Case No: AC-2023-LON-003634

Neutral Citation Number: **[2025] EWHC 1615 (Admin)**

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2025

Before:

LORD JUSTICE MALES
-and-
MRS JUSTICE STEYN

- -

Between:

THE KING ON THE APPLICATION OF AL-HAQ	**Claimant**
- and –	
SECRETARY OF STATE FOR BUSINESS AND TRADE	**Defendant**
-and-	
1) OXFAM **2) AMNESTY INTERNATIONAL UK** **3) HUMAN RIGHTS WATCH**	**Interveners**

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Philippa Kaufmann KC, Raza Husain KC, Blinne Ní Ghrálaigh KC, Admas Habteslasie, Zac Sammour, Mira Hammad, Rayan Fakhoury, Jagoda Klimowicz, Aislinn Kelly-Leith, Aliya Al-Yassin & Rebecca Brown (instructed by **Bindmans LLP**) for the **Claimant**

Sir James Eadie KC, Sam Wordsworth KC, Richard O'Brien KC, Melanie Cumberland KC, Jason Pobjoy KC, Jessica Wells, Kathryn Howarth, Jackie McArthur & Jonathan Worboys (instructed by **Government Legal Department**) for the **Defendant**

Marie Demetriou KC, Professor Philippa Webb, Sean Aughey, Ali Al-Karim & Alastair Richardson (instructed by **Leigh Day**) for the **First Intervener**

Jemima Stratford KC, Conor McCarthy, Anthony Jones & Hugh Whelan (instructed by **Deighton Pierce Glynn**) for the **Second & Third Interveners** (written submissions only)

Tim Buley KC, Dominic Lewis & Rachel Toney (supported by the Special Advocates' Support Office) as **Special Advocates**

Hearing dates: 13, 14, 15 & 16 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 30 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES AND MRS JUSTICE STEYN:

Introduction

1. On 2nd September 2024 the Defendant, the Secretary of State for Business and Trade ('the Secretary of State'), decided to suspend licences authorising the export of items that might be used in carrying out or facilitating Israeli military operations in the conflict in Gaza. He did so explicitly because the Government had formed the view that Israel was not committed to compliance with international humanitarian law ('IHL') in the conflict in Gaza and that there was therefore a clear risk that such items might be used in that conflict to commit or facilitate a serious violation of IHL. However, the Secretary of State excluded from that suspension licences for the export of components for F-35 combat aircraft which could not be identified as destined for Israel. In this claim for judicial review the Claimant, supported by the Interveners, challenges the lawfulness of this exclusion, which has been referred to as the 'F-35 Carve Out'.

2. In reaching these decisions, together referred to as 'the September Decision', the Secretary of State received advice from the Defence Secretary and the Foreign Secretary. In short, the advice of the Defence Secretary, set out in a letter dated 18th July 2024, was that:

   (1) the multinational F-35 joint strike fighter programme ('the F-35 Programme'[1]) is significantly dependent on the United Kingdom as the largest national provider of component parts outside the United States;

   (2) it was not currently possible to suspend licensing for export of F-35 components for use by Israel without having an impact on the entire F-35 Programme;

   (3) a suspension of licensing for all F-35 nations would have a profound and immediate impact on international peace and security, would undermine US confidence in the UK and NATO at a critical juncture, would seriously undermine the credibility of the UK as a trusted partner on the international stage, and would undermine a key capability allowing the UK and its closest allies and partners to address current security challenges.

3. Again in short, the advice of the Foreign Secretary, set out in a letter dated 29th August 2024, was that:

   (1) Israel was not committed to compliance with IHL in the conflict in Gaza;

   (2) there was therefore a clear risk that military equipment exported to Israel which might be used in that conflict might be used to commit or facilitate a serious violation of IHL; and

   (3) licences of such equipment should therefore be suspended; but

[1] An international collaboration with the US and six other international partners for the production of F-35 fighter aircraft, in which components manufactured by the UK are supplied to final assembly facilities in the US, Italy and Japan, with completed aircraft and spare parts then supplied to partner nations and certain others, including Israel: see further at paras 22 to 25 below.

(4) because of the critical impact on international peace and security likely to be caused by suspending the export of components from the United Kingdom to the F-35 Programme, an exception should be made for the export of such components save for those which could be identified as destined for Israel.

4. The September Decision was set out in a letter dated 2nd September 2024 ('the Decision Letter'). Referring to the F-35 Carve Out, it stated the Secretary of State's view that the advice of the Defence Secretary and the Foreign Secretary that suspending F-35 licences 'would have a critical impact on international peace and security, including NATO's defence and deterrence … provides justification to take exceptional measures to avoid these impacts, consistent with the UK's domestic and international legal obligations'.

5. The Secretary of State announced this decision to Parliament on the same day in a written statement. He explained that the F-35 Carve Out was 'in line with the Written Ministerial Statement that issued the Strategic Export Licensing Criteria[2] on 8 December 2021, which provided the application of the Criteria would be without prejudice to the application to specific cases of specific measures as may be announced to Parliament from time to time'.

6. Also on 2nd September 2024, an oral statement to Parliament was made by the Foreign Secretary. Referring to the F-35 Carve Out, the Foreign Secretary described the F-35 Programme as 'crucial to wider peace and security' and said that 'the effects of suspending all licences for the F-35 programme would undermine the global F-35 supply chain that is vital for the security of the UK, our allies and NATO'.

7. The Claimant, a non-governmental human rights organisation established in 1979, contends that the F-35 Carve Out was unlawful. There are five grounds of challenge, as follows:

(1) **Ground 8**: the Defendant was wrong (i) to assess that continued exports of military equipment to Israel would be compatible with Criterion 1 of the SELC, which requires 'respect for the UK's international obligations and relevant commitments' and (ii) in his self-direction that the F-35 Carve Out was consistent with the UK's … international law obligations'. In so concluding, the Secretary of State misunderstood and misapplied:

(A) Common Article 1 of the Geneva Conventions[3], ratified by the UK on 29th September 1957;

(B) Articles 6 and 7 of the Arms Trade Treaty, ratified by the UK on 2nd April 2014;

(C) Article I of the Genocide Convention[4], to which the UK acceded on 30th January 1970; and

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[2] Criteria for the licensing of exports of military equipment which constitute guidance given under section 9 of the Export Control Act 2002: see further paras 19 to 21 below.

[3] These include, to give them their full titles, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, both of 12th August 1949.

[4] Convention on the Prevention and Punishment of the Crime of Genocide 1949.

(D) rules of customary international law reflected in Articles 16 and 41 of the International Law Commission's Articles on State Responsibility[5].

(2) **Ground 9**: the Defendant was wrong to conclude that the F-35 Carve Out was 'consistent with the UK's domestic law obligations'. In fact it was not because it breached three rules of customary international law which either have been or should be received into the common law, namely the obligations to ensure respect for the Geneva Conventions, to prevent genocide and not to facilitate internationally wrongful acts.

(3) **Ground 10**: the F-35 Carve Out was *ultra vires* the Defendant's powers under the Export Control Act 2002 because it gave rise to a significant risk of facilitating criminal offences under the Geneva Conventions Act 1957 and the International Criminal Courts Act 2001.

(4) **Ground 11**: the F-35 Carve Out was irrational (as a matter of process irrationality) because the reasoning relied on in support of it suffers from a 'logical error or critical gap'.

(5) **Ground 12**: the Secretary of State erred in his approach to the assessment of whether there was good reason to depart from his published policy on the export of arms. In particular, in balancing the risks of continuing to export F-35 parts against the risks of suspending those exports, he unreasonably limited his consideration of the former to the existence of unspecified serious violations of IHL without making any attempt to assess the nature, extent or potential gravity of these risks, while adopting a different approach in relation to his consideration of the risks of suspending licences.

8. The Claimant also challenges a further aspect of the September Decision (**Ground 13**), contending that it was unlawful to limit the suspension of arms exports to Israel to arms which might be used in the conflict in Gaza, and that all such exports should be suspended.

9. These challenges were the subject of a rolled up hearing between 13th and 16th May 2025. They are concerned with the lawfulness of the F-35 Carve Out as an element of the September Decision. This means that although there have been further developments in the conflict in Gaza since September 2024, and further public statements by His Majesty's Government (including a statement in Parliament by the Foreign Secretary on 20th May 2025, after the hearing before us had concluded, that trade talks with Israel were being suspended), those further developments are not relevant to the lawfulness of the September Decision.

10. It is apparent from what we have said already that the claim for judicial review faces a high hurdle. It would require this court to conclude that a decision, the F-35 Carve Out, was unlawful, when that decision was considered by the Defence Secretary and the Foreign Secretary who are constitutionally accountable to Parliament, to be 'vital' for the security of the UK. For the reasons which follow in this OPEN judgment, supplemented by a short CLOSED judgment, we have concluded that the claim cannot

[5] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001.

surmount this hurdle and that permission to bring a claim for judicial review must be refused.

Procedural background

11. The claim form was filed on 7th December 2023 as a challenge to previous decisions not to suspend export licences for military equipment for Israel. The claim was listed for a rolled up hearing to commence in October 2024, but that hearing was overtaken by the September Decision, which transformed the scope of the proceedings. Following that decision, the court discharged all previous case management orders and set directions for disclosure and amended pleadings, designed to enable the new scope of the claim to be determined.

12. Following a hearing on 18th November 2024, in a judgment dated 30th January 2025 ([2025] EWHC 173 (Admin)), Mr Justice Chamberlain:

    (1) held that insofar as the existing Grounds 1 to 6 were properly characterised as challenges to decisions made before the September Decision, there was no value in the court determining those grounds;

    (2) rejected the Claimant's submission that it was necessary to consider the matters pleaded in Grounds 2 to 6 in determining the new Grounds 12 and 13;

    (3) held that the new Ground 8 did not require reference to existing Ground 7 and consequently refused permission to amend to plead Grounds 1 to 7 as relevant to the challenge to the September Decision; and

    (4) granted permission to the Claimant to plead Grounds 8 to 13 as summarised above, which grounds would proceed to the rolled up hearing which has now taken place before us.

