Appeal No: T3/2017/2079(C) and 2079(D)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
Judgment of Burnett LJ and Haddon-Cave J [2017] EWHC 1754 (Admin)

BETWEEN:

THE QUEEN
(on the Application of Campaign Against the Arms Trade)
Claimant/Appellant

-and-

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE
Defendant/Respondent

-and-

AMNESTY INTERNATIONAL
HUMAN RIGHTS WATCH
RIGHTS WATCH (UK)
First Interveners

-and-

OXFAM INTERNATIONAL
Second Intervener

WRITTEN SUBMISSIONS ON BEHALF OF AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH, AND RIGHTS WATCH (UK)

Introduction

1. Amnesty International, Human Rights Watch, and Rights Watch (UK) ('the Interveners') provide these written submissions pursuant to the permission granted by Lord Justice Irwin by Order dated 16 July 2018.

2. The Interveners have long histories of working to promote, protect, and monitor human rights, both in the UK and internationally. They share a commitment to ensuring that any decisions taken by the UK in relation to the export of materiel used in armed conflicts abroad conform with the requirements of international and domestic law. The Interveners benefit from a worldwide network of human rights researchers, such that they are able to obtain reliable information in relation to conditions on the ground in conflict zones, including in Yemen. Further, the Interveners employ experts in international human rights law, international

humanitarian law, and international criminal law to draft and review all of their publications, including their conclusions on violations of international law.

3. The Interveners have been granted permission to provide written submissions (limited to 20 pages), in relation to the following issues:[1]

   3.1. The value and unique advantages of the NGO, UN, and other third party reports filed as evidence of violations of international humanitarian law on the part of the Saudi-led coalition in Yemen, as well as the methodology underpinning those reports; and

   3.2. The position under international law with respect to the interpretation of the threshold of *'clear risk*' of a *'serious violation of international humanitarian law*' found in Criterion Two of the Consolidated EU and National Arms Export Licensing Criteria.

4. In short, the Interveners submit that: (a) the Divisional Court was wrong in law to deprecate the evidence in NGO, UN, and other third party reports generically, rather than properly assessing their individual merits: many such reports have real practical advantages and adopt sufficiently robust methodologies that they ought to have been given considerable weight in assessing the evidence regarding the actions of the Saudi-led coalition in Yemen; and (b) it would be consistent with international legal standards for this Court to adopt an interpretation of Criterion Two which considered the words '*clear risk*' to impose a moderate evidential threshold, as set out below.

Submissions

(1) UN, NGO, and Third Party Reports

5. Before the Divisional Court, the Claimant referred to the evidence provided by '*third party*' reports as raising a presumption of a '*clear risk*' of serious violations of international humanitarian law. The Divisional Court noted, at paragraph 205 of its judgment, that these third party reports included '*(i) the reports of United Nations agencies (including the United Nations Panel of Experts), (ii) the reports of the European Parliament, (iii) the reports of UK Parliamentary Committees, (iv) the reports of NGOs, (v) the reports of the Claimants and Intervenors and (vi) press and other media reports*'

6. Paragraph 201(ii) of the Divisional Court judgment questions the reliability of such evidence:

[1] Order of Irwin LJ, 16 July 2018.

'There is a significant qualitative difference between the risk analysis which the government agencies involved in the decision-making process are able to carry out, on the one hand, and the reports of the NGOs and press as to incidents in Yemen, on the other. The government system involves drawing upon, and drawing together, a large number of significant strands and sources of information, including evidence and intelligence not available to the public, NGOs or press, including through close contacts with the Saudi military. By contrast, the reports of the NGOs and press of incidents suffer from a number of other relative weaknesses. These include, that such organisations often have not visited and conducted investigations in Yemen, and are necessarily reliant on second-hand information. Moreover, ground witnesses may draw conclusions about airstrikes without knowledge of all the circumstances.'

7. The reliability and integrity of the reports of NGOs, the UN, and other third parties, including the press, is thus an issue in this case, as is the weight which the Secretary of State and the Divisional Court should have given to that evidence. The Divisional Court was wrong in law to conclude that there is a general qualitative difference between such third party information / analysis and governmental information / analysis, and to ascribe to the third party evidence less weight on that basis. The authorities make clear that what is required is a much more balanced and nuanced assessment of all relevant information, reflecting an overall picture of the available information. Each piece of information should be considered individually and assessed in light of its specific context, including factors such as access, impartiality, reliability, etc.

8. In *NA v United Kingdom*,[2] the European Court of Human Rights gave guidance as to the approach to be taken to in-country material from agencies of the UN, reputable NGOs, and governmental sources:[3]

'119 ... the Court recalls the principles recently set out in Application No.37201/06, Saadi v Italy, February 28, 2008 at [128]–[133], that in assessing conditions in the proposed receiving country, the Court will take as its basis all the material placed before it or, if necessary material obtained proprio motu. It will do so, particularly when the applicant—or a third party within the meaning of the art.36 of the Convention—provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. <u>The Court must be satisfied that the assessment made by the authorities of the contracting state is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations</u>. As regards the general situation in a particular country,

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2 *NA v United Kingdom* (2009) 48 EHRR 15.

3 Footnotes omitted; emphasis added.

the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection organisations such as Amnesty International, or governmental sources, including the US State Department.

