the Court to assess individual *mens rea*; the significant risk of the commission of the crime in relation to its *actus reus* is sufficient.

229. D cites Archbold 2025 as support for the proposition that there can be no accessorial liability unless the primary offence is shown to have occurred. This is obviously correct if the question is whether somebody can be convicted, but it has no relevance in relation to the anterior question of whether there is a significant risk of the facilitation of crime.

D. JUSTICIABILITY

230. D contends that Gd 10 is non-justiciable, relying on *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 872. That contention is without merit.

231. **First**, it is based on a mischaracterisation of C's case. D contends that C is inviting the Court to sit in judgment on the acts of the Israeli state and UK ministers: ADGR ¶82 [CB/A/3/164]. That is wrong. C's case is that the significant risk of facilitating crimes is disclosed by D's own assessment of risk in relation to the export of military items to Israel. C is inviting the Court to

instructed staff to worsen the conditions in which people were held (¶74 [CB/E/52/869]).

[296] At the time of the Decision, arrest warrants had not yet been granted by the Pre-Trial Chamber

[297] Seventh IHLCAP Assessment, ¶78 [CB/E/41/710]

determine the public law implications of the D's own assessment.

232. **Second**, the analysis of justiciability in *Noor Khan* relied on the foreign act of state doctrine as set out in *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855. That line of authority was discussed in *Belhaj v Straw*. For the reasons set out above in relation to Gd 8, the D's reliance on this doctrine is equally misplaced in respect of Gd 10. Further, in relation to Gd 10, the criminal provisions of the GCA and the ICCA would lose all meaning if Courts in England and Wales were unable to make decisions which touched on criminal liability where the acts of another State were involved.

233. **Third**, the present case is on all fours with the position considered by the Supreme Court in *Rahmatullah*. In that case, the Secretary of State argued that the Court was prohibited from considering the legality of C's detention and issuing a writ of habeas corpus because this would involve sitting in judgment on the acts of the US. The Supreme Court disagreed (at ¶53) (emphasis added):

> The illegality in this case centres on the UK's obligations under the Geneva Conventions. It does not require the court to examine whether the US is in breach of its international obligations… Here, there was evidence available to the UK that Mr Rahmatullah's detention was in apparent violation of GC4. The illegality rests not on whether the US was in breach of GC4 but on the proposition that, conscious of those apparent violations, the UK was bound to take the steps required by article 45 of GC4.

234. By the same token, the D's own assessment in this case indicates that the continued export of F-35 components creates a significant risk of facilitating the most serious kind of domestic criminal offence. The illegality rests on whether, conscious of this risk, D has the power nevertheless to exercise his powers to enable such exports.

235. **Fourth**, and in any event, even if the doctrine of foreign act of state might otherwise apply, the conduct in issue in the present case falls squarely within the public policy exception for the reasons set out above.

IX. GROUND 11: IRRATIONAL ASSESSMENT OF RISKS OF SUSPENSION

236. The evidence available in OPEN indicates that the D's decision not to suspend F-35 parts was based on three assertions or considerations:

(a) **First**, D proceeded on the basis that it would not be possible to suspend F-35 parts for items sent to Israel without suspending parts for all F-35 recipients, because the UK does not track where the parts go after providing them to the global pool.[298]

(b) **Secondly**, D considered a unilateral suspension of items for use by Israel to be impossible because the nature of the F-35 supply scheme means that parts to one country cannot be suspended except on a consensus basis (ADGR ¶110 [CB/A/3/172]); and any limitation on the use of components in F-35s for Israel would require a consensus decision of the JESB (ADGR/ ¶112 [CB/A/3/172]).

