Claim No. CO/1306/2016

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

BETWEEN:

THE QUEEN
on the application of
CAMPAIGN AGAINST ARMS TRADE

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS, INNOVATION, AND SKILLS

Defendant

-and-

HUMAN RIGHTS WATCH
AMNESTY INTERNATIONAL
RIGHTS WATCH (UK)

First Interveners

OXFAM

Second Intervener

SKELETON ARGUMENT ON BEHALF OF HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, AND RIGHTS WATCH (UK)
for hearing on 7-9 February 2017

A. INTRODUCTION

1. Amnesty International, Human Rights Watch and Rights Watch (UK) ('the First Interveners') have permission to intervene on the following matters (see Order of Blake J dated 22 September 2016 [**A95]**, as varied by Order of Cranston J dated 13 October 2016 [**A114]**):

   (1) The position at international law of the attribution of State responsibility for an internationally wrongful act; and

   (2) Information regarding the current state of the conflict in Yemen and its impact on civilians.

2. The First Interveners have provided detailed written submissions dated 16 January 2017 addressing those matters **[C1-C25]**. The First Interveners also have permission to make oral submissions of 30 minutes on point 1(1) above. This Skeleton Argument is restricted to matters relating to those oral submissions.

3. The Court is asked to read the First Interveners' Submissions dated 16 January 2017 **[C1-C25]**. In short, the First Interveners say that:

   (1) On the facts of this case there is at least a *prima facie* case that the UK was and is in breach of its international law obligations (reflected in Article 16 of the ILC's 'Articles on State Responsibility') relating to '*aiding or assisting'* the Kingdom of Saudi Arabia ('KSA') in breaches of international humanitarian law ('IHL');

   (2) Criterion One of the Consolidated EU and National Arms Export Licensing Criteria ('Consolidated Criteria'), requires the UK to consider its obligations arising from Article 16, but the UK has failed to do so; so that

   (3) There are additional reasons to conclude that the grant and maintenance of the export licences at issue in this case was and is unlawful.

4. In this skeleton, the First Interveners will emphasise and develop certain key points, whilst also responding to the Defendant's stance set out in recent correspondence, namely:

   (1) The position under international law;

   (2) The position under Criterion One of the Consolidated Criteria; and

   (3) Observations on the Defendant's stance.

B. THE POSITION UNDER INTERNATIONAL LAW

5. Article 16 of the Articles on State Responsibility provides as follows:

   'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.'

6. The First Interveners emphasise the following points arising from their Submissions:

(1) It is settled that Article 16 reflects a rule of customary international law: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment of 26 February 2007, ICJ Rep 2007, p.42, §420 ('*Bosnia Genocide* case', International Court of Justice); *Al-M* (5 November 2003) 2 BVerfG 1506/03, §54 (Federal Constitutional Court of Germany) [**C5-C6/§§9-10**].

(2) Both the UK courts and the UK Government have accepted that Article 16 reflects customary international law: *R (Al-Saadoon) v Secretary of State for Defence* [2015] 3 WLR 503 (Admin), [193] (Leggatt J); UK Government's Reply to the report of the Joint Committee on Human Rights regarding allegations of UK complicity in torture;[1] UK Government Response to the Joint Committee on Human Rights report regarding the Government's use of drones for targeted killing[2] [**C5-C6/§§9-10**].

(3) The sale and supply of weapons and military support from one State to another is a paradigm example of a situation where Article 16 may be engaged [**C13/§20**].

(4) The central question in interpreting and applying Article 16 is whether the assisting State has the requisite '*knowledge of the circumstances*' of the internationally wrongful act. In this regard, there is strong academic support for the proposition that '*knowledge'* encompasses not just '*near-certainty*' or '*something approaching practical certainty'*, but also '*wilful blindness*' [**C9/§14**]. The point has been summarised as follows:

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1 Secretary of State Home Department and Secretary of State for Foreign and Commonwealth Affairs, *Allegations of UK Complicity in Torture: The Government Reply to the Twenty-Third Report from the Joint Committee on Human Rights* (Cm 7714, 2009), 2 **[C35-C45]**.

2 Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killing: Government's Response to the Committee's Second Report of Session 2015-16 (fourth report)* (2016-17, HL 49, HC 747), 17 **[C46-C75]**.

'*If a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye*'[3] [**C9/§14**].