13. The effect of this judgment of Mr Justice Chamberlain is that the only grounds which remain live are Grounds 8 to 13 summarised above. Accordingly it is unnecessary to say anything further about Grounds 1 to 7.

The Export Control Act 2002

14. The export of arms and other military equipment is governed by the Export Control Act 2002, which authorises the Secretary of State to make provision for or in connection with the imposition of export controls. That is subject to section 5, which provides:

> '**General restriction on control powers**
>
> (1) Subject to section 6, the power to impose export controls, transfer controls, technical assistant 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.
>
> (3) …

> (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. …'

15. One of the categories specified in the Schedule is military goods.

16. Section 9 of the Act requires the Secretary of State to issue guidance about the general principles to be followed when exercising licensing powers. It provides:

> '**9. Guidance about the exercise of functions under control orders**
>
> (1) This section applies to licensing powers and other functions conferred by a control order on any person in connection with controls imposed under this Act.
>
> (2) The Secretary of State may give guidance about any matter relating to the exercise of any licensing power or other function to which this section applies.
>
> (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 –
>
> (a) issues relating to sustainable development; and
>
> (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.
>
> (6) A copy of any guidance shall be laid before Parliament and published in such manner as the Secretary of State may think fit.
>
> (7) In this section "guidance" means guidance stating that it is given under this section. …'

17. The Schedule to the Act provides that export controls may be imposed in relation to any goods whose export or use is capable of having a 'relevant consequence'. A relevant consequence is defined as including an adverse effect on the national security

of the UK and breaches of international law and human rights. The latter are defined as:

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

18. The Export Control Order 2008 (SI 2008/31) makes it unlawful to export military goods without a licence.

The Strategic Export Licensing Criteria

19. Guidance pursuant to section 9 of the 2002 Act was set out in a statement to Parliament made by the Secretary of State for International Trade on 8th December 2021, updating previous guidance. Introducing the guidance, the Secretary of State said that:

> 'HM Government is committed to a robust and transparent export control regime for military, dual-use and other sensitive goods and technologies. The purpose of these controls is to promote global security and facilitate responsible exports. They help to ensure that goods exported from the United Kingdom do not contribute to the proliferation of weapons of mass destruction (WMD) or a destabilising accumulation of conventional weapons. They protect the United Kingdom's security and our expertise by restricting who has access to sensitive technologies and capabilities. 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.'

20. She went on to identify eight criteria for the licensing of exports of military goods, the 'Strategic Export Licensing Criteria' or 'SELC', of which the first two are relevant for present purposes These were:

> '**CRITERION ONE**
>
> Respect for the UK's international obligations and relevant commitments, in particular sanctions adopted by the UN Security Council, agreements on non-proliferation and other subjects, as well as other international obligations.
>
> The Government will not grant a licence if to do so would be inconsistent with, inter alia:

a) the UK's obligations and its commitments to enforce United Nations and Organisation for Security and Co-operation in Europe (OSCE) sanctions, as well as national sanctions observed by the UK and other relevant commitments regarding the application of strategic export controls;

b) the UK's obligations under the United Nations Arm Trade Treaty;

c) the UK's obligations under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;

d) the UK's obligations under the United Nations Convention and Certain Conventional Weapons, the Convention on Cluster Munitions (the Oslo convention), the Cluster Munitions (Prohibitions) Act 2010, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Ottawa convention) and the Land Mines Act 1998;

e) the UK's commitments in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, and the Wassenaar Arrangement;

f) the OSCE principles governing conventional arms transfers.

CRITERION TWO

Respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:

a) Not grant a licence if it determines there is a clear risk that the items might be used to commit or facilitate internal repression;

Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment; summary or arbitrary executions; disappearances; arbitrary detention, and other serious violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

> For these purposes items which might be used for internal repression will include, inter alia, items where there is evidence of the use of these or similar items for internal repression by the proposed end-user, or where there is reason to believe that the items will be diverted from their stated end-use or end-user and used for internal repression. The nature of the items to be transferred will be considered carefully, particularly if they are intended for internal security purposes.
>
> b) Exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN or the Council of Europe;
>
> Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, the Government will:
>
> c) Not grant a licence if it determines there is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law.
>
> In considering the risk that items might be used to commit or facilitate internal repression, or to commit or facilitate a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit or facilitate gender-based violence or serious acts of violence against women or children.'

21. However, the Secretary of State also stated that:

> 'The application of these Criteria will be without prejudice to the application to specific cases of specific measures as may be announced to Parliament from time to time.'

The F-35 Programme

22. The F-35 Programme is an international collaborative defence programme which produces and maintains F-35 combat aircraft. The UK is one of eight 'partner nations' participating in this programme. As such, it contributes components which are destined for assembly lines for the production of new aircraft in the US, Italy and Japan, and for the 'Global Spares Pool', which is used to sustain the existing fleet. The UK is the second largest contributor of components after the US. The programme is significantly dependent upon the UK which is the design authority and sole supplier for a large number of components which are critical to enable the aircraft to operate. These include ejection seats, the tail sections of the aircraft's fuselage, and other components which are integrated by other partner nations into higher assemblies and systems. The manufacture and assembly of a new aircraft takes about three years.

23. F-35s are fighter aircraft with stealth capabilities which means that they are not easily seen by enemy radar. They are amongst the most capable aircraft of their type in the world, providing partner nations with a strike capability which many adversaries do not have.

24. The F-35 global fleet is actively deployed in operations around the globe. These operations include national or NATO operations such as air policing across NATO's flanks, from Iceland to the Baltic and Black Sea region, operations against ISIL, and forward presence missions to reassure allies and deter adversaries. The advice of the Defence Secretary was that the deployment of F-35s across Europe represents a significant element of NATO's defence posture against Russia and other threats, that an inability to employ F-35s in sufficient numbers would drastically reduce NATO's ability to gain control of the air in any conflict, leading to a protracted and attritional land campaign with much higher casualty rates, and that any disruption to the programme would have a critical impact on the UK's own defence capability.

25. Israel is not a partner nation, but is one of the customers of the F-35 Programme. As such, it orders new F-35 aircraft from time to time and is able to draw on the Global Spares Pool for spare parts. It follows from the nature of the programme that any new F-35 aircraft supplied to Israel will include components manufactured in the UK (although any new orders placed after the September Decision are unlikely to be fulfilled before late 2027), but that spare parts drawn by Israel from the Global Spares Pool will not necessarily do so, although they may.

The lead up to the September Decision

26. As is well known, the current conflict in Gaza began as a response to the terrorist atrocities committed by Hamas on 7th October 2023. On 9th October 2023 the Export Control Joint Unit ('ECJU'), a cross-departmental team responsible for the UK's system of export controls and licensing, began a review of all extant licences under which military or dual use items could be exported to Israel. At the same time, an IHL Compliance Assessment Project was undertaken by a group described as the IHLCAP Cell, gathering information from a wide range of sources including reports from NGOs operating in Gaza, FCDO desks, media reports, statements from NGOs and other organisations, and engagement with the Israeli Government. The information thus gathered was compiled into a document called the 'Evidence Base'. The Evidence Base also drew on a log of military incidents in Gaza prepared by an independent NGO, the Centre for Information Resilience.

27. This information was analysed by the IHLCAP Cell to determine whether the available evidence indicated that there may have been a breach of IHL. The analysis was hampered by the lack of reliable information about specific incidents, much of which was highly contested and subject to deliberate misinformation, together with the limitations in the extent to which the Government of Israel was prepared to share information with the UK Government. Regular IHLCAP Assessments were provided as to Israel's capability and commitment to comply with IHL, together with its record of such compliance. These assessments, together with submissions by ECJU, informed the Foreign Secretary's various decisions and recommendations to the Secretary of State. In addition the Foreign Secretary received regular updates from FCDO officials concerning incidents or occurrences in the conflict in Gaza.

28. For the purposes of the present challenge, we can begin with the ECJU Assessment dated 11th June 2024. This took account of recent developments, including the ICJ's provisional measures decision in the case brought against Israel by South Africa (see para 62 below) and the announcement by the International Criminal Court prosecutor that he had applied for arrest warrants against the Israeli Prime Minister and Defence Minister. It stated that the duty to prevent genocide was engaged when the UK was aware or should have been aware that there was a 'serious risk that genocide would occur', citing the *Bosnian Genocide* case (see paras 62 and 63 below), adding that 'technically' a determination that this duty has been violated cannot be made until genocide actually occurs. It concluded that the provisional measures ordered by the ICJ on 24th May 2024 did not fundamentally alter the position and noted that the impact of the ICJ's earlier decision had been subject to extensive public debate by lawyers in the UK and that the former President of the ICJ, who had been in post when that decision was made, had given an interview saying that the Court did not decide that the claim of genocide was plausible. In its review of the evidence the ECJU stated that 'It is uncontentious that conduct which could, in principle, satisfy the physical component of genocide continues to take place in Gaza', referring to high numbers of civilian casualties, extensive destruction of civilian infrastructure including schools, hospitals, refugee camps and aid convoys, and displacement of 80% of the population. However, the ECJU immediately went on to say that whether this amounted to a risk of genocide depended on whether Israel was motivated by genocidal intent:

> 'As noted above, whether such conduct is indicative of a risk of genocide or is rather the result of an intensive armed conflict in a densely populated urban area, turns primarily on an assessment of whether Israel's actions are motivated by genocidal intent. This is a judgment that must be made with reference to the totality of the relevant information, including the pattern of conduct and statements made.'