120 In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.

121 The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that states (whether the respondent State in a particular case or any other contracting or non-contracting state), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that same consideration must apply, a fortiori, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.'

9. In *MD (Ivory Coast) v Secretary of State for the Home Department*,[4] the Court of Appeal considered the approach of the European Court of Human Rights in *NA* and found it to be authoritative.[5] In particular, Lord Justice Sullivan held that:

'*In the LP case the tribunal had relied on letters from the British High Commission. The European Court of Human Rights did not suggest that that was an impermissible practice and indeed in paragraph 121 it expressly acknowledged that States through their diplomatic missions and their ability to gather information will often be able to provide highly relevant information. However, that information is not simply to be taken at face value. As with background information that is contained in reports from other non-governmental organisations such as Amnesty International or other government sources such as the United States State Department, the information provided by the United Kingdom Diplomatic Service must be assessed in the light of all relevant factors including those factors specifically mentioned in paragraph 120 of NA: independence, reliability, objectivity, corroboration et cetera.*'

10. There are multiple other instances where senior appellate courts have relied upon and/or noted the value of UN and NGO expert opinions and reports. For example:

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4 *MD (Ivory Coast) v Secretary of State for the Home Department* [2011] EWCA Civ 989.

5 *MD*, [46] (per Sullivan LJ), [50] (per Toulson LJ) and [53] (per Pill LJ).

10.1. In *Sufi and Elmi v United Kingdom*, the Grand Chamber of the European Court of Human Rights extensively cited reports by the United Nations and NGOs, including both Amnesty International and Human Rights Watch.[6] It relied on this '*objective information*' as a basis for its findings.[7]

10.2. In *Saadi v Italy*, the Grand Chamber of the European Court of Human Rights had regard *'to the reports of Amnesty International and Human Rights Watch*' and held that *'[b]earing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that those conclusions are corroborated in substance by numerous other sources…, the Court does not doubt their reliability*;'[8]

10.3. In *Tworkowski v Judicial Authority of Poland*, referring to the Grand Chamber decision in *MSS v Belgium and Greece*,[9] Mr Justice Mitting noted that the Grand Chamber '*was satisfied that the applicant would be subjected to ill-treatment contrary to his rights under Article 3 in Greece because of numerous reports and materials from reputable international organisations, including: UNHCR, the European Commission for Human Rights, NGOs such an Amnesty International and Human Rights Watch, the Greek National Commission for Human Rights*;'[10]

10.4. In *R (EM (Eritrea)) v Secretary of State for the Home Department*, the Supreme Court held that '*particular importance should attach to the views of UNHCR and noted that ECtHR in MSS had treated UNHCR's judgment as "pre-eminent and possibly decisive*."'[11]

10.5. The Court of Appeal has repeatedly emphasised the value of reports by reputable NGOs such as the Interveners and the weight that should be afforded to them. For example:

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6 *Sufi and Elmi v United Kingdom* (2012) 54 EHRR 9, [121] ff. and [140] ff.

7 *Ibid.*, [248] and [287]-[292]

8 *Saadi v Italy* [2008] ECHR 179; (2009) 49 EHRR 30, [143].

9 *MSS v Belgium and Greece* [2011] ECHR 108; (2011) 53 EHRR 2.

10 *Tworkowski v Judicial Authority of Poland* [2011] EWHC 1502 (Admin), [14(5)].

11 *EM (Eritrea) v Secretary of State for the Home Department* [2014] AC 1321 (UKSC), [71]-[72] (Lord Kerr, on behalf of the Court).

10.5.1. In *MS (Bangladesh) v Secretary of State for the Home Department*, Lord Justice Davis referred to '*reputable independent bodies such as Amnesty International or Human Rights Watch*'.[12]

10.5.2. In *R v Immigration Appeal Tribunal*, Lord Justice Buxton held: '*Amnesty International is recognised as a responsible, important and well-informed body. Immigration tribunals will always give consideration to their reports, even though they are in report form and not in the form of evidence from someone present to be questioned.*'[13]

10.5.3. In *IA (Syria) v Secretary of State for the Home Department*, Lord Justice Toulson (as he then was) criticised the IAT's failure to give due weight to evidence provided by an NGO. He held:

> '*22. ... To treat the Amnesty International letter as if it were simply a letter written with no identifiable foundation was not a satisfactory way of approaching the document. Amnesty International is a body of high repute, and the document did indicate, in broad terms, its sources of information.*
> *23. Inevitably, in the area that such bodies are investigating, there may be difficulties in obtaining evidence from fully identifiable sources, but Amnesty International are well aware of that. It does not follow that a tribunal is bound to share their opinions on any particular matter, but the substance of that report did require the tribunal properly to engage with it…*
> *26. ... The issues which have been raised in the Amnesty International report need to be evaluated. ...*'[14]

10.6. The International Court of Justice, in its *Armed Activities (DRC v Uganda)* judgment,[15] examined allegations by the DRC concerning violations of IHRL and IHL by Uganda during its military intervention into the country. The ICJ held that it would '*take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources*.'[16]

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[12] *MS (Bangladesh) v Secretary of State for the Home Department* [2018] EWCA Civ 1258, [23].