[298] Exhibit KB1 [CB/E/59/921-925]

(c) **Thirdly**, D appears to have been concerned about the "*potential impact on UK/US relationship of any suspension of export licences to the F35 programme*".[299]

237. As to the first concern, the fact that UK exporters cannot know the destination of any particular part at the point of export is irrelevant. What matters is whether the contractors who operate the 'spares pool' and distribute parts to particular programme-users know: (i) which state the part is being assigned to, (ii) which state produced it, and (iii) that they are instructed by the UK not to transfer parts produced in the UK to Israel. The supply pool operators must know which state they are exporting to, because that is necessary in order for the system to work (i.e. for distributions to be effectively made). They must equally know who produced the relevant parts in circumstances where (i) there must be some means of identifying the origin of faulty parts in order to remedy such issues, and (ii) UK manufacturers are sole suppliers of particular items (as is the case for ejector seats, for example Detailed Advice from the Defence Secretary to D and SSFCDA [CB/E/30/588]). Neither the ADGR nor the D's evidence in OPEN contain anything to gainsay these obvious and basic points. ADGR ¶113 [CB/A/3/172] impliedly concedes that such logistical modifications are achievable.

238. Moreover, UK-manufactured F-35 components are not exclusively exported to the global 'spares pool': they are also exported directly to assembly lines, where they comprise 15% of the value of each new aircraft.[300] It follows that the D's first concern on no view provided a rational basis for failing to suspend parts for new aircraft.

239. As to the second concern, the OPEN documents do not evidence any detailed discussion of modifications to the programme necessary to restrict supply: on the contrary, only "*informal discussions*" have been commenced.[301] No evidence of engagement with Participating States has been adduced, despite requests from C for information about such engagement.

240. Moreover, to the extent D suggests that the UK's obligations under the MOU take precedence over its other international obligations that would prohibit the transfer, that is wrong. The MOU cannot override such fundamentally important and universally applicable rules contained, for example, in GC1 and CA1 without direct words to that effect.[302]

241. As to the third concern, *viz* the D's asserted concerns about an impact on UK-US relations, no evidence at all has been adduced in OPEN (issues relating to UK-US relations having been entirely redacted). On this point, Dutch Court of Appeal in its judgment of 12 February 2024 in *Oxfam (and others) v the Netherlands* dismissed a materially identical concern raised by the Dutch Government (see (¶3.15, 5.47 and 5.51)).

[299] Exhibit KB1 [CB/E/59/925-926]
[300] Letter from Defence Secretary with detailed advice (Exhibit KB1**)** [CB/E/59/922].
[301] Bethell 1 ¶14 [CB/D/26/563].
[302] *ELSI*, Judgment, I.C.J. Reports 1989, ¶ 50: "the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so." Nor could D argue that the MOU could be used to 'read down' obligations in the ATT (similar to the argument it makes in respect of CA1) because: (i) of the operation of Article 26(1) ATT, referred to above; (ii) the MOU is not a subsequent agreement between all the parties to the ATT as to its interpretation (Art 31(3)(a) VCLT); (iii) nor is the MOU an instrument containing 'relevant' rules of international law applicable between all the parties to the ATT (Art 31(3)(c) VCLT).

X. GROUND 12: ERROR IN THE ASSESSMENT OF WHETHER THERE WAS A "GOOD REASON" FOR DEPARTING FROM CRITERION 2(C)

A. OVERVIEW

242. Gd 12 is concerned with "*process*" rationality, as discussed by Chamberlain J in *R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin) at ¶¶55-56.

243. In determining whether there was a *"good reason"* to depart from Criterion 2(c), D weighed the risks of the continued export of F-35 parts against the risks of suspending these exports. As to the former, he took account of the *"clear risk"* of a *"serious"* violation of IHL but did not seek to assess the nature, extent and gravity of this risk. C's case is that this was not a rational approach, particularly where D did account for the nature, extent and gravity of the risks of suspension.

244. Further or in the alternative, the matters identified in Gds 8, 10 and/or 11 gave rise to material errors in the D's approach to the balancing exercise.

B. THE FACTUAL CONTEXT

245. The essential factual context underpinning Gd 12 is not in dispute.

246. D concluded that continued export of F-35 parts would breach Criterion 2(c), i.e. that there was a *"clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law"*. It would therefore be in breach of the D's published policy, from which he was entitled (as a matter of public law) to depart only if there was a *"good reason"* for doing so.