29. The ECJU then carried out that assessment, noting 'the troubling comments' made by some Israeli politicians and senior officials, and identifying some incidents which had amounted to possible breaches of IHL, but referring also to the practice by Hamas operatives of deliberately concealing themselves amongst civilians, using facilities such as hospitals and other healthcare premises for military purposes. Overall, while recognising concerns, the conclusion was that Israel was not harbouring genocidal intent. This was explained as follows:

> 'Recent developments do not significantly alter the basis on which ECJU has previously assessed that exports to Israel remain consistent with the UK's obligation to prevent genocide. The key judgment remains whether the conduct capable in principle of satisfying the physical component of genocide is the result of an intensive armed conflict in a densely populated urban area, or conversely whether the pattern of conduct and statements made are now considered to approach the high threshold required to indicate genocidal intent.
>
> Noting the high threshold – i.e. that genocidal intent has to be the only reasonable inference that can be drawn from the pattern of conduct and from statements made – and the plausible

> alternative explanation that the impacts seen are the result of its legitimate military campaign, ECJU maintains its assessment that extant licences to Israel remain consistent with the UK's duty to prevent genocide. The conclusion that Israel has not demonstrated genocidal intent is consistent with the finding of the Foreign Secretary based on the latest IHLCAP assessment that Israel remains committed to comply with IHL.'

30. The ECJU then turned to consider Common Article 1 of the Geneva Conventions, referring to 'the UK's long-standing position that CA1 refers to a State's obligation to respect the provisions of the Convention itself and to ensure that all persons within its jurisdiction comply with the Conventions', but that it 'does not constitute an obligation in international law to ensure that other States also respect the Conventions' (see paras 47 to 52 below). It concluded, however, that the UK's arms export regime was arguably compliant even with the latter more expansive interpretation taken by the International Committee of the Red Cross ('ICRC'), as the system operated to refuse an export licence where the risk of misuse was clear.

31. Finally, considering the Arms Trade Treaty, the ECJU concluded that the UK did not have actual knowledge that a relevant atrocity was taking place or would take place and that the items to be exported would be used in its commission. For the reasons already stated, there was not currently a serious risk of genocide occurring, the available evidence did not suggest that exports would be used to commit crimes against humanity, and there was currently no clear risk that exported items might be used to commit or facilitate a serious risk of IHL.

32. However, in July 2024 the ECJU's assessment that Israel was committed to compliance with IHL changed. At that stage the assessment was that Israel was not so committed and it was this which led to the September Decision. The principal reasons for this change of view were concerned with Israel's treatment of detainees and the impact of the conflict on the civilian population (including the damage to water and sanitation facilities, a factor particularly emphasised by Oxfam), although there were also concerns about Israel's conduct of hostilities.

33. As a result of this change of view as regards compliance with IHL, an assessment was carried out in July 2024 against the SELC criteria. The purpose of this was to consider whether the change of view as regards commitment to comply with IHL meant that a different view should also be taken as regards the risk of genocide and of infringement of the Arms Trade Treaty. The conclusion reached was that:

> 'With respect to the duty to prevent genocide, a finding that Israel is not committed to comply with IHL does not necessarily indicate that it is harbouring genocidal intent. The current IHL assessment notes that concerning Israeli statements seen towards the start of the conflict have not been repeated in the same vein. There have been a range of positive statements and some negative statements from specific actors; however, their remarks are not assessed to be representative of the Israeli Government overall. The areas of most acute concern with respect to compliance with IHL do not relate to Israel making civilians the object of attack. No evidence has been seen that Israel is

> deliberately targeting civilian women or children. There is also evidence of Israel making efforts to limit incidental harm to civilians.'

34. As to the Arms Trade Treaty, the ECJU concluded that the finding that Israel was not committed to IHL did not provide actual knowledge that relevant exports would be used in the commission of war crimes.

35. The result was a Ministerial Submission to the Foreign Secretary dated 26th August 2024 recommending that he conclude that, overall, Israel was not committed to complying with IHL, that there was a clear risk that items might be used to commit or facilitate violations of IHL, and that he advise the Secretary of State accordingly. The Submission noted the implications for the F-35 Programme, saying that direct exports of F-35 components to Israel could be prevented, but that in relation to the Global Spares Pool it was generally not possible to determine who the end user would be.

36. The Foreign Secretary did so conclude and issued his advice to the Secretary of State in a letter dated 29th August 2024 which we have summarised at para 3 above. We would add that the Foreign Secretary's conclusion that the clear risk threshold in Criterion 2(c) of the SELC had been met was not finely balanced. His advice to the Secretary of State was that this was 'the only conclusion available to him'.

The September Decision

37. The Ministerial Submission to the Secretary of State dated 30th August 2024 referred to the advice of the Foreign Secretary that there was a clear risk that certain UK exports of military equipment to Israel might be used to commit or facilitate a serious violation of IHL, to the Foreign Secretary's recommendation of a suspension of extant licences for equipment assessed as for use in military operations in the current conflict in Gaza, and to the advice of the Defence Secretary as to the impact on international peace and security if the UK stopped exporting components to the F-35 Programme. It identified two possible courses of action:

> '**Option 1**: Suspend extant export licences where we assess the items are for use in military operations in the current conflict in Gaza.
>
> **Option 2**: Suspend all extant licences for use by the Israeli Defence Force (IDF), including those which we do not assess are for use in the current conflict in Gaza. This would constitute a decision to send a political signal, since it would go beyond strict application of the "clear risk" test in the Strategic Export Licensing Criteria (SELC).'

38. The Submission then asked the Secretary of State to decide whether licences permitting exports of components to the F-35 Programme should be excluded from this decision, with the clarification that the exclusion (i.e. the F-35 Carve Out) would not in principle apply to licences for components which could be identified as going to Israel. It concluded as follows:

> '**Advice**

> 24. As Secretary of State for Business and Trade, you are the ultimate decision maker on export licences. You can choose to apply the SELC consistently against F-35 cases, including the requirement not to grant or sustain a licence where there is a clear risk that exported UK F-35 components under licence might be used to commit or facilitate a serious violation of IHL.
>
> 25. Alternatively, it is open to you to decide to depart from the SELC for F-35 components and, effectively, exclude them from the scope of any suspension. This decision would be in line with the Written Ministerial Statement that issued the SELC in 2021, which provided that the application of the SELC would be quote without prejudice to the application to specific cases of specific measures as may be announced to Parliament from time to time.'

39. The Secretary of State's decision was set out in the Decision Letter dated 2nd September 2024 referred to at para 4 above and was followed by the statements to Parliament referred to at paras 5 and 6. In short, the decision was to select Option 1, subject to the F-35 Carve Out.

40. Although the Claimant contends that the Secretary of State misdirected himself in law, it is clear that the process of assessing Israel's commitment to compliance with IHL was conducted with care and thoroughness and there was no challenge to the good faith of those concerned.

The true nature of the F-35 Carve Out

41. We have already summarised the advice given by the Defence Secretary as to the critical importance of the F-35 programme for international peace and security and for the UK's own defence. The Claimant cannot and does not challenge that assessment.

42. However, we should say something further about one aspect of that advice, namely that it was not currently possible to suspend licensing F-35 components for use by Israel without having an impact on the entire F-35 Programme. The Defence Secretary's advice on this point was as follows:

> 'Due to the nature of the partnership agreed at the outset of the international collaborative programme and enshrined in the F-35 Memorandum of Understanding[6] it is not currently possible to suspend licensing F-35 components for use by Israel without having an impact on the entire F-35 programme. …
>
> A suspension of UK licensing for all F-35 nations, leading to the consequent disruption for partner aircraft, even for a brief period, would have a profound impact on international peace and security. …'

43. The reasons why it was not possible to suspend the licensing of components for use by Israel without having an impact on the entire programme were explained in the

[6] The Memorandum was not disclosed in OPEN but was referred to in the CLOSED evidence.

CLOSED evidence. In particular, that evidence showed that the Claimant's submission that the UK ought to have sought to persuade other partner nations to suspend the supply of F-35 aircraft and spare parts to Israel based on the UK's conclusion that Israel was not committed to compliance with IHL was unrealistic. Although that possible course of action was considered, it was rejected, in our view rationally, as having no realistic prospect of success.

44. It follows that the true nature of the F-35 Carve Out was not that the UK would continue to supply F-35 components to Israel. In fact an exception to the F-35 Carve Out provided that it should not in principle apply to components which could be identified as going to Israel. Rather, the true nature of the F-35 Carve Out was that the UK would not cease to participate in the F-35 Programme, a step which, in the view of the Foreign Secretary and the Defence Secretary, would have had a profound and immediate impact on international peace and security, despite the fact that some UK-manufactured components would ultimately be supplied to Israel, either incorporated in a complete aircraft or as spares.

Ground 8 – the UK's treaty obligations

The nature of the issue

45. Ground 8 challenges the F-35 Carve Out on the basis that the Secretary of State misdirected himself in the Decision Letter in determining that the F-35 Carve Out was 'consistent with the UK's … international legal obligations'. The Claimant's case is that the F-35 Carve Out puts the UK in breach of its obligations under three international treaties to which it is a party, namely Common Article 1 of the Geneva Conventions, Articles 6 and 7 of the Arms Trade Treaty, and Article 1 of the Genocide Convention, as well as equivalent rules of customary international law reflected in Articles 16 and 41 of the Articles on State Responsibility. So far as relevant, none of the treaties in issue under Ground 8 has been incorporated into domestic UK law by legislation[7] and there is an issue under Ground 9, to which we will come, whether the rules of customary international law on which the Claimant relies should be received into domestic law.

46. The Secretary of State's primary response to this challenge is that Ground 8 is not justiciable in a domestic court. Before examining that response, and in order to put it into context, we should identify, if only in outline, the international law issues which the Claimant's case on Ground 8 would require us to decide. In doing so, we will not attempt to deal with the wealth of international law materials to which the parties referred.