[13] *R v Immigration Appeal Tribunal, ex p. Kilinc* (1999) Imm AR 588

[14] *IA (Syria) v Secretary of State for the Home Department* [2007] EWCA Civ 1390

[15] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, ICJ Rep 2005, 168 at p239.

[16] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, ICJ Rep 2005, 168 at p239.

10.7. The United States Supreme Court, in the separate cases of *Miller v Alabama* and *Graham v Florida*, relied upon data provided by Human Rights Watch and Amnesty International jointly with respect to juvenile incarceration across different jurisdictions.[17]

10.8. The position in Canada has been summarised by the Federal Court as follows:

10.8.1. In *Sittamplam v. Minister for Citizenship and Immigration*: '*Reports by Amnesty International, Human Rights Watch and the UNHCR are regularly used by tribunals and reviewing courts and are regarded as credibly reporting on human rights conditions in many different countries.*'[18]

10.8.2. In *Mahjoub v. Canada (Minister of Citizenship and Immigration)*: 'T*he delegate's blanket rejection of information from agencies with worldwide reputations for credibility such as AI and HRW is puzzling, especially given the institutional reliance of Canadian courts and tribunals on these very sources. Indeed, the Minister of Citizenship and Immigration frequently relies on information from these organizations in creating country condition reports, which in turn are used by Immigration and Refugee tribunals, in recognition of their general reputation for credibility. ... This reputation for credibility has been affirmed by Canadian courts at all levels. The Supreme Court of Canada relied on information compiled by AI, as well as one of its reports, in Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, at pages 829, 830, 839. That Court also cited AI in Suresh, above, at paragraph 11 ...*'[19]

10.9. The Constitutional Court of South Africa also noted the relevance of '*investigations conducted by reputable international organisations [including Amnesty International] and a Special Rapporteur appointed by the United Nations Human Rights Committee*.'[20]

11. In the context of a Criterion 2 assessment, the EU User's Guide to the Common Position ('**EU User's Guide**') explicitly listed both Amnesty International and Human Rights Watch as relevant information sources.[21] The Interveners note that the UK Government itself often cites,

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[17] *Miller v Alabama* 567 U.S. 460 (2012), pp21-22; and *Graham v Florida* 560 U.S. 48 (2010), p14.

[18] *Sittamplam v. Minister for Citizenship and Immigration* 2009 FC 65, [64].

[19] *Mahjoub v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1503, [72]-[73].

[20] *Kaunda and ors v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004), [123].

[21] General Secretariat of the Council of the European Union, User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military

and relies upon, research by UN bodies and NGOs such as Amnesty International and Human Rights Watch, including as regards the position in Yemen. For example:

11.1. The January 2019 edition of the Home Office Yemen Country Guidance,[22] which sets out the findings of reports from the UN Group of Experts report, the UN Human Rights Council report, and Human Rights Watch;[23]

11.2. A series of Foreign and Commonwealth Office updates during the course of the conflict in respect of the human rights situation in Yemen, which cite and rely upon reports from the UN Panel of Experts report, Amnesty International, and Human Rights Watch as evidence of attacks on civilians, unlawful detention and persecution of civilians and members of religious minorities;[24] and

11.3. Multiple other Foreign and Commonwealth Office reports, such as on Libya,[25] Bangladesh,[26] and Egypt[27] rely upon similar material, including reports by Amnesty International and Human Rights Watch.

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technology and equipment, COARM 172, CFSP/PESC 393 (20 July 2015) ('EU User's Guide'), Annex 1, available at: http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf

[22] Home Office, Country Policy and Information Note: Yemen: Security and humanitarian situation (Version 4.0, January 2019) ('Yemen Country Guidance'), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769333/Yemen_-_Sec_and_Hmtn_Sitn_-_CPIN_-_v4.0_.pdf

[23] Yemen Country Guidance, [8.4.1]-[8.4.6].

[24] See: Foreign and Commonwealth Office, Corporate Report: Yemen – In-Year Updated July 2015 (15 July 2015), available at: https://www.gov.uk/government/publications/yemen-in-year-update-july-2015/yemen-in-year-update-july-2015; Corporate Report: Human Rights Priority Country Status Report: January to June 2016, available at: https://www.gov.uk/government/publications/yemen-human-rights-priority-country/human-rights-priority-country-update-report-january-to-june-2016; and Corporate Report: Human Rights Priority Country Status Report: July to December 2016, available at: https://www.gov.uk/government/publications/yemen-human-rights-priority-country/human-rights-priority-country-update-report-july-to-december-2016

[25] Foreign and Commonwealth Office, Corporate Report: Libya – Human Rights Priority Country (8 February 2017), available at: https://www.gov.uk/government/publications/libya-human-rights-priority-country/libya-human-rights-priority-country

[26] Foreign and Commonwealth Office, Corporate Report: Human Rights Priority Country Status Report: Bangladesh (8 February 2017), available at: https://www.gov.uk/government/publications/peoples-republic-of-bangladesh-human-rights-priority-country/human-rights-priority-country-update-report-july-to-december-2016

[27] Foreign and Commonwealth Office, Corporate Report: Human Rights and Democracy: The 2017 Foreign and Commonwealth Office Report (5 October 2018), available at: https://www.gov.uk/government/publications/human-rights-and-democracy-report-2017/human-rights-and-democracy-the-2017-foreign-and-commonwealth-office-report

12. On the facts of the present case, the Divisional Court was wrong to accord the third party information before it less weight generally, compared to governmental information. As the methodology sections of the various third party reports before the Divisional Court make clear, the reports adopted rigorous methodologies and many of them are based on detailed in-country research, with others drawing on extensive interviews with recent refugees from Yemen. Reports based on work outside Yemen are no less rigorous and the process of evidence gathering and confirmation is just as comprehensive. The independence, reliability and objectivity of the Interveners' publications is fundamental to their reputation, and something which they make every possible effort to ensure and other relevant third parties are likely to be in a similar position.