(5) On the facts of this case, on the basis of the publicly available material, there is at least a *prima facie* case that the UK was and is in breach of its obligations arising from Article 16 (and that for these purposes it had and has sufficient '*knowledge of the circumstances*'). That position is supported *inter alia* by the following material (and the public nature of that material) [**C14-C19/§§21-25**]:

a. The report by the United Nations Security Council Panel of Experts on Yemen [**D50-D150]**. This found not only '*grave violation[s] of the [IHL] principles of distinction, proportionality and precaution*', but also that '*in certain cases*' the violations had been conducted '*in a widespread and systematic manner*';

b. The Resolution of the European Parliament [**D225-D229];**

c. The reports of NGOs, including Amnesty International and Human Rights Watch;

d. The credible evidence that, in apparent breach of IHL, the KSA has carried out multiple attacks on civilians and civilian objects, including, for example the Al Mazraq camp for internally displaced persons and the Médecins Sans Frontières Hayadeen Hospital;[4]

e. The 8 May 2015 declaration by Brig Gen Ahmad al-Assiri that, contrary to the rules of IHL, the cities of Sa'ada and Marran would be treated as military targets in their entirety, without distinction between military and civilian objects [see **B7-B8/§§14.4, 15]**;

f. The fact that attacks on those cities followed, in apparent breach of IHL principles prohibiting targeting of civilians and the principle of distinction; and

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[3] Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' *Chatham House Research Paper,* November 2016 §§43-45, [**First Interveners' Authorities Bundle, Tab 24]**.

[4] The UK Ministry of Defence acknowledges that it has '*not identified a legitimate military target for the majority*' of the probable Coalition strikes it was tracking (see Gists provided following CLOSED disclosure process [**B343])**.

g. The further material relating to the period after 9 December 2015, identified in the First Interveners' Submissions [**C21-C25/§34**].

(6) The fact that, apparently, the UK has not assessed for itself the question of whether or not the KSA has committed internationally wrongful acts does not provide a defence under Article 16:

a. Under Article 16, State A may be responsible for assisting State B, regardless of whether State A has positively determined that State B has committed breaches of international law;

b. It is sufficient if State A has notice that the bare facts which comprise State B's wrongful acts will occur, or if State A is wilfully blind to those bare facts **[C11-C15/§§13-14].**

(7) The *prima facie* case that the UK has breached its obligations arising from Article 16 is reinforced by:

a. The ongoing nature of the conflict in Yemen;

b. The evidence that breaches of IHL have not been one-off, but have been repeated, widespread and systematic; and

c. The absence of any positive assessment by the UK itself to rebut that evidence.

C. THE POSITION UNDER CRITERION ONE

7. The First Interveners emphasise the following points arising from their Submissions:

(1) The First Interveners' case is that, under Criterion One, the Defendant on behalf of the UK is:

a. obliged not to grant or maintain an export licence if to do so would or would be likely to place the UK in breach of its own international obligations and commitments, including the UK's obligations arising from Article 16; and

b. is positively obliged to perform its own analysis to consider its obligations arising from Article 16 [**C19-C21/§§26-32**]. This is a very short point of

construction, which, as set out below (paragraphs 10 and 11), the Defendant has declined to address, citing *inter alia* lack of '*opportunity*'.

(2) On the facts, it is reasonably clear that the UK has not considered its duties under Article 16 when making the decisions at issue in this case. Thus:

a. There is no specific reference in the evidence submitted by the Defendant to consideration of the UK's obligations arising from Article 16.

b. Rather, the evidence shows that the major, if not exclusive focus was Criterion 2(c). For example, a memorandum dated 10 November 2016 from Edward Bell to the SOS stated that the '*key consideration in relation to exports to Saudi Arabia which might be used in the conflict in Yemen is Criterion 2c.*' [Exhibit 10 to Second Witness Statement of Edward Bell, **B1202]**[5].

8. If paragraphs 7(1) and 7(2) are correct, then it follows that there the decisions to continue to grant and/or to maintain the licences at issue in this case were not taken lawfully.

9. It also follows that the Defendant's pleaded case in defending the Claim is (at least in significant part) unsustainable:

(1) The Defendant contends: '*licences for the export of arms and military equipment to KSA <u>have not been and will not be issued</u> if to do so would be inconsistent with <u>any provision of the Criteria.</u> This includes criterion 2(c) i.e. where there is a clear risk that the items to be licensed might be used in the commission of a serious violation of IHL.*' [Defendant's Summary Grounds, **B70/§7,** emphasis added]. The Defendant repeats this contention in paragraph 2 of its Skeleton Argument on the renewed application for permission [**B109]**.

(2) Thus, it is part of the Defendant's own positive case that licences have not been and will not be issued if to do so would be inconsistent with '*any provision of the Criteria.*'

(3) However, at the same time, as set out below, the Defendant has declined to address the First Interveners' Submissions that the Defendant has acted inconsistently with Criterion One.

[5] See also **B1160** reiterating that the '*key test in considering these applications is Criterion 2'*.

D. OBSERVATIONS ON THE DEFENDANT'S POSITION IN RESPONSE TO THE FIRST INTERVENERS

10. On 24 January 2017, the Defendant sent a letter [**E130-E132**], which set out the Defendant's position in relation to the Interveners' Submissions. In summary:

    (1) The Defendant '*readily accepts*' that '*both groups of Interveners are reputable and responsible organisations who wish to assist the Court by the provision of information and legal analysis in these proceedings*.' He adds that he '*does not seek to limit the information that is made available to the Court by the Interveners*.'