Common Article 1 of the Geneva Conventions

47. Common Article 1 of the Geneva Conventions, so called because the Article is in the same terms in all four Geneva Conventions, provides as follows:

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[7] Section 1 of the Geneva Conventions Act 1957 creates individual criminal liability for committing or being an accessory to grave breaches of the Geneva Conventions and Additional Protocols I and III. Section 51 of and Schedule 8 to the International Criminal Court Act 2001 make it an offence to commit war crimes, which include grave breaches of the Geneva Conventions, and those provisions have created an offence of genocide in domestic law.

> 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'

48. The Claimant contends that the effect of this Article is to impose an obligation on the UK to ensure respect for the Conventions by Israel, and that this requires it to cease supplying military equipment to Israel because of the clear risk that such equipment would be used to commit serious violations of IHL. The Claimant submits that even though the UK has no jurisdiction over Israel, it is enough that the UK is able to influence Israel's conduct and that this is the ordinary meaning of the language of the Article and is in accordance with the object and purpose of the Conventions. It submits that this interpretation is supported by:

    (1) decisions of the International Court of Justice (e.g. *Nicaragua v United States of America*, ICJ Reports 1986, para 220[8]; the Advisory Opinion in the *Wall in the Occupied Palestinian Territory* case, ICJ Reports 2004, paras 158 to 159[9]; and the provisional measures decision in *Nicaragua v Germany* of 30th April 2024[10]);

    (2) the practice of a majority of states;

    (3) the view of the ICRC (e.g. *Commentary to Geneva Convention 1* (2016), para 153);

    (4) academic commentary; and

    (5) United Nation General Assembly Resolutions (e.g. Resolution 681 of 20th December 1990) calling on the parties to the Convention to ensure respect by Israel for its obligations under the Convention.

49. The Secretary of State submits, in accordance with the long-standing position of the UK, that the obligation 'to ensure respect' for the Convention is a duty to ensure that all those within a party's jurisdiction respect the Convention and not an obligation to ensure respect for the Convention by other states. He submits that this is the ordinary meaning of the Article, interpreted in good faith, and that an obligation to ensure that other states comply with the Convention would impose a significant and unprecedented burden which, if intended, would have been set out explicitly. It would also give rise to difficult questions as to the extent of such an obligation in the event of unwillingness by those other states to comply. That position is shared by at least some other states, including the US, Canada and Israel.

50. The Secretary of State acknowledges that this may be a minority view, but submits that the interpretation of Common Article 1 did not arise for decision and was not the subject of serious argument in any of the ICJ cases relied on by the Claimant; that there are no instances of state practice (in the sense of states acting to ensure compliance by other states, as distinct from merely expressing a view about the meaning of the Article); that the ICRC commentary recognises that there are states which do not share its view; that the academic commentary is not all one way; and that the United Nations General

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[8] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*.
[9] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*.
[10] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany) (Provisional Measures)*.

Assembly Resolutions are political declarations concerned with Israel's compliance with its obligations rather than statements about the legal obligations of other states.

51. It is apparent, therefore, that this ground of challenge to the F-35 Carve Out would require the English court to determine a contentious question of international law. Moreover, because it is the Secretary of State's position that even on the wider interpretation for which the Claimant contends, there was no breach of Common Article 1 by the UK, which did all it reasonably could to ensure compliance by Israel, in circumstances where suspending all UK exports to the F-35 Programme would incur serious risks to international peace and security, it would also require the court to apply this interpretation to the facts of the conflict in Gaza which are already in issue before the ICJ and to weigh for itself the Government's view of the risks to international peace and security which such a suspension would involve.

52. We would add that if the UK is under an obligation to ensure respect by Israel for the Geneva Conventions, so too is every other state which is a party to those Conventions, including those states which are partner nations in the F-35 Programme. Inevitably, therefore, a decision by the English court would not be limited to the lawfulness of the UK's conduct in international law.

Articles 6 and 7 of the Arms Trade Treaty

53. Articles 6 and 7 of the Arms Trade Treaty provide as follows:

> '**Article 6**
>
> **Prohibitions**
>
> 1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
>
> 2. A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
>
> 3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Article 7

Export and Export Assessment

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

(a) would contribute to or undermine peace and security;

(b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(ii) commit or facilitate a serious violation of international human rights law;

(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or

(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.
…'

54. The Claimant submits that the prohibition in Article 6 is strict and that:

(1) because the export of F-35 components would violate Common Article 1 of the Geneva Conventions and Article I of the Genocide Conventions, their export would be contrary to Article 6(2) of the Arms Trade Treaty;

(2) their export would also be contrary to Article 6(3), which does not require actual knowledge that future events would occur, only constructive knowledge of a risk of such events occurring, an interpretation which is consistent with state practice and accords with the view of the ICRC and leading commentaries.

55. The Claimant submits also that if there would be no breach of Article 6, there would be a breach of Article 7. That Article applies where the evidence of genocide, crimes against humanity or war crimes is not sufficiently clear to engage the strict prohibition in Article 6, and requires an assessment of the potential that arms exports could be used by the receiving state to commit or facilitate a serious violation of IHL, with any transfer which is more likely than not to result in such consequences being prohibited.

56. The Claimant's case as to breach of Article 6(2) depends on, and does not appear to add anything to, its case concerning breach of Common Article 1 of the Geneva Conventions and Article I of the Genocide Convention.

57. Its case as to Article 6(3) depends on what is meant by the words 'if it has knowledge at the time of authorization that the arms or items would be used in the commission' of war crimes. The Secretary of State submits that 'knowledge' refers to actual knowledge and is not satisfied by constructive knowledge, and that this is a high threshold, which applies only when a state knows that the arms 'would' be used in this way and not merely that they might be. He draws attention to the contrast between Article 6(3), which contains a strict prohibition but which only applies when there is such knowledge, and Article 7, which applies when Article 6 does not apply and requires a risk assessment, together with a balancing of the risk of (for example) the export of arms contributing to or facilitating a serious breach of IHL against the prospect that such exports may contribute positively to international peace and security. He draws attention also to the recognition by the ICRC that there are differences of view among states as to whether constructive knowledge is sufficient, as well as among commentators.

58. As to Article 7, the Secretary of State submits that the ordinary meaning of the Article is that it provides for a balancing exercise between the positive and negative consequences identified in Article 7(1) and that the danger to international peace and security which would have been caused by suspending the export of components to the F-35 Programme outweighed the potential that such components might be supplied to Israel and used to commit or facilitate a serious violation of IHL. He submits that this is particularly the case in circumstances where the danger to international peace and security would have been immediate, while the potential that F-35 components would be used to commit a violation of IHL was uncertain and where Israel was not dependent on the use of F-35s for the continuation of the conflict in Gaza.

59. Again, therefore, the English court would be required to determine disputed issues as to the interpretation of the Arms Trade Treaty and its application to the facts of the

conflict in Gaza, as well as the extent to which it was appropriate to give weight to the wider aspects of suspending exports to the F-35 Programme.

Article I of the Genocide Convention

60. Article I of the Genocide Convention provides:

> 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

61. Article II explains that any of the following acts, committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such', constitute genocide:

> '(a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.'

62. The Claimant submits that it is irrelevant whether genocide has actually occurred, although it puts the allegation that it has in the forefront of its submissions.[11] Rather, the Claimant submits that the obligation to prevent genocide arises at the instant that a state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed, and says that the F-35 Carve Out violated that obligation. It relies on the decision of the ICJ in *Bosnia and Herzegovina v Serbia and Montenegro*, ICJ Reports 2007, paras 431 and 432.[12] It contends that a proper assessment would have reached the conclusion that there was such a serious risk, and that on a correct interpretation of the provisional measures orders made in *South Africa v Israel*, ICJ Reports 2024, paras 54, 58 and 59[13] and *Nicaragua v Germany*, the ICJ had already found that such a risk existed.

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[11] As the Claimant puts it in paras 14 to 16 of its skeleton argument,

> 'Israel's assault on Gaza is "a moral stain on the conscience of our collective humanity". In just over 18 months, Israel has decimated an entire society. The Israeli army has committed genocide, war crimes and crimes against humanity against the population in Gaza … That Israel has acted in this way is demonstrable and incontrovertible. What is happening in Gaza is a live-streamed genocide. …'

In oral argument Mr Raza Husain KC for the Claimant insisted that the evidence supporting this allegation was an important part of the Claimant's case which it should be allowed to deploy.

[12] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*.

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*.

63. The Secretary of State acknowledges that a state's obligation to prevent genocide, and the corresponding duty to act, arise when the state learns, or should normally have learned, of the existence of a serious risk of genocide, at which point it is under a duty to employ all means reasonably available to it, so as to prevent the genocide so far as possible, but submits that ICJ jurisprudence shows consistently that there can be no breach of this duty unless genocide is actually committed. For this purpose he relies upon the *Bosnia* case, paras 430 and 431, which it is worth setting out (emphasis added):

> '430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the actions of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of the genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.
>
> 431. Thirdly, *a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the*

> *Convention) begins that the breach of an obligation of prevention occurs*. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3 of its Articles on State Responsibility:
>
> > "3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."
>
> This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that 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. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, *if neither genocide nor any of the other acts listed in Article III of the Conventions are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.*'

64. Relying on this passage, the Secretary of State submits that the UK could only be held to be in breach of its obligations under Article I if Israel has in fact committed genocide, and that suspension of exports to the F-35 Programme was a 'means reasonably available' to the UK, or a 'means likely to have a deterrent effect' on Israel, to prevent that genocide. It would be necessary to make such a finding in circumstances where no court, including the ICJ, has found that Israel has committed genocide in Gaza and where the effect of the ICJ's provisional measures decisions in *South Africa v Israel* and *Nicaragua v Germany* is hotly disputed.