13. While Rights Watch (UK) has not conducted relevant field research in Yemen, both Human Rights Watch and Amnesty International have undertaken extensive such research, including (contrary to what the Divisional Court suggested in paragraph 201(ii) of its judgment) multiple in-country investigations. The relevant reports prepared by them set out as much detail as they are prudently able to provide about their working methodologies, as summarised below. The Court will understand that the primary concern in this respect needs to be for the safety of all those working for and providing information to the Interveners as part of their field research.

14. As regards the Human Rights Watch reports published since the Saudi-led coalition's intervention in Yemen in March 2015, the organisation has conducted field research in the north and south of Yemen, including the Sana'a, Aden, Saada, Hajjah, 'Amran, Ibb, Taiz, and Hodeidah governorates. When conducting investigations into possible unlawful airstrikes, Human Rights Watch sought to gather a range of information, including interviews with victims, witnesses, and medical workers (in person or by telecommunication), site visits, analysis of satellite imagery, review of individual medical records and hospital log books, and examination of physical evidence such as weapons' remnants, craters and physical destruction, videos and photos, including by arms experts. Human Rights Watch has also conducted dozens of interviews with local activists, domestic and international human rights and humanitarian organizations, lawyers representing victims, and Yemeni government officials. Human Rights Watch analysed public statements that the Joint Incidents Assessment Team ('**JIAT**') produced over the last two years, as well as statements by coalition officials posted on government websites. All interviewees provided consent to be interviewed and were informed of the purpose of the interview and how their information would be documented or reported. No interviewee received remuneration for giving an interview.

15. Further, Human Rights Watch has repeatedly written to the coalition, its current and former member countries and the coalition's investigative mechanism since 2015 after conducting research, seeking information on coalition attacks documented by Human Rights Watch and any

investigations the coalition has undertaken into these attacks. The purpose of such letters is to provide an opportunity for member states, or for JIAT on behalf of the coalition, to confirm or deny the findings and their factual basis. As one example, before publishing its most recent report in August 2018, Human Rights Watch wrote to JIAT in early 2017, and to current and former coalition member countries in mid-2017. Human Rights Watch then published the letters but still received no reply. In 2018, Human Rights Watch again wrote to JIAT, and sent a copy to Saudi Arabia, the United Arab Emirates, Yemen, Qatar, Bahrain, and Kuwait, who sat on JIAT when it was initially announced. No current members of the coalition responded. Qatar provided a response in June 2018, which was included as an annex to the report.

16. As regards Amnesty International's work in the field, between February 2015 and May 2018, Amnesty International conducted seven field missions in the north and south of Yemen, covering Sana'a, Saada, Amran, Hodeidah, Ibb, Ta'iz, Lahj, and Aden. When conducting investigations, Amnesty International gathers information by interviewing survivors, victims, witnesses, medical and NGO personnel, journalists, lawyers and government officials on the ground, either in person or by telecommunication. All interviews are conducted in Arabic. Amnesty International investigates and corroborates the circumstances and impact of attacks by examining satellite imagery, medical reports, physical evidence (such as remnants from munitions used in attacks), and photos and videos with the original metadata. Images of weapon remnants are analysed by weapons experts, and images of the impact site are sent for ballistic analysis where possible. Amnesty International has repeatedly written to the Saudi authorities, detailing its findings and requesting information about the choice of targets, the decision-making process, and the rationale behind the airstrikes documented in its reports. Amnesty International has also requested that the Saudi authorities share the findings of any investigations that may have been carried out so far into documented airstrikes. No responses have been received.

17. The Interveners are unable to speak with direct authority on the methodology employed by the UN and other third party organisations. However, the introductions to and methodology sections of their reports show – unsurprisingly – that they take the need for reliability and objectivity very seriously.[28] As a member of international organisations, including the UN (and currently the EU), the UK is in some senses partly responsible for their reports.

18. In light of the above, it is apparent that the third party material before the Divisional Court was not, and could not properly be classified as being, in some generic sense weaker than information available to the UK government. Indeed, it had significant advantages in certain respects:

[28] Supplementary Bundle, Volume III, at C156, C206 and C335

18.1. Unlike the UK Government, which has not had a diplomatic on-the-ground presence in Yemen since February 2015 when its Ambassador was withdrawn,[29] the third party investigators were often able to undertake on-the-ground research;

18.2. The third party investigators in many cases had access to areas and/or segments of the population who could not be reached by the UK Government and its partners on the ground; and

18.3. The third party investigators enjoyed a perception of impartiality in the conflict, such that it was more likely that full and frank information would be provided by interviewees.