247. In deciding whether this was the case D conducted a balancing exercise, weighing the risks of continuing to export F-35 parts against the risks of suspending them – an exercise described at ADGR ¶¶122-127 [CB/A/3/173-177],[303] and reflected in contemporaneous documents.[304]

248. On the former side of the scales (the **"risks of export"**), D placed the *"clear risk that Israel might commit"* one or more serious violations of IHL — the threshold assessment which triggered the balancing exercise in the first place: ADGR ¶¶7(g), 124, 126. [CB/A/3/137,175,176] He made no attempt to assess and take account of the extent, nature (including proper legal characterisation), or potential gravity of those risks.[305] Nor did he attempt to assess the broader risks of export — including (for example) the risk of serious violations of IHRL and/or of exposing UK officials to liability for serious violations of international law.

[303] Explaining that D "identified and balanced" (on the one hand) "the risks inherent in not suspending F-35 licences" and (on the other) "the risks inherent in suspending F-35 licences" [CB/A/3/173-177].
[304] See e.g. submission of 30 August 2024, ¶2(a) ("you are then asked… in relation to the F-35 programme, to consider the balance between the impacts raised by the Defence Secretary and the consequences of continuing to supply the F-35 programme and decide whether licences permitting export of components to the F-35 programme should be excluded from your decision on suspension") (emphasis added).
[305] D's defence is not that he did in fact attempt to calibrate the risks of export, but that he was not required to do so: see e.g. ADGR 7(d) and (g) [CB/A/3/137], 126 [CB/A/3/176], 129-130 [CB/A/3/177].

249. On the latter side of the scales (the **"risks of suspension"**), D placed what he assessed as the *"immensely serious and imminent risks to international peace and security"* (ADGR ¶130 [CB/A/3/177]) arising from disruption to the F-35 programme. In his ADGR, D indicated for the first time that he does not contend, and did not proceed on the basis, that these risks would necessarily have overridden any risks of export: ADGR ¶121 [CB/A/3/174-175].[306]

250. On this basis D determined that the risks of suspension outweighed the risks of export, and hence that there was a *"good reason"* to depart from Criterion 2(c).

251. Conducting this balancing exercise was (in public law terms) the appropriate approach. *Nadarajah* and subsequent authorities[307] establish that the existence of a *"good reason"* for departing from a published policy (or legitimate expectation) turns on an assessment of proportionality, which involves balancing the public interest pursued against competing interests and considerations.[308] This is the exercise D set out to undertake. The overarching question under Gd 12 is whether he did so lawfully.

C. THE PRIMARY CASE FOR "PROCESS" IRRATIONALITY

252. C contends that the D's approach to the balancing exercise was irrational. Its primary case is as follows.

253. As noted above, in respect of the risks of export D relied solely on his prior conclusion that *"the 'clear risk' threshold had been crossed"*: ADGR ¶7(d) [CB/A/3/137]. His analysis ended there. In particular, he made no attempt (i) to assess or take account of the extent, nature, and gravity of the risk of serious IHL violations by Israel (the exercise referred to as "*calibration*"), or (ii) to identify, much less calibrate, other potential risks of export. This was irrational because, put simply, one cannot conduct a balancing exercise without even attempting to work out what sits on one side of the scales.

254. As to the (i), the category of *"clear risk of a serious violation"* is a wide one. Within this category, different risks are — depending on their nature, extent and gravity — likely to be afforded different weight in the balancing exercise, to the point where (as D now accepts) some risks would be capable of tipping the overall balance.

255. By failing to undertake a calibration exercise, D disabled himself from gaining any further insight into the risks he was seeking to weigh. By way of illustration, D had no means of

---

[306] As explained at fn 113 of C's Reply [CB/A/4/226], this submission is inconsistent with D's position at the time of the "linkage" judgment – which was that the risks of suspension were so significant that they were bound to be overriding, meaning that D's failure to calibrate was rational precisely because calibration was incapable of altering the outcome of the balancing exercise: see [2025] EWHC 173 (Admin), ¶16-17, 30-31, 44-45. The consequences for D's argument under s.31(2A) of the Senior Courts Act are considered at ¶¶265-268 below – and follow even if (as D appears to insist) there is no direct inconsistency.