Articles 16 and 41 of the Articles on State Responsibility

65. Articles 16 and 41 of the International Law Commission's Articles on State Responsibility provide as follows:

> '**Article 16**
>
> Aid or assistance in the commission of an internationally wrongful act
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally

> responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.
>
> **Article 41**
>
> Particular consequences of a serious breach of an obligation under this chapter
>
> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.'

66. The Claimant submits that these Articles, which are concerned with a state's accessory liability for breaches of international law by other states, reflect rules of customary international law. Unlike the other international law provisions relied on under Ground 8, these Articles are not contained in any treaty. We consider below under Ground 9 the rules of customary international law on which the Claimant relies.

67. For the moment we simply note that the Claimant accepted that its reliance on these Articles of State Responsibility would require the court to make findings about the lawfulness in international law of Israel's conduct in Gaza.

Jurisdiction/justiciability

68. As we have said, the Secretary of State's primary response to Ground 8 is that it is not justiciable in a domestic court. This response invokes some important constitutional principles. These include that unincorporated treaties do not become part of domestic law (the principle of dualism: if it were otherwise, the executive would be able to make law without parliamentary scrutiny by concluding a treaty, thereby undermining the sovereignty of Parliament); that the conduct of international relations is a matter for the executive and not the courts; and that the national security of the UK is the responsibility of the executive which is democratically accountable to Parliament and ultimately the electorate. As a result, a domestic court has no jurisdiction to interpret or apply an unincorporated treaty. That said, there are some circumstances in which the court will interpret or apply such a treaty, specifically where there is a sufficient 'domestic foothold' to enable it to do so. This is a convenient, albeit imprecise metaphor. As explained in *Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11, [2024] AC 411, para 158, 'It is simply a way of referring to a situation where it is necessary to decide a question of international law in order to determine a question of domestic law'. Even when there is such a foothold, however, the separate principle of foreign act of state may be relevant.

69. The Claimant submits that there is such a foothold in the present case, because the Secretary of State was applying the policy set out in the SELC (including that the SELC 'are one of the means by which we implement a range of international legal commitments including the Arms Trade Treaty' and the reference in Criterion 1 to 'respect for the UK's international obligations and relevant commitments'); and because of the self-direction in the Decision Letter that the F-35 Carve Out was 'consistent with the UK's … international obligations'. It submits that the principle of foreign act of state has no application in the present case.

70. It is therefore necessary to examine the case law which establishes the basic principles and the scope of the exceptions, before considering whether the matters relied upon by the Claimant confer jurisdiction on a domestic court to interpret and apply those international obligations of the UK.

71. If the court does have jurisdiction, the next question concerns the standard of review. The Claimant submits that, once the jurisdiction hurdle is overcome, it is for the court to decide one way or the other whether the supply of components to the F-35 Programme puts the UK in breach of one or more of its treaty obligations as a result of the prospect that such components will or may be supplied to Israel and used in the Gaza conflict. The Secretary of State, in contrast, submits that the appropriate standard of review is tenability: that is to say, that if the court considers that it is a tenable view that such supply would comply with the pleaded international obligations, Ground 8 must fail, although if necessary the Secretary of State submits that the view which he has taken is not merely tenable but correct.

The case law

The basic rule of non-justiciability

72. We begin our review of the case law with the decision of the House of Lords in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. One of the issues arising was whether state members of the International Tin Council ('the ITC', which had legal personality in English law by virtue of an Order in Council) were responsible for the debts of the ITC. That depended on the interpretation of the Sixth International Tin Agreement, an unincorporated treaty. In a well known passage which it is worth citing in full despite its length, Lord Oliver described 'the principle of non-justiciability' as follows (499H-500H):

> 'It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v Sprigg* [1899] A.C. 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 134 Moo. P.C.C. 22, 75:
>
> > "The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding

> what is right, nor the power of enforcing any decision which they may make."

On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v Attorney General* [1971] WLR 1037. The Sovereign acts

> "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:" *Rustomjee v The Queen* (1876) 2 QBD 69, 74, per Lord Coleridge C.J.

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. *Fothergill v Monarch Airlines Ltd* [1981] AC 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, *Philippson v Imperial Airways Ltd* [1939] AC 332.

> Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in *Zoernsch v Waldock* [1964] 1 WLR 675) or the very rare case in which the exercise of the Royal Prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740.'

73. Although this decision predates the terminology of 'domestic foothold', it is notable that the House of Lords did not consider that the existence of an Order in Council providing that the ITC would have 'the legal capacities of a body corporate' in English law enabled a domestic court to interpret the unincorporated treaty. It is notable also that the exceptions to which Lord Oliver referred (incorporation by statute; enactment of a statute in order to give effect to treaty obligations; incorporation by contract; and where domestic legislation expressly or by necessary implication requires resort to the terms of the treaty for the purpose of interpreting the legislation) are of limited scope.

74. *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 is to the same effect. The issue was whether convictions in a criminal trial should be quashed as a result of infringements of the defendants' rights under Article 6 ECHR, at a time when the Convention had not yet been incorporated into English law by the Human Rights Act 1998. Lord Hoffmann said:

> '26. What, then, is the effect of the ECtHR rulings upon the question of whether the appellants' convictions are safe? The Convention is an international treaty made between member States of the Council of Europe, by which the High Contracting Parties undertake to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." Article 19 sets up the ECtHR "to ensure the observance of the engagements undertaken by the High Contracting Parties". It has jurisdiction under Article 32 to decide "all matters concerning the interpretation and application of the Convention". And by Article 46 the High Contracting Parties undertake "to abide by the final judgment of the Court in any case to which they are parties."
>
> 27. In other words, the Convention is an international treaty and the ECtHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English

> law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chieveley said in *Attorney-General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 283:
>
> > "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention]".
>
> 28. But for present purposes the important words are "when I am free to do so". The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not.

75. More recently, in *R (SG) v Secretary of State for Work and Pensions*[14] [2015] UKSC 16, [2015] 1 WLR 1449, the claimant contended that a cap on housing benefit by reference to median earnings contained in regulations made under the Welfare Reform Act 2012 was contrary to Article 3.1 of the United Nations Convention on the Rights of the Child (requiring that 'in all actions concerning children … the best interests of the child shall be a primary consideration') because of its impact on households with children. The Supreme Court held that although unincorporated treaties could be taken into account in the interpretation of Convention rights protected in domestic law by the Human Rights Act, domestic courts have no jurisdiction to interpret or apply unincorporated treaties. Lord Reed said:

> '90. … It is firmly established that United Kingdom courts have no jurisdiction to interpret or apply international treaties: see, for example, *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499 and *R v Lyons* [2003] 1 AC 976, para 27. As was made clear in *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756, it is therefore inappropriate for the courts to purport to decide whether or not the executive has correctly understood an unincorporated treaty obligation.'

76. Lord Reed went on to cite from the judgments in *Corner House*, a case to which we shall return. It is apparent that the principle is a limitation on the jurisdiction of the court which extends not only to interpretation of an unincorporated treaty, but also to its application. Thus a domestic court has in general no jurisdiction to decide how an unincorporated treaty should be applied, even if its interpretation is clear.

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[14] Also known as *R (JS) v Secretary of State for Work and Pensions*.

77. Still more recently, the passage from Lord Oliver's judgment in *JH Rayner* cited above was reasserted by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223.

78. Other statements to the effect that unincorporated international treaties and conventions cannot be the source of domestic law rights or duties and will not be interpreted by the courts as domestic courts should not normally determine issues which are only really appropriate for diplomatic or similar channels can be found in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964, para 123, while the principle that 'as the conduct of foreign relations is entrusted to the executive branch of government, this is a field where the judiciary must normally defer to the executive which alone is competent to determine foreign policy' is affirmed in *'Maduro Board' of the Central Bank of Venezuela v 'Guaidó Board' of the Central Bank of Venezuela*[15] [2021] UKSC 57, [2023] AC 156, para 69, a case concerned with the one voice doctrine for the recognition of foreign states and governments. This accords with similar statements of high authority, such as by Lord Bingham in *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, where the issue was whether the customary international law crime of aggression was a criminal offence in domestic law:

> '30. In the present case, involving the crime of aggression, there are compelling reasons for not departing [from the principle that only Parliament can create new criminal offences]. A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law. The first of these rules is vouched by authorities such as *Chandler v Director of Public Prosecutions* [1964] AC 763, 791, 796; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398; *Lord Advocate's Reference No 1 of 2000* 2001 JC 143, para 60; *R (Marchiori) v The Environment Agency* [2002] EWCA Civ 03, [2002] EuLR 225, paras 38-40. The second rule is supported by such authorities as *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 932; *J H Rayner (Mincing Lane) Limited v Department for Trade and Industry* [1990] 2 AC 418, 499; *Westland Helicopters Limited v Arab Organisation for Industrialisation* [1995] QB 282, 292; and *R (on the application*

[15] Reported as *Deutsche Bank AG v Receivers Appointed by the Court*.

> *of Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335, paras 38, 40. In *Buttes,* at p 933, Lord Wilberforce cited with approval the words of Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* 168 US 250 (1897), 252:
>
> > "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."
>
> I do not suggest that these rules admit of no exceptions: cases such as *Oppenheimer v Cattermole* [1976] AC 249 and *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 may fairly be seen as exceptions. Nor, in the present context, is the issue one of justiciability, to which many of these authorities were directed. In considering whether the customary international law crime of aggression has been, or should be, tacitly assimilated into our domestic law, it is nonetheless very relevant not only that Parliament has, so far, refrained from taking this step but also that it would draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection.'

National security and democratic accountability

79. In the context of national security, the importance of democratic accountability has been emphasised. For example, it is for the Secretary of State to decide whether a person is a danger to national security and there are limited circumstances in which the courts may intervene (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, per Lord Hoffmann at paras 53 and 54; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945; and *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765 at paras 55 to 59). As explained by Lord Reed in *Begum*, echoing Lord Hoffmann in *Rehman*, this is not only because the Secretary of State is best qualified to make such a decision, but also because she is democratically accountable for the decision and its consequences:

> '62. Finally, Lord Hoffmann explained at para 62 that a further reason for SIAC to respect the assessment of the Secretary of State was the importance of democratic accountability for decisions on matters of national security:
>
> > "It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community,

> require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."