19. Further, the value of the third party reports in this case lie not only in the quality of any individual report, but also in the notable consistency in the findings across the various different reports (compiled by different organisations, applying different methods). Of particular significance is the consistency between contemporaneous third party reports and subsequent investigations specifically endorsed by the UK, such as the August 2018 report to the UN Human Rights Council of the Group of Independent Eminent International and Regional Experts (including the UK military expert Charles Garraway)[30] – a Group whose mandate the UK voted to renew in 2018.[31]

20. Accordingly, and assessed by reference to the criteria set out in the *NA v United Kingdom* case, including independence, reliability and objectivity, the third party material before the Divisional Court should have been subject to much more careful individual and collective scrutiny by the Court and should have been afforded greater weight. A proper risk assessment in respect of exports to Saudi Arabia ought to involve careful consideration of reliable third party evidence, since, as the House of Lords Select Committee on International Relations noted in its February

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[29] HM Government, World Location News: Yemen and the UK, available at: https://www.gov.uk/world/yemen/news

[30] 'Situation of human rights in Yemen, including violations and abuses since September 2014,' Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts and a summary of technical assistance provided by the Office of the High Commissioner to the National Commission of Inquiry (17 August 2018), UN Doc. A/HRC/39/43. https://www.ohchr.org/Documents/Countries/YE/A_HRC_39_43_EN.docx

[31] UN Human Rights Council, Resolution 39/16: The Human Rights Situation in Yemen, UN Doc. A/HRC/RES/39/16 (5 October 2018). https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/296/70/PDF/G1829670.pdf?OpenElement

2019 report, '*[r]elying on assurances by Saudi Arabia and Saudi-led review processes is not an adequate way of implementing the obligations of a risk-based assessment…*'[32]

(2) 'Clear Risk'

21. Criterion Two of the Consolidated EU and National Arms Export Licensing Criteria[33] ('**Consolidated Criteria**') is titled '*The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law*.' It provides, in part, that:

> *'[h]aving assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will … not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law*' (Criterion 2(c)).[34]

22. The meaning of the threshold test of '*clear risk*' is crucial to the proper construction of the negative obligation contained within Criterion 2(c). The exercise of assessing a '*clear risk*' for the purposes of the Criterion 2 requires that a decision-maker engages in a case-by-case analysis and takes into account a range of factors.[35] For example, the EU User's Guide, which the Consolidated Criteria reflect, proposes that a decision-maker should assess, among other factors, the recipient State's past and present record, formal stated intentions, and practical capacity to ensure compliance.[36] While not binding, the EU User's Guide is relevant for the interpretation of the Common Position and the Consolidated Criteria, given its explicit purpose to assist Member States in understanding and giving effect to their obligations. In relation to the similar test in Criterion 2(a) (a '*clear risk that the items might be used for internal repression*'), the Government's response to the House of Commons Quadripartite Committee 2005 Annual Report (in which the Committee had asked the Government to explain how it carried out the

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[32] House of Lords Select Committee on International Relations, 'Yemen: Giving Peace a Chance' (6th Report of Session 2017-19, HL Paper 290, 16 February 2019), [72]. https://publications.parliament.uk/pa/ld201719/ldselect/ldintrel/290/29002.htm

[33] Set out at: Hansard, Consolidated EU and National Arms Export Licensing Criteria: Written Statement, 25 March 2014, cols 9-14WS (Rt Hon Vince Cable MP, then Secretary of State for Business, Innovation, and Skills). https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm

[34] Consolidated Criteria, Criterion 2(c).

[35] See e.g. Divisional Court judgment, [179].

[36] EU User's Guide, [2.13].

assessment)[37] confirmed that it '*considers the nature of the equipment, the stated end-use of the equipment, and the end user*.'[38]

23. Neither the Consolidated Criteria, the EU Common Position, nor the EU User's Guide set out specific guidance on how onerous the standard of proof is under the *'clear risk*' test. Both the factual context and reference to comparable legal frameworks, however, indicate that the '*clear risk*' threshold was (and remains) met in the present case and that the Divisional Court was wrong to find otherwise.

24. As regards the factual context, this is addressed by the Claimant and the Special Advocates and is not repeated here. The interveners note that the European Parliament, in its September 2017 resolution on the implementation of the Common Position, stated its view that '*exports to Saudi Arabia are non-compliant with at least criterion 2 regarding the country's involvement in grave breaches of humanitarian law [in Yemen] as established by competent UN authorities*'[39] and called for an arms embargo on Saudi Arabia as a result.[40] Although the resolution did not go into detail regarding the required threshold for a breach of Criterion 2, it makes clear that on the facts the European Parliament was satisfied that it had been met, i.e. that the '*clear risk*' test had been satisfied in the context of arms exports to Saudi Arabia for use in Yemen.