    (2) However, the Defendant then says that he '*proposes to confine his written and oral arguments only to those matters which impact upon the claim as advanced by the Claimant and the Special Advocates'*. He argues that: (a) '*Interveners' arguments are not directly relevant to the claim before the Court and cannot in any way be dispositive of the claim. In effect the Interveners' arguments are stand alone claims which seek to raise (complex) legal and factual arguments with reference to separate aspects of the Consolidated Criteria, namely Criterion One (rather than Criterion Two on which the Claimant relies)'* and (b) he '*has had no opportunity to serve evidence in response to these separate claims and will not be in a position to do so . . .*'

    (3) The letter ends by seeking to '*reserve*' the '*right to serve submissions and evidence in response to the interventions should that become necessary and subject to further directions from the Court.*'

11. The Defendant's position is, with respect, misconceived:

    (1) Under the Order of Blake J dated 22 September 2016 **[A95]** (as varied by the Order of Cranston J dated 13 October 2016 [**A114]**) the First Interveners were given permission to intervene.

    (2) The First Interveners' submissions are confined to the issues on which permission was given and as contemplated by the First Interveners' application to intervene. The Defendant does not seek to suggest otherwise.

(3) The Defendant's pleading point set out in the 24 January 2017 letter has already been raised unsuccessfully once, during the Defendant's attempt to prevent the First Interveners from having permission to intervene.[6]

(4) As to the Defendant's timing argument:

a. The First Interveners have complied with the timetable ordered by the Court, including service of their submissions by 16 January 2017.[7]

b. The Defendant has known since at least August 2016 that the First Interveners were proposing to rely on Article 16 and Common Criterion One.

c. In any event, the Defendant has had (and still has) ample time to contend that under Criterion One it has no obligations relating to Article 16 (a short point of construction), or that it has duly considered those obligations (a short point of fact, albeit one which seems untenable on the evidence).

12. Furthermore, the First Interveners' arguments are not '*standalone'*. They are directly relevant and do impact upon the claim as advanced by the Claimant and as addressed by the Defendant. In particular:

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[6] On 3 August 2016, the First Interveners made their application to intervene **[A90-A94].** In subsequent correspondence, the Defendant consented to the proposed intervention on the factual situation in Yemen, but objected to the proposed intervention on the State Responsibility issue, raising the same pleading point that he now seeks to revive (see Defendant's Letters to First Interveners of 17 August 2016, First Interveners' Letter to Defendant of 22 August 2016 and Defendant's Letter in response of 1 September 2016) (*not currently in Hearing Bundle*). By Order dated 22 September 2016 Blake J granted the application to intervene, including on the State Responsibility point [**A95**]. However, the Order stated (apparently erroneously) that the Defendant had not responded to the application. Accordingly, the First Interveners wrote to the Court to ensure that all relevant correspondence had been considered by the Judge when making his order (see First Interveners' Letter to Court of 26 September 2016) (*not currently in Hearing Bundle*). The Defendant then asked the Court to reconsider the 22 September Order, again advancing the pleading argument (see Defendant's email to the Court of 12 October 2016) (*not currently in Hearing Bundle*). On 13 October 2016, Cranston J varied the order, but maintained the permission to intervene **[A114].**

[7] Furthermore, the 16 January 2017 date for service of the Interveners' Submissions was agreed by the parties in circumstances where: (a) the Defendant had originally proposed a date of 20 January 2017, which was reflected in the Order of Cranston J dated 23 November 2016 [**A117-A118**]; (b) by Order of 14 December 2016 (sealed on 11 January 2017), the date was brought forward to 16 January 2017 [**A129-131**]); (c) this variation was made at the suggestion of the First Interveners, for the very purpose of allowing sufficient time for the Defendant to consider the Submissions of the First Interveners.

(1) The central issue in the case is whether any decisions to continue to grant and/or maintain licences have been taken after a '*lawful review*'. The First Interveners' arguments go directly to that issue.

(2) As set out in paragraph 9 above, the Defendant's own pleaded case puts compliance with '*any provision of the Criteria*' in issue.

(3) When considering whether there has been a '*lawful review'*, the Court should not consider Criterion 2(c) in isolation, but should read it together with Criterion 1 (and the UK's obligations arising from Article 16), especially in circumstances where both Criteria concern: (a) the KSA's alleged breaches of IHL in Yemen; and (b) the UK's level of knowledge or information in relation to those breaches.

(4) The First Interveners' arguments are also highly relevant to the question of what any future '*lawful review*' would entail.

CONCLUSION

13. In summary:

(1) There are additional reasons for the Court to find that the Secretary of State has failed to perform a lawful review as to whether the licences at issue in this case comply with the Consolidated Criteria.

(2) The Court should not hesitate to engage with the substance of the First Interveners' arguments.

SUDHANSHU SWAROOP QC
NIKOLAUS GRUBECK
ANTHONY JONES

30 January 2017