These points have been reiterated in later cases, including *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("*A*") and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945.'

80. The point has been reaffirmed by the Supreme Court very recently. In *U3 v Secretary of State for the Home Department* [2025] UKSC 19 Lord Reed said:

> '65. One further factor is also important. In carrying out a review of a discretionary decision by the person entrusted by Parliament to take that decision, and in particular when assessing the reasonableness of a decision, a court or tribunal will always attach weight to the assessment made by the primary decision-maker. That is a matter of particular significance in the present context, for two reasons, which might be described as institutional and constitutional.
>
> 66. Institutionally, the Secretary of State acts on the basis of expert advice, including advice from the Security Service. The assessment of intelligence depends on an expertise which serving intelligence officers possess, but judges do not: expertise, for example, in assessing the reliability of information received from covert sources, based on such matters as the past record of informants, their motivation and their current circumstances, or the likelihood that the breaking of codes or encryptions has been detected, or that the presence of listening devices has been suspected; and expertise in the interpretation of a mosaic of individual items of information. Even persons formerly involved in intelligence work, such as some of the members of SIAC, are unlikely to be as well placed to assess such information as serving officers, because they will have no close or current involvement with the sources of that information and the factors bearing on its reliability.
>
> 67. There are in addition constitutional reasons why public safety should be primarily the responsibility of a member of the government who is accountable to Parliament, and ultimately to the electorate, rather than the responsibility of the members of a judicial tribunal, however eminent and experienced they may be. As Lord Hoffmann said in *Rehman*, in a postscript to his speech written after the 9/11 attacks on the United States, "such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting

> them to persons responsible to the community through the democratic process" (para 62).
>
> 68. Accordingly, there are both institutional and constitutional reasons why, in carrying out its function of reviewing decisions taken on grounds of national security, SIAC should attach very considerable weight to the Secretary of State's evaluation.'

81. Although *Begum* and *U3* were not concerned with the interpretation or application of unincorporated treaties, the constitutional reasons referred to by Lord Hoffmann and Lord Reed apply, if anything, with even greater force in this context, and especially when a domestic court is invited to review decisions which are critical to international peace and security and the defence of the UK.

82. These principles were applied in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), an earlier Divisional Court case involving the present Claimant, also arising out of military operations by Israel in Gaza. The Claimant sought a declaration that the UK Government was responsible for a breach of the UK's international obligations and a mandatory order that the Government use its best endeavours to comply with those obligations, including by suspending UK government, financial or ministerial assistance given to UK companies exporting military technology to Israel. The Divisional Court held that the claim was not susceptible to judicial review. Lord Justice Pill said:

> '46. Constitutionally, the conduct of foreign affairs is exclusively within the sphere of the executive (*Jones, Gentle* in the Court of Appeal, *Abbasi*). While there may, exceptionally, be situations in which the court will intervene in foreign policy issues, this case is far from being one of them. The two strands considered, the nature of the underlying claim, that is condemnation of Israel, and the nature of the claim against the Government, that is a direction or declaration as to what foreign policy it should follow, operate together to demonstrate that the court should not be prepared to consider it.'

Domestic foothold

83. However, although the basic rule is that the court does not have jurisdiction to interpret or apply an unincorporated treaty, there are some circumstances in which it will do so, where there is what has been described as a sufficient 'domestic foothold' (see para 68 above). The earliest use of this terminology in the cases cited to us was in *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin). The claimant sought a declaration as to the true meaning of United Nations Security Council Resolution 1441 which, among other things, recalled that Iraq would 'face serious consequences as a result of its continued violations of its obligations' concerning disarmament. In effect, the court was invited to declare that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further Resolution. The claimant referred to statements by ministers reserving the right to take such action in the event that Iraq did not so comply, and to a statement in Parliament by the Prime Minister that 'We will always act in accordance with international law'. The Divisional Court held at paras 35 to 40 that it had no jurisdiction

to rule on matters of international law 'unless in some way they are properly related to the court's determination of some domestic law right or interest'. Lord Justice Simon Brown said:

> '36. … As Mr Sales [counsel for the Prime Minister] points out, there is in the present case no point of reference in domestic law to which the international law issue can be said to go; there is nothing here susceptible of challenge in the way of determination of rights, interests or duties under domestic law to draw the court into the field of international law. … the domestic courts are the surety for the lawful exercise of public power only with regard to domestic law; they are not charged with policing the United Kingdom's conduct on the international plane. That is for the International Court of Justice. Mr Singh [counsel for CND] was quite unable to point to any case in which the domestic courts have ruled on a matter of international law in no way bearing on to the application of domestic law. …
>
> 40. Here there is simply no foothold in domestic law for any ruling to be given on international law. …'

84. The Prime Minister's statement that 'We will always act in accordance with international law' plainly did not constitute such a foothold.

85. The concept was explained further by Mr Justice Cranston in *Al-Haq*:

> '54. In the few cases where the courts have pronounced on matters of high policy there was what has been termed a domestic foothold. There was either legislative authorisation (see *Gentle*, [26]); the foreign legislation in issue was in the most blatant breach of international norms: (*Oppenheimer v Cattermole* [1976] AC 249, 278 C; *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883); or the issue arose in the context of ensuring a fair trial in the courts of England and Wales (*A v Secretary of State for the Home Department* (No 2) [2006] AC 221). The claimant advances asylum claims to justify its contention that these matters are justiciable, but there courts make findings about matters such as a well founded fear of persecution in other states because they are authorised to do so under domestic legislation.'

86. Mr Justice Cranston also emphasised, at para 59, the constitutional point that the conduct of foreign policy is entrusted to the elected government, not the courts.

87. This approach was confirmed by the Supreme Court in *Law Debenture Trust Corpn Plc v Ukraine* [2023] UKSC 11, [2024] AC 411. In a claim for payments due on Eurobond notes issued by Ukraine and held by Russia, the question arose whether it was a defence that Ukraine was entitled under the international law doctrine of countermeasures to refuse payment as a legitimate countermeasure to Russian military intervention in Crimea and eastern Ukraine. The Supreme Court held that English law did not recognise such a defence and approved what had been said in *Al-Haq*:

‘207. Whether or not Ukraine had a right in international law to take legitimate countermeasures against the Russian Federation on the international plane, such a right cannot assist Ukraine in these proceedings. The principles of international law governing the rights of states to take countermeasures are, pre-eminently, rules addressed to the conduct of states amongst themselves on the international plane. They are in general not justiciable before courts in this jurisdiction for two reasons. First, English law does not recognise a defence reflecting the availability of countermeasures on the international plane. The parties selected English law as the law governing their contracts and the exclusive jurisdiction of the English courts and the asserted defence has no foothold in domestic law. (See *R (Al-Haq) v. Secretary of State for Foreign and Commonwealth Affairs* per Pill LJ at paras 44 and 45; per Cranston J at paras 53-55). Ukraine’s case on countermeasures is, quite simply, irrelevant to the determination of the rights and duties arising in English law in relation to the Notes. To employ the terminology of Lord Mance in *Keyu*, there is here no applicable rule of common law which the courts themselves can sensibly adapt to reflect customary international law. That in itself is a complete answer to Ukraine’s plea founded on countermeasures. Secondly, the subject matter of such inter-state disputes is inherently unsuitable for adjudication by courts in this jurisdiction. If the availability of countermeasures at the level of international law were accepted as giving rise to a defence in domestic law, national courts would become the arbiter of inter-state disputes governed by international law which is not their function. They would be required to rule on the legality of conduct of states on the international plane and whether it constituted an internationally wrongful act. In the present case, Ukraine accepts that, according to its case, at trial a court in this jurisdiction would not be bound by the views of the executive in the United Kingdom but would be required to make its own assessment on the basis of evidence led as to the legality in international law of Russia’s invasion and annexation of Crimea. In addition, it would be required to assess the proportionality of the response, taking account of the gravity of the internationally wrongful act and the rights in question. Accordingly, at trial, the court would have to assess the impact of Russia’s conduct, including its effect on the productive economic capacity of Ukraine. In our view, Ukraine’s case on countermeasures falls prima facie within the principle of non-justiciability of inter-state disputes identified by Lord Wilberforce in *Buttes Gas*, pp 931-938. We acknowledge that this second objection may, in certain circumstances, be subject to exceptions founded on the public policy of the domestic forum. (See *Kuwait Airways*, *Belhaj v Straw* and the judgment of the Court of Appeal in the present proceedings.) This is a matter on which it has not been necessary to express a concluded view on this appeal. (See para 191 above.) However,

> the first objection is in our view an insuperable obstacle to the importation into domestic law within the United Kingdom of the international law principles of countermeasures for which Ukraine contends.
>
> 208. Accordingly, we conclude that in these proceedings Ukraine has no arguable defence based on any right it may have in international law to take countermeasures on the international plane.'

Non-justiciability and 'deference'

88. A distinction can be seen in these cases between issues which require the interpretation or application of an unincorporated treaty (*JH Rayner*, *Lyons*, *SG*) and those which involve issues of foreign policy or national security without requiring an unincorporated treaty to be interpreted or applied (*Jones*, *Rehman*, *Begum*, *Law Debenture Trust*, *Maduro Board*, *U3*). In the former situation, the cases hold that without a sufficient domestic foothold the court has no jurisdiction (or the matter is not justiciable: if there is a distinction between these concepts, it need not be explored here). In the latter situation, the court has jurisdiction but that jurisdiction will be exercised cautiously, with deference[16] being given to the view of the executive for all the institutional and constitutional reasons explained, and in some cases the court will in any event decline to adjudicate. There is, therefore, a spectrum so that the extent to which the court is able to adjudicate will vary, depending on the nature of the issue. It is important to say, however, that this is a matter of principle and not of discretion.