25. As regards the position under comparable international frameworks, the Interveners have identified only two other relevant contexts in international law in which the same '*clear risk*'

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[37] House of Commons, Quadripartite Committee, 'Strategic Export Controls: 2007 Review: First Joint Report of Session 2006-07' (HC 117, 17 August 2007), [340]. https://publications.parliament.uk/pa/cm200607/cmselect/cmdfence/117/117.pdf

[38] HM Government, 'Strategic Export Controls: HMG's Annual Report for 2005, Quarterly Reports for 2006, Licensing Policy and Parliamentary Scrutiny: Response of the Secretaries of State for Defence, Foreign and Commonwealth Affairs, International Development and Business, Enterprise and Regulatory Reform' (Cm 7260, November 2007), p32. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243149/7260.pdf

[39] European Parliament, Resolution of 13 September 2017 on arms export: implementation of Common Position 2008/944/CFSP (2017/2029(INI)) ('Resolution on implementation of Common Position'), [17]. It is clear from the context of the foregoing that the reference is to breaches in Yemen [16]. The EU User's Guide recognizes that the European Parliament is one of the bodies competent to establish serious violations of human rights for the purposes of an assessment under Criterion 2(c): EU User's Guide, [2.6] and Annex III. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0344+0+DOC+PDF+V0//EN

[40] Resolution on implementation of Common Position, [17].

threshold is used. These are (i) the OSCE Document on Small Arms and Light Weapons[41] and (ii) the Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons.[42] Both instruments provide, *inter alia*, that '*[e]ach participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might … Be used for the violation or suppression of human rights and fundamental freedoms … [or] Prolong or aggravate an existing armed conflict … or threaten compliance with international law governing the conduct of armed conflict*.'[43] In respect of both of these instruments, however, there is a lack of commentary or jurisprudence elucidating the meaning of the '*clear risk*' threshold for the purposes of those instruments.

26. The International Committee of the Red Cross ('ICRC'), in its guidance on *Arms Transfer Decisions* (the 'ICRC Guidance'), states:[44]

> *'For the purposes of the arms transfer risk assessment, isolated incidents of violations are not necessarily indicative of a recipient's attitude towards IHL or human rights law, and may not by themselves be considered a sufficient basis for denying an arms transfer. However, any discernible pattern of violations, or any failure by the recipient to take appropriate steps to put an end to violations and to prevent their recurrence, should cause serious concern. The indicators listed in Section 4 are relevant to all arms transfer risk assessments …'*

27. Section 4 of the ICRC Guidance sets out a non-exclusive list of 'indicators to be considered in a risk assessment'. These include the recipient's '*past and present record of respect for IHL and human rights law*', '*intention as expressed through formal commitments*', and '*capacity to ensure that the arms or equipment transferred are used in a manner consistent with IHL and human rights law*' as well as '*the occurrence of serious violations of human rights law and other patterns of*

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[41] Organization for Security and Co-operation in Europe, OSCE Document on Small and Light Weapons, FSC.DOC/1/00/Rev.1 (20 June 2012) ('OSCE Document'), p5. https://www.osce.org/fsc/20783?download=true

[42] Wassenaar Arrangement, Best Practice Guidelines for Exports of Small and Light Weapons (12 December 2002) ('Wassenaar Arrangement Guidelines'). https://www.wassenaar.org/app/uploads/2016/07/Export_Small_Arms_Light_Weapons_Guidelines.pdf

[43] OSCE Document, Common Export Criterion 2(b)(i) and (v), p5; and Wassenaar Arrangement Guidelines, 2(e) and (i), pp2-3.

[44] ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria, A Practical Guide*, August 2016, p.12; available at: https://shop.icrc.org/decisions-en-matiere-de-transferts-d-039-armes-application-des-criteres-fondes-sur-le-droit-international-humanitaire-2809.html

human rights violations in the recipient country'.[45] Again, whilst this gives helpful indications of the matters to be taken into account, it does not seek to specify the level of risk required.

28. Further guidance as to the level of proof required under the '*clear risk*' standard may be derived from two relevant sources of international law:[46]

    28.1. The meaning of the standard of '*clear risk of a serious breach*' of EU values under Article 7(1) of the Treaty on European Union ('TEU');[47] and

    28.2. The '*real risk*' test widely used in the context of extradition, and which has been contrasted with the '*clear risk*' threshold under Article 7(1) TEU.

Article 7(1) of the Treaty on European Union

29. Article 7 of the Treaty on European Union provides a procedure by which the Council may decide to suspend certain rights of a Member State. The first step of that process is set out in Article 7(1), which provides, *inter alia*:

> '*On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council ... after obtaining the consent of the European Parliament may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 [of the TEU] …*'[48]

30. It is appropriate to look to the *'clear risk*' threshold in Article 7 of the TEU for secondary guidance as to the meaning of the *'clear risk*' threshold in Criterion 2 of the Consolidated Criteria (which mirrors Criterion 2 of the Common Position), since both usages exist within EU law in equivalent contexts of assessing and responding to the risk of serious unlawful actions by sovereign entities. The European Commission's Communication on the Article[49] explains the threshold as follows:

> *'The clear risk of a serious breach*

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[45] Ibid. p14.

[46] The Arms Trade Treaty uses the wording 'overriding risk', rather than 'clear risk'.

[47] Consolidated Version of the Treaty on European Union, OJ C 325, 24 December 2002, pp5-181 ('TEU').

[48] TEU, Article 7(1).