[307] See e.g. *Paponette v Attorney-General of Trinidad and Tobago* [2012] 1 AC 1, ¶37-38 (onus on the public authority to justify the frustration of a legitimate expectation by reference to an *"overriding interest"* against which *"the requirements of fairness"* must be weighed); *Alliance of Turkish Businesspeople v SSHD* [2020] 1 WLR 2436 at ¶19, 66 (approach is to ask whether *"frustrating the substantive expectation can be objectively justified as a proportionate response, having regard to the legitimate aim pursued"*).

[308] There is, of course, a further question as to the method or standard of review a court should adopt when reviewing the balance struck by the decision-maker (see ¶92 and fn 119 of C's Reply [CB/A/4/229]), but this is unlikely to require resolution in this case.

differentiating between (on the one hand) a clear but limited risk of F-35 parts being used to commit or facilitate an isolated violation of international law, affecting a limited number of people; and (on the other) a clear likelihood of their being used to commit or facilitate widespread war crimes and crimes against humanity, or indeed acts of genocide, affecting the entire Palestinian population of Gaza.

256. No reasonable decision-maker undertaking the balancing exercise would deprive themselves of the ability to draw these kinds of important and potentially critical distinctions. Put another way, any reasonable D would at least have attempted the calibration exercise.

257. This is particularly so given that D did calibrate the countervailing risks of suspension. In particular he identified the specific nature of the relevant risks to peace and security; the extent of these risks (i.e. the likelihood of their materialising); and the gravity of the consequences if they did.[309]

258. The D's failure to calibrate was accordingly irrational. This error was compounded by his failure to seek to identify and calibrate other potential risks of export, such as (for example) the risk of serious violations of IHRL[310] and/or the risk of exposing UK officials to liability for serious violations of international law.[311] As the balancing exercise was (properly) intended to take account of the full range of relevant risks,[312] these could not reasonably be excluded from consideration.

259. D has failed to offer any coherent explanation of how a rational decision-maker could decline to seek to calibrate and fully identify the risks he proposed to weigh, where this was capable of affecting the outcome. Still less has he explained how he could reasonably decline to do so where he did calibrate the countervailing risks.

260. In reality, the D's only response to Gd 12 appears to be that it was rational not to attempt the calibration exercise because it would not have made a difference on the facts. This is, of course, circular. The focus is (and must be) on the D's reasoning adopted at the time. Without having made any attempt to calibrate risk — even in summary form — D cannot have had any basis for concluding that the calibration exercise would make no difference to the outcome, and hence cannot reasonably have declined to undertake it on that basis. Ultimately, the D's argument

[309] For example: (i) The first identified risk involved disruption to the F-35 programme undermining the credibility of NATO's warfighting plans ADGR ¶127(a) and (f) [CB/A/3/176]. This was assessed as likely to materialise swiftly ("*within weeks*" or "*immediately*"). The consequences if it did were expressly identified as "*very serious*". (ii) The second identified risk was needing to pause planned F-35 transfers to Ukraine ADGR ¶ 127(g) [CB/A/3/176-177]. This was considered to arise only in the event of a "*prolonged disruption*" and, even in that scenario, to be less than likely ("*might require NATO states… to pause*"). (iii) The third identified risk involved a drastic reduction in NATO's ability to gain control of the air ADGR ¶127(e) [CB/A/3/176]. This was considered to arise only in the event of a conflict, but to be likely in that scenario ("would drastically reduce"). The consequences were identified as the risk of "*a protracted, attritional land campaign with much higher casualty rates*".

[310] Including for example the rights to life and food: see fn 187 above.

[311] As to which see VIII.C above (in the context of Gd 10). Even if these risks were not such as to render D's decision *ultra vires*, they were obviously relevant to and fell to be accounted for in the balancing exercise.