89. The existence of these two distinct principles can be seen, for example, in Lord Justice Simon Brown's summary of his conclusions in the *CND* case:

> '47. I would state my conclusions in summary form as follows:
>
> (i) The court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights or duties under domestic law. That is the position here.
>
> (ii) The court will in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence. That too is the position here. Whether as a matter of juridical theory such judicial abstinence is properly to be regarded as a matter of discretion or a matter of jurisdiction seems to me for present purposes immaterial.

[16] In the sense explained by Lord Sumption in *Lord Carlile* at para 22: not 'cringing abstention in the face of superior status', but 'a recognition that a court of review does not usurp the function of the decision-maker' together (in the present context) with 'the constitutional principle of the separation of powers' and 'a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject matter'.

> Either way I regard the substantive question raised by this application to be non-justiciable.'

90. As already noted, the cases show that the position is different where there is a sufficient 'domestic foothold' for the interpretation or application of an unincorporated treaty. In such a case the court has jurisdiction, but all the institutional and constitutional reasons why very considerable weight should be given to the view of the executive in cases involving issues of high policy, including in particular issues of national defence and national security, continue to apply. In such a context, whatever may be the position in other fields, there is very limited if any scope for the court to intervene to overrule the view of the responsible minister accountable to Parliament (cf. *Marchiori v Environment Agency* [2002] EWCA Civ 3, [2002] Eu LR 225, paras 38 to 40). Further, it follows in our judgment that the concept of a 'domestic foothold' which enables a domestic court to interpret and apply an unincorporated treaty must be interpreted in a way which does not require the court to trespass on matters which are properly the sole responsibility of the executive, such as national security, defence and the conduct of foreign relations. Too liberal an approach to this concept would subvert the constitutional principles to which we have referred. While it will be appropriate, and in accordance with the rule of law, for the court to ensure that such interests are properly engaged, as they undoubtedly are in this case, once it concludes that they are there will generally be very limited and sometimes no further scope for review of the responsible minister's decision.

The ECAT cases

91. As already noted, the Claimant submits that a domestic foothold exists in the present case which enables the court to interpret and apply the UK's international law obligations contained in the unincorporated treaties on which it relies (1) because the Defendant was applying the policy set out in the SELC (including that the SELC 'are one of the means by which we implement a range of international legal commitments including the Arms Trade Treaty' and the reference in Criterion 1 to 'respect for the UK's international obligations and relevant commitments'); and (2) because of the self-direction in the Decision Letter that the F-35 Carve Out was 'consistent with the UK's … international obligations'.

92. For this purpose the Claimant relies on cases concerned with the European Convention on Action against Trafficking in Human Beings ('ECAT'), culminating in *R (EOG) v Secretary of State for the Home Department* [2022] EWCA Civ 307, [2023] QB 351. The Secretary of State chose to implement the UK's obligations under the Convention by issuing guidance which was initially non-statutory, but which was statutory after the passing of the Modern Slavery Act 2015, section 49 of which required guidance to be issued. The claimants contended that because the guidance was intended to give effect to the requirements of ECAT, judicial review was available to determine whether that intention was successfully achieved, as explained by Lord Justice Underhill:

> '25. There have been a number of cases in which the terms of the Secretary of State's guidance about the treatment of victims of trafficking have been challenged on the basis that they did not give proper effect to the requirements of chapter III of ECAT. It has in all these cases been recognised that the claimants could not rely on the provisions of chapter III as such since ECAT has

> not been incorporated in domestic legislation: it is trite law that international treaties are not justiciable by the Courts, in the sense that they create no enforceable rights, except to the extent that they are so incorporated – see the classic exposition of Lord Oliver in *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, at pp. 499-500. Rather, the claimants have contended that the Secretary of State had declared that in promulgating the Guidance it was her intention to give effect to the UK's relevant obligations under ECAT; and that if, on the Court's construction of the relevant provisions, she had failed to do so, she had misdirected herself as to a material consideration and was liable to judicial review on ordinary public law principles. The Secretary of State has generally acknowledged that that was a proper approach. ….'

93. Although that had generally been the Secretary of State's approach in previous cases, in *R (KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin), [2022] 1 WLR 1312 the Secretary of State took a different position, contending in the light of *SC* that the meaning of ECAT as an unincorporated treaty was not justiciable. Mr Justice Linden held that 'the critical point' was that 'the source of the public law obligation contended for was the declared policy of the defendant rather than ECAT itself'. He continued:

> '36. … In each case it was decided or conceded that, as a matter of fact - this was in fact the Defendant's policy - and construction - this is what her policy documents said - the Defendant had committed to making the relevant decision in accordance with the requirements of the relevant article(s) of the ECAT. It was therefore 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. This did not involve direct enforcement of an unincorporated treaty as the treaty was not the source of the obligation contended for. Nor did it involve the filling of lacunae, as Mr Tam [counsel for the Secretary of State] submitted, given that the claimants in those cases relied on what was said in the policy documents.'

94. Although this analysis was challenged in the Secretary of State's grounds of appeal in *KTT*, when the appeal was heard (together with the appeal in *EOG*) this challenge was abandoned and the Secretary of State conceded that if in the relevant respects her policy was that the guidance should comply with ECAT, it was open to the court to decide whether it in fact did so and to hold that it was unlawful if it did not. Accordingly, as Lord Justice Underhill put it:

> '34. The upshot of all this is that in the end we did not have to hear submissions on the justiciability issue. I should say, however, that I find Linden J's analysis convincing and that I entirely agree with his conclusions quoted at para. 32 above. …'

95. This means that this aspect of the decision in *EOG* is not binding upon us, but it represents strong persuasive authority that if a policy is expressly stated as being intended to comply with an international obligation, it is open to the court to hold that it is unlawful if it does not so comply. However, that remains subject to ordinary principles of public law, which include the need to give appropriate and sometimes decisive weight to the institutional and constitutional factors to which we have referred in cases of national security, defence and the conduct of international relations. We would not accept that the reasoning in cases concerned with the trafficking of individuals can simply be transposed into the very different context of the present case.

Launder and Kebilene

96. The Claimant relies also on two cases in which the House of Lords was prepared to decide whether there was a breach of the claimant's rights under the ECHR at a time when (as in *Lyons*) the Convention had not yet been incorporated into domestic law, namely *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 and *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326.

97. *Launder* was an extradition case. The claimant resisted extradition to Hong Kong on bribery charges on the ground that the People's Republic of China would not honour the obligation which it had undertaken in the 1984 handover treaty between the UK and the PRC to ensure that the claimant would receive a fair trial, so that his extradition would infringe his rights under Article 6 of the ECHR. Other Articles of the ECHR were also relied on. The certified issue for the House of Lords was whether the Secretary of State was entitled, when exercising his powers under the Extradition Act 1989, to proceed on the basis that it was the collective view of the UK Cabinet that the PRC would respect its treaty obligations, so that evidence to the contrary would not be considered. In the event the House of Lords decided that the certified issue did not arise because the Secretary of State had not relied on any collective Cabinet view, but had formed his own judgment whether the claimant would receive a fair trial, as he was required to do when deciding whether extradition would be unjust or oppressive. The House of Lords held that, in an extradition case, the Secretary of State could not ignore representations that the claimant would not receive a fair trial on the ground that it must be assumed that the requesting state would adhere to its treaty obligations. Rather, if issues of that kind were raised in a responsible manner, by reference to evidence and supported by reasoned argument, the Secretary of State was required to consider them. That was what the Secretary of State had done and his conclusion that the PRC would honour its treaty obligations was rational. Lord Hope added that:

> 'If there was room for doubt on this matter, I would regard this as a case where great caution would have to be exercised, despite the need for anxious scrutiny, therefore holding that decision to be one which, in the relevant sense was unreasonable. But in all the all circumstances, I do not think that there is any real room for doubt.'

98. In the course of his speech, however, Lord Hope referred to the fact that the Secretary of State had said in the reasons for his decision that he had taken account of the claimant's representations that extradition would breach his rights under the ECHR. As to this, Lord Hope said:

> 'It is often said that, while the Convention may influence the common law, it does not bind the executive. This view was reflected in the observation by Sir Thomas Bingham MR in *Regina v Ministry of Defence, ex parte Smith* [1996] QB 517, 558E that exercising an administrative discretion is not of itself a ground for impugning that exercise. That is so; but the whole context of the dialogue between the Secretary of State and the respondent in this case was the risk of an interference with the respondent's human rights. That in itself is a ground for subjecting the decisions to the most anxious scrutiny, in accordance with the principles laid down by this House in *Regina v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] A.C. 151, as Sir Thomas Bingham MR also recognised in *Smith* at p. 554H. Then there is the question whether judicial review proceedings can provide the respondent with an effective remedy, as article 13 requires where complaints are raised under the Convention in extradition and deportation cases: see *Soering v United Kingdom* [1989] 11 EHHR 439; *Vilvarajah v United Kingdom* [1991] 14 EHHR 248; *D v United Kingdom,* The Times, 12 May 1997. *If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument*. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy, that Mr. Vaughan directed his argument.' (Emphasis added).

99. We would respectfully suggest that the invocation in *Launder* of the claimant's rights under the ECHR was something of an irrelevance. As the House of Lords held, the question for decision by the Secretary of State under well established domestic extradition law principles was whether extradition to Hong Kong would be unjust or oppressive. The answer to that question would necessarily take account of whether the claimant would receive a fair trial and whether, as he suggested, he was at risk of ill-treatment there. That was a matter which needed to be addressed under domestic law and reference to the ECHR added little if anything to his case.