[49] European Commission, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union in based, COM (2003) 606 final (15 October 2003) ('Commission Communication'). http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf

A risk of serious breach remains within the realm of potential, though there is a qualification: the risk must be "clear," excluding purely contingent risks from the scope of the prevention mechanism. A serious breach, on the other hand, requires the risk to have actually materialised. To take a hypothetical example, the adoption of legislation allowing procedural guarantees to be abolished in wartime is a clear risk; its actual use even in wartime would be a serious breach.
By introducing the concept of "clear risk," Article 7 of the Union Treaty provides a means of sending a warning signal to an offending Member State before the risk materialises.' [50]

31. That Communication clarifies that, for the purposes of Article 7(1) TEU – and, the Interveners submit, the same wording in Criterion 2 of the Common Position – a '*clear risk*' sits between a *contingent or hypothetical risk* at one extreme of the spectrum and a risk which has *actually materialized* at the other end. The example deployed – the existence (but not use) of legislation the use of which would constitute a breach – is instructive. That example demonstrates that a '*clear risk*' of an outcome should be taken to exist where, for instance, the formal or practical conditions exist for that outcome to occur, but as a matter of fact the outcome has not (or not yet) come to pass.

32. Steps have been taken under Article 7(1) in respect of both Poland and Hungary. In respect of Poland, the European Parliament on 15 November 2017 adopted a resolution in which the Parliament concluded that '*the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU*.'[51] That conclusion was based upon what the Parliament maintained was its *'concern*'[52] and '*dee[p] concer[n]*'[53] over legislative developments relating to the judiciary which '*ris[k] the systematic undermining of fundamental human rights*.'[54]

33. The European Commission has also adopted its Reasoned Proposal calling upon the Council to make a determination of '*clear risk*' for the purposes of Article 7(1) TEU.[55] That Reasoned Proposal does not expressly advert to the standard of likelihood required to satisfy the '*clear*

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[50] Commission Communication, [1.4.2].

[51] European Parliament, Resolution of 15 November 2017 on the Situation of the Rule of Law and Democracy in Poland (2017/2931(RSP)) ('Poland Resolution'), [16]. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0442+0+DOC+PDF+V0//EN

[52] Poland Resolution, [2].

[53] Poland Resolution, [4].

[54] Poland Resolution, [2].

[55] European Commission, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, COM (2017) 835 final ('Commission Proposal'). http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108

risk' threshold, but concludes that the test has been met in respect of Poland on the basis of its survey of a series of national laws adopted and the actions of the Acting President of the Polish Constitutional Tribunal in unlawfully appointing certain judges and excluding certain others from particular positions in recent years.[56] The Commission observes that '*[t]he common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law.*'[57] The Commission therefore adverts to legislative and practical changes in the judiciary in Poland which *provide the conditions* for direct or indirect interference with fair trials (by, for instance, allowing for executive control or placing the employment of judges in jeopardy). That indicates that the Commission, in keeping with the view expressed in the general Communication on Article 7 TEU, is applying a test when analysing the situation of the judiciary in Poland which finds a '*clear risk*' of a serious breach of the rule of law where *the conditions exist for that breach to occur*, even if those breaches have not (yet) fully come to pass.

34. In respect of Hungary, the European Parliament on 12 September 2018 adopted a resolution calling for the Council to make a determination of *'clear risk*' under Article 7(1) TEU of a serious breach of fundamental EU values.[58] In that resolution, the Parliament relied upon its *'concerns*' in relation to a wide range of issues affecting civil society generally (including the independence of the judiciary, freedom of expression, freedom of religion, the rights of migrants and minorities), and took the view that '*the facts and trends mentioned in [the Parliament's Reasoned Proposal] represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof.*'[59] The Parliament's Reasoned Proposal sets out a catalogue of concerns raised by UN bodies and international NGOs with the conduct of the Hungarian authorities, and a series of adverse judgments of the European Court of Human Rights, but does not give any indication of how much of that information (or how little) was required by the Parliament to meet the '*clear risk*' threshold.

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56 See: Commission Proposal, Parts 3 and 4.

57 Commission Proposal, (173).

58 See: European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) ('Hungary Resolution'). http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0340+0+DOC+PDF+V0//EN

59 Hungary Resolution, [2].

'*Real risk*'

35. The '*real risk*' standard is a familiar test in international human rights law, applying to situations where a State's own obligations to protect human rights may be violated by that State transferring a person to another jurisdiction where they face the risk of certain serious violations, particularly violations of the right to life,[60] the prohibition of torture or inhuman or degrading treatment or punishment,[61] and the prohibition of slavery.[62] In *Soering v United Kingdom*,[63] the European Court of Human Rights held that the decision to extradite a person would engage a State's own obligations under Article 3 '*where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country*.'[64] In interpreting that test, in *Rabone v Pennine Care NHS Trust*,[65] Lord Dyson drew a distinction between a '*real risk*' and a '*remote or fanciful*' risk, but at the same time rejected the suggestion '*that there had to be a "likelihood or fairly high degree of risk*"' to satisfy the *'real risk*' threshold.[66] Accordingly, on the continuum of likelihood of outcomes, a *'real risk*' would appear to sit between a *'remote or fanciful*' risk at one extreme, and a *'likelihood*' at the other.