[312] This is clear from the broad terms of the contemporaneous documents and the description of the balancing exercise in the ADGR: see ¶247 above. While the risk of serious IHL violations by Israel was plainly front and centre, there is no indication that the SSBIT sought to limit his assessment of risks of export to risks of this kind; indeed, in C's submission he could not lawfully have done so.

avails him only if and to the extent that it founds a refusal of relief (the irrationality of his approach notwithstanding) under s.31(2A), as to which see subsection E below.

D. THE STANDARD OF REVIEW

261. There is (and can be) no dispute that Gd 12 is justiciable. It turns on well-established public law principles, and does not come close to requiring judicial adjudication on the lawfulness of action by Israel. The only question is the appropriate standard of review.

262. It is significant in this regard that C's case turns on process rather than outcome. As such, it is on no view the *"epitome"* of a case for deference to the decision-maker: *cf.* ADGR ¶128 [CB/A/3/177]. To the contrary: where a decision-maker has undertaken to weigh one set of risks against another, the Court is perfectly well placed — in terms of both constitutional responsibility and institutional expertise — to determine whether it was rational to seek to calibrate the risks on one side of the scales and not the other.

263. Further, the significance of what is at stake favours the more intense standard of review referred to as *"anxious scrutiny"*: see e.g. *KP*, ¶58-63, 76.[313] As explained above, these stakes could hardly be higher. The export of F-35 parts continues to contribute to the devastation in Gaza: it will be recalled that F-35s are described as *"the most lethal fighter jet in the world"* and are used regularly by the Israeli military, including in cases described by the UN as *"emblematic"* of indiscriminate and disproportionate attacks on the civilian population.[314] Further, the claim raises serious questions as to the UK's understanding of and compliance with some of its most fundamental international obligations. Accordingly, *"the court will subject the decision to 'more rigorous examination, to ensure that it is in no way flawed'"*: *ibid*, ¶77, 80.

264. On this standard of review — and indeed even on a more deferential one — the D's approach was irrational for the reasons set out in subsection C.

E. THE "MAKES NO DIFFERENCE" ARGUMENT

265. As explained above, the D's only real defence to Gd 12 is his invocation of s.31(2A)[315] of the Senior Courts Act.

266. Applying the key principles summarised above at [xxx] to Gd 12, the question for the Court is whether D can establish that, even if he had engaged in a lawful calibration exercise — that is, in a counter-factual scenario in which he lawfully assessed the nature, extent and gravity of the risk of serious IHL violations by Israel — and even if he had lawfully identified and calibrated all other relevant risks, it is *"highly likely"* that he would have concluded that the risks of export were outweighed by the risks of suspension.

267. D has not come close to discharging this burden[316]:

---

[313] As this standard flows from the gravity of the consequences of the decision, it is equally applicable where (as here) a claim is brought for the benefit of, rather than directly by, the individual(s) whose rights or interests are affected: see e.g. *R (Hillingdon LBC) v Lord Chancellor* [2009] 1 FCR 39, ¶67; *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), ¶240.

[314] See ASFG, ¶86-87 [CB/A/2/57].

[315] And s.31(3C).

[316] Just as he has not done in relation to Gd 8, as explained above.

(a) D accepts, and the Court's assessment of the counter-factual must proceed on the basis, that the risks of suspension were not necessarily overriding — such that the risks of export, properly calibrated, could in principle outweigh them.

(b) D has chosen to offer no evidence (and indeed no submissions) as to the nature, extent, or gravity of the risks of export which would have tipped the balance.

(c) Nor has D offered any evidence as to the nature, extent or gravity of the risks which he says a lawful calibration exercise would have identified on the evidence available at the time of the September Decision. Indeed, he has not even offered witness evidence seeking to confirm the bare assertion that a lawful calibration exercise would have made no difference to the outcome of the balancing exercise.