36. Seeking to quantify the likelihood at the '*real risk*' point of the continuum, Lord Justice Sedley in *Batayav v Secretary of State for the Home Department (No 1)* provided the hypothetical illustration that '*[i]f a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening*.'[67] As a result, his Lordship advised against *'assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability*…'[68] Both observations have recently been followed by the Court of Appeal in *R (TDT) v Secretary of State for the Home Department*.[69]

37. The relationship between the '*real risk*' test in the context of extradition cases and the '*clear risk*' standard as used in Article 7(1) TEU has been addressed by both the Court of Justice of the

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60 European Convention, Article 2.

61 European Convention, Article 3.

62 European Convention, Article 4.

63 *Soering v United Kingdom* [1989] ECHR 14; (1989) 11 EHRR 439.

64 *Soering*, [91].

65 *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 (UKSC).

66 *Rabone*, [38] (Lord Dyson).

67 *Batayav v Secretary of State for the Home Department (No 1)* [2003] EWCA Civ 1489, [38] (Sedley LJ).

68 *Batayav*, [39] (Sedley LJ).

69 *R (TDT) v Secretary of State for the Home Department* [2018] 1 WLR 4922 (CA), [44]-[46] (Underhill LJ, on behalf of the Court).

EU and by the Divisional Court in 2018. Both courts were faced with the question of whether the existence of a reasoned Commission Proposal demonstrating, for the purpose of Article 7(1) TEU, a '*clear risk*' of violations of fundamental principles by a Member State should be accepted as demonstrating that, for the purpose of extradition law, a '*real risk*' exists of that State violating the extradited person's fundamental rights.

38. The case of *Minister for Justice and Equality v LM* was a preliminary reference made by the High Court of Ireland in relation to a claim by a person seeking to resist extradition to Poland pursuant to a European Arrest Warrant.[70] Extradition was resisted on the grounds that it would expose him to a '*real risk of a flagrant denial of justice*' in contravention of Article 6 of the European Convention (which, as a fundamental right recognized in Article 6(2) TEU, the EU extradition system is required to respect by virtue of Article 1(3) of the European Arrest Warrant Framework Decision).[71] As evidence of that '*real risk*,' the claimant relied upon the Commission's Reasoned Proposal regarding the situation of the judiciary in Poland, and its conclusion of a '*clear risk*' as to violation of fundamental EU principles. The Court of Justice concluded that even the determination by the Commission of a *'clear risk*' of a serious breach of the rule of law impairing judicial independence in Poland did not mean that the Irish court was absolved from the obligation of separately taking a view as to whether the standard of a '*real risk of a flagrant denial of justice*' was met.[72]

39. The *LM* decision demonstrates that there will be cases where the correct conclusion is that the '*clear risk*' standard for the purposes of an Article 7(1) TEU assessment is met but that, nonetheless, there is not a '*real risk*' for the purposes of a decision on the lawfulness of an extradition. That same relationship between the '*clear risk*' standard and the '*real risk*' extradition test was endorsed by the Divisional Court in the case of *Lis and ors v Poland*. In that case, the Court concluded that:

> *'By reason of the matters contained in the Commission's Reasoned Proposal and in other material to which we have referred, there is sufficient concern about the independence of the Polish judiciary to mean these applicants … should have the opportunity to advance reasons why they might have an exceptional case requiring individual "specific and precise assessment" to see whether there are substantial grounds for believing they individually might run a real risk of a breach of their fundamental rights to a fair trial.*'

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[70] Case C-216/18 *Minister for Justice and Equality v LM* ECLI: EU:C: 2018:586 (*'LM*').

[71] See: Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009F0299&from=EN

[72] *LM*, [69].

40. If the Commission Reasoned Proposal may find a '*clear risk*' of violations of judicial independence in Poland, but the Divisional Court stipulates that further investigation is necessary before a determination of a '*real risk*' of a breach of fair trial rights in the Polish courts may be made, it would appear that the evidential threshold to satisfy a '*clear risk*' ought to be interpreted as either similar to, or even less stringent than, the '*real risk*' test. Accordingly, mindful that the '*real risk*' standard refers to something '*distinctly less than a probability*,' the '*clear risk*' standard would not appear to indicate a level of likelihood any higher than that.

41. Drawing the points together, the Interveners submit that the '*clear risk*' standard at issue in this case may, in keeping with relevant international legal materials, properly be interpreted as a moderate threshold denoting an outcome which, while well below the level of a probability, is an actual possibility given the facts observed in relation to the Saudi-led coalition's acts and omissions. In the context of export licensing, a clear risk of a serious violation of international humanitarian law would need to be determined in light of a recipient State's military capability, the nature of the specific arms to be exported, the State's past and present conduct, and objective indicators of its attitude, including whether the State has held those responsible for past breaches to account and the State's general human rights compliance. On the facts of the present case, there can be no doubt that the threshold is met and there is a clear risk of a serious violation of international humanitarian law. Given the factual context, this conclusion would remain the same, even if a higher standard for '*clear risk*' were adopted.

Conclusion

42. For these reasons, the Interveners invite the Court to find that (i) the Divisional Court's analysis of the material by third parties such as the Interveners was inadequate, in that it should have been subjected to much more careful scrutiny and afforded greater weight; and (ii) the '*clear risk*' test should be construed in light of the above submissions.

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22 March 2019