(d) Little if any assistance can be derived from the contemporaneous documents underpinning the *"clear risk"* assessment, as these applied a methodology which cannot fairly and properly be taken as lawful.[317]

268. Thus, all that the Court can confidently conclude about the counterfactual scenario is that D would have been faced with a wealth of evidence establishing (at least) a clear risk of serious violations of IHL; and that the lawful calibration of this risk could in principle have changed the result of balancing exercise. Beyond this, and without hearing argument on and determining what a lawful calibration exercise would have involved, the Court cannot reach safe conclusions as to what such an exercise would have yielded as to the nature, extent and gravity of the relevant risks; and cannot safely conclude that this would not have tipped the overall balance. All of this would enter into the realm of speculation, against which the authorities on s.31(2A) consistently warn.

F. CONCLUSION

269. For all the reasons above, the D's approach to the balancing exercise was unlawful. The appropriate outcome is for him to be required to undertake the risk assessment and calibration exercise and to re-take his decision accordingly.

XI. GROUND 13: UNLAWFUL DECISION-MAKING IN RELATION TO UNSUSPENDED LICENCES

270. The submission to D on 30 August 2024 asked him to decide whether (i) to follow the SSFCDA's recommendation to suspend extant licences for equipment assessed to be for use in military attacks in Gaza only; or (ii) "*go beyond"* what D considered was required by a *"strict application*" of the SELC and "*send a political signal*" by suspending all extant licences for use by the Israeli army regardless of their potential use [CB/E/56/896]. Gd 13 relates to D's

[317] C maintains that it was not, and that the use of a lawful methodology would have led to the identification of a high level of risk of extremely grave breaches of IHL, including genocide. However, C accepts that the Court may conclude that the 'linkage' judgment precludes it from advancing this case on the basis that any methodological errors would be irrelevant to the outcome on Gds 8-12. That being so, and as explained at fn 113 of C's Reply, the lawfulness of the D's methodology cannot now be assumed against C so as to deny it relief (under Gd 12 or otherwise). If it were necessary to seek to determine what a lawful calibration exercise would have yielded – which in C's submission it is not — the appropriate approach would be to take C's case on Gds 2-7 at their highest, or to permit the parties to make full arguments on the issue at the point of determining remedy.

failure to have regard to matters which were mandatory relevant considerations when making that decision. In particular:

(a) D chose option (i) and thereby decided not to suspend any licences for any items except those which he assessed to be for use in military attacks in Gaza, despite the fact that it was open to D to include within the scope of the suspension any arms or materials exported to Israel that could be used to facilitate Israel's unlawful presence in the West Bank, including East Jerusalem, and Gaza.[318]

(b) When deciding not to suspend such items, D had no regard at all to the ways in which the unsuspended items might be used by Israel, for example in the West Bank, including East Jerusalem. There is nothing in OPEN to suggest that any factors other than political signalling were factored into the decision.

(c) The SELC apply to "*all licence decisions*", including to items capable of being used in the West Bank, including East Jerusalem; and in any event the potential uses in the West Bank of items being exported are considerations which are so obviously material to the decision that any rational decision-maker would have regard to them.[319]

(d) It follows that D erred in failing to have regard to mandatory relevant considerations, specifically those set out below. It appears that this error stemmed from his misdirection that the decision between option (i) and option (ii) was wholly one of political signalling, and therefore did not require consideration of the SELC.

271. The matters to which D unlawfully failed to have regard were, in particular, (i) Israel's history of undisputed breaches of international law outside of Gaza (including as set out in the oPT Second Advisory Opinion); and (ii) the consequential risk that the items might be used to maintain Israel's illegal presence in the oPT and/or facilitate other unlawful acts by Israel:

(a) D failed to have regard to the possibility that Israel would use unsuspended items in support of its unlawful settlement policy, acts of annexation and discriminatory measures, and its ongoing unlawful presence in the West Bank in violation of the fundamental right of Palestinians to self-determination.[320]

(b) The IHLCAP Assessment dated 21 March 2024 recorded at ¶70 the UK's view, supported by the UN Security Council and international observers, that Israel's settlement expansion *"is a breach of IHL* [that] *reflects negatively on Israel's commitment to its IHL obligations, and should be taken into account when assessing Israel's overall commitment to IHL"* (Exhibit CH2-34) [SB/E/74/944-945]. D had therefore (i) concluded that Israel was not committed to IHL, and (ii) had before him an assessment which supported a

[318] See, for example, submarines, maritime patrol equipment and *"security scanners for crossing point authority"* in the 'amber' list of licences: Annex C to the Submission from ECJU to the Foreign Secretary of 24 July 2024.
[319] Indeed, the relevance of the SELC to new licence decisions has been duly recognised by D: see Hurndall 2, §5 [SB/B/14/113-114] and Pratt 1, §§82-101 [SB/B/13/107-111].
[320] oPT Second Advisory Opinion, ¶¶ 230, 243 and 261-262. D has never substantively addressed this issue, despite correspondence from C: see letter from C dated 12 March 2025, §3 [SB/A/9/60-61], letter from D dated 18 March 2025, §4 [SB/A/10/63], and ADGR §135(b) [CB/A/3/178], stating only that "*[t]he consequences of the ICJ's Advisory Opinion on the Occupied Palestinian Territories are being considered in detail across relevant Government departments*", without any assertion that these were taken into account by D at the time of the decision.

finding that this lack of commitment was not confined to Israel's military assault on Gaza. Despite that, D failed to have regard even to the possibility of unsuspended items being used to commit or facilitate a breach of international law in the West Bank, including East Jerusalem.

(c) A necessary corollary of the SSFCDA's determination that Israel was not committed to complying with IHL in its conduct of the assault on Gaza was that its repeated bilateral assurances to the contrary had been false or unreliable. It follows that Israel had, deliberately or otherwise, provided false or misleading bilateral assurances to HMG on a number of occasions.[321] The implications of that finding for any reliance to be placed on assurances about the use of unsuspended items in the West Bank (including East Jerusalem) was not considered.

272. D erred in failing to have regard to the above matters, each of which were a mandatory relevant consideration under the SELC[322] and in any event obviously material to the decision: *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] 3 All E.R. 527 at ¶32; *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2021] 2 All E.R. 967 ¶¶116-121).

273. D cannot rely on s.31(2A)/(3C) SCA 1981 (ADGR §139 [CB/A/3/179]):

(a) D has confirmed that the matters that C contends ought to have been taken into account *are* now being taken into account.[323] It is not possible to conclude that the s.31(2A)/(3C) test is met in these circumstances.

(b) Further and in any event, the Court ruled against C on the question of linkage between the various methodological challenges advanced in the earlier version of C's grounds: see above. He cannot succeed in any such argument in circumstances where relevant considerations identified by C to which D failed to have regard included the nature, scale, gravity and pervasiveness of IHL violations by Israel which D had found to be possible in relation to detainees and the provision of humanitarian assistance, in particular their legal characterisation, e.g., as war crimes and crimes against humanity: see ASFG/280(a)(i) and ¶135 above, *mutatis mutandis*.

XII. CONCLUSION

274. For the reasons given above, the F-35 Carve Out was unlawful. So too was the D's decision not to suspend all licenses for use by the Israeli army. C seeks relief as set out in the ASFG.

BINDMANS LLP
GLOBAL LEGAL ACTION NETWORK (GLAN)

PHILLIPPA KAUFMANN KC
RAZA HUSAIN KC
BLINNE NÍ GHRÁLAIGH KC

[321] See also Alayyan 1, §§72-120 [SB/C/17/284-302].
[322] In particular SELC 1, 2(b)-(c), 4(b), 6(b).
[323] ADGR ¶135 [CB/A/3/178]; ECJU Ministerial Submission of 2 October 2024, ¶9 [SB/H/191/3060].

ADMAS HABTESLASIE
ZAC SAMMOUR
ELEANOR MITCHELL
MIRA HAMMAD
RAYAN FAKHOURY
COURTNEY GRAFTON
JAGODA KLIMOWICZ
AISLINN KELLY-LEITH
CATHERINE DRUMMOND
ALIYA AL-YASSIN
REBECCA BROWN