100. *Kebilene* was another case where rights contained in the ECHR were relied on at a time when the Human Rights Act 1998 had been passed, but had not yet been brought into force. The House of Lords held that the provisions of the Act did not give rise to any legitimate expectation that a prosecution would not be brought under terrorism legislation in circumstances which would infringe Article 6(2) of the Convention which guarantees the presumption of innocence. In the course of his speech Lord Steyn cited the words from Lord Hope's speech in *Launder* which I have emphasised and expressed his agreement with them. He said that because the Director of Public Prosecutions had taken legal advice on the compatibility of the legislation with the provisions of the Convention, the court could examine that issue so that, if the advice turned out to be wrong, the Director would have the opportunity to reconsider his decision to prosecute on the correct legal basis.

101. At first sight the *dicta* in *Launder* and *Kebilene* might suggest that an acknowledgement by the decision maker that he had sought to comply, or that he believed that the decision did comply, with the provisions of the Convention, at a time when its status in English law was that of an as yet unincorporated treaty, was sufficient to enable a domestic court to interpret and apply the terms of that treaty.

Corner House

102. Such an understanding of what these cases decided would have represented a major inroad into the basic principle that the court has no jurisdiction to interpret or apply the terms of such a treaty. It was firmly rejected in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756. That was a case in which the Director of the Serious Fraud Office decided to discontinue an investigation into allegations of corruption against BAE Systems Plc in connection with a contract for the supply of arms to Saudi Arabia. He did so because of a threat by the Saudi authorities that if the investigation continued, Saudi Arabia would withdraw from (among other things) bilateral counterterrorism cooperation arrangements with the UK. The advice given to the Director by the Security Services included that, if this were to happen, there would be a 'real risk to British lives on British streets'.

103. No doubt conscious that the decision to discontinue the investigation might be perceived or misinterpreted as having been made for commercial reasons[17], the Attorney General made a statement to Parliament explaining that it had been taken in the UK public interest for national security reasons. He pointed out that Article 5 of the 1997 OECD Convention on Combating Bribery of Public Officials in International Business Transactions precluded him and the Director from taking into account considerations of the national economic interest or the potential effect upon relations with another state in reaching the decision to terminate the investigation and added that 'we have not done so'. The claimant submitted, relying on *Launder* and *Kebilene*, that the Director's public claim to be acting in accordance with Article 5 of the Convention enabled the domestic court to review the correctness in law of his self-direction. The House of Lords rejected this submission. Lord Bingham said:

> '44. In support of step (1) in this argument reliance was placed in particular on *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 866-867 and *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 341-342, 367, 375-376. Both cases concerned decision-makers claiming to act consistently with the European Convention at a time when it had not been given effect in domestic law. The courts accepted the propriety of reviewing the compatibility with the Convention of the decisions in question. But there was in the first case no issue between the parties about the interpretation of the relevant articles of the Convention, and in the second there was a body of Convention jurisprudence on which the courts could draw in

[17] A point particularly emphasised in the speech of Lady Hale at para 52: 'The great British public may still believe that it was the risk to British commercial interests which caused [the Director] to give way but the evidence is quite clear that this was not so. He only gave way when he was convinced that the threat of withdrawal of Saudi security co-operation was real and that the consequences would be an equally real risk to "British lives on British streets".'

> seeking to resolve the issue before it. Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the UK by fear that their decisions might be held to be vitiated by an incorrect understanding.'

104. Lord Brown added:

> '65. Although, as I have acknowledged, there are occasions when the Court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the Contracting Parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge. Really this is no more than to echo para 44 of Lord Bingham's opinion. For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons.
>
> 66. Are there such compelling reasons here? In my judgment there are not. There seem to me to be very real differences between this case and both *Launder* and *Kebilene*. In the first place, as Lord Bingham points out at para 43, there is a marked distinction between seeking to apply established Convention jurisprudence to the particular case before the court (as there) and determining, in the absence of any jurisprudence whatever on the point, a deep and difficult question of construction of profound importance to the whole working of the Convention (as here). Secondly, it seems to me tolerably plain that the decision-makers in both *Launder* and *Kebilene*, deciding respectively on extradition and prosecution, would have taken different decisions had their understanding of the law been different. In each case the decision-maker clearly intended to act consistently with the UK's international obligations whatever decision that would have involved him in taking. That, however, was not the position here. Although both the Director (and the Attorney General) clearly believed—and may very well be right in believing—that the decision was consistent with article 5, it is surely plain that the primary intention behind the decision was to save this country from the dire threat to its national and

> international security and that the same decision would have been taken even had the Director had doubts about the true meaning of article 5 or even had he thought it bore the contrary meaning. All that he and the Attorney General were really saying was that they believed the decision to be consistent with article 5. This clearly they were entitled to say: it was true and at the very least obviously a reasonable and tenable belief. Both the Director's and Attorney General's understanding of article 5 was clearly apparent from their public statements: it was implicit in these that they understood article 5 not to preclude regard being had to fundamental considerations of national and international security merely because these would be imperilled by worsening relations with a foreign state.
>
> 67. The critical question is not, as the respondents' arguments suggest, whether the Director's successor would make the same decision again once the Courts had publicly stated that this would involve a breach of the Convention; rather it is whether the Court should feel itself impelled to decide the true construction of article 5 in the first place. It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue. For the reasons I have sought to give it would certainly not be appropriate to do so in the present case.'

105. Lord Brown went on to refer to an article by Philip Sales QC and Joanne Clement concerned with the standard of review to be applied when a domestic court does have to rule on such a question of international law. He said:

> '68. Since writing the above I have chanced upon an article in the July 2008 Law Quarterly Review Vol. 124, p.388, *International law in Domestic Courts: The Developing framework*, by Philip Sales QC and Joanne Clement. This has strongly confirmed to me the view I have already taken. The following passage in particular seems to me worth quoting (omitting the footnoted references) at pp 406 and 406:
>
> > "Part of the problem here is that the executive may not have any practical option but to direct itself by reference to international law, and if the rule of law in *Launder* is treated as unlimited it will lead to very extensive direct application of treaties and international law in the domestic courts, thereby for practical purposes undermining the basic constitutional principle about non-enforceability of unincorporated treaties. One solution might be for the domestic courts, in recognition of the limits of their competence to provide a fully authoritative ruling on the point, the limits of their competence under domestic constitutional arrangements to

> rule on the subject-matter in question and the dangers posed to the national interest by them ruling definitively on the point at all, either to decline to rule or to allow the executive a form of 'margin of appreciation' on the legal question, and to examine only whether a tenable view has been adopted on the point of international law (rather than ruling on it themselves, as if it were a hard-edged point of domestic law). This is the approach which has been adopted by the ECtHR, when it has to examine questions of international law which it does not have jurisdiction to determine authoritatively itself. Adoption of a 'tenable view' approach would be a way—under circumstances where the proper interpretation of international law is uncertain, the domestic courts have no authority under international law to resolve the issue and the executive has responsibility within the domestic legal order for management of the United Kingdom's international affairs (including the adoption of positions to promote particular outcomes on doubtful points of international law)—to allow space to the executive to seek to press for legal interpretations on the international plane to favour the United Kingdom's national interest, while also providing a degree of judicial control to ensure that the positions adopted are not beyond what is reasonable."
>
> The article goes on to suggest that the *Launder* approach must indeed be subject to limitations, dependent perhaps upon "the intensity of judicial scrutiny judged appropriate in domestic law terms in the particular context". I have no doubt this is so and that the question will require further consideration on a future occasion. I have equally no doubt, however, that in this particular context the "tenable view" approach is the furthest the Court should go in examining the point of international law in question and, as I have already indicated, it is clear that the Director held at the very least a tenable view upon the meaning of article 5.'

106. The effect of *Corner House* is to confine the dicta in *Launder* and *Kebilene* to the particular context in which they arose. They were concerned with individual rights arising under the ECHR, at a time when the Convention had not yet been incorporated into domestic law, but everybody knew that it soon would be. That is a context very different from that of the present case. They do not stand for any general proposition that a statement by a minister or public official that a decision is in accordance with the UK's international obligations enables a domestic court to decide for itself the correctness of that statement. On the contrary, *Corner House* firmly rejects that proposition. Although there are some later cases in which *Launder* and *Kebilene* have been referred to, such cases do not have any bearing on the very different context of national security and defence with which the present case is (and *Corner House* was) concerned. Those cases were far removed from that subject matter. Moreover, while it was a feature of *Corner House* that the Director would have made the same decision irrespective of Article 5 of the OECD Convention, that does not detract from the

importance of the statements by Lord Bingham and Lord Brown to which we have referred.

The tenability approach

107. The suggestion in *Corner House* that in some contexts the court should go no further than to examine whether a view of international law is tenable has been taken up in later cases, for example *R (ICO Satellite Ltd) v Office of Communications* [2010] EWHC 2010 (Admin), paras 94 and 96. In *Benkarbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777 Lord Sumption said:

> '35. There are circumstances in which an English court considering the international law obligations of the United Kingdom may properly limit itself to asking whether the United Kingdom has acted on a "tenable" view of those obligations. A suggestion to this effect by Sir Philip Sales and Joanne Clement, "International law in domestic courts: the developing framework" (2008) 124 LQR 388, 405-407 was tentatively endorsed by Lord Brown of Eaton-under-Heywood in *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, at para 68. Thus the court may in principle be reluctant to decide contentious issues of international law if that would impede the executive conduct of foreign relations. Or the rationality of a public authority's view on a difficult question of international law may depend on whether its view of international law was tenable, rather than whether it was right. Both of these points arose in *Corner House*. Or the court may be unwilling to pronounce upon an uncertain point of customary international law which only a consensus of states can resolve. As Lord Hoffmann observed in *Jones v Saudi Arabia* (para 63),
>
> > "it is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."
>
> But I decline to treat these examples as pointing to a more general rule that the English courts should not determine points of customary international law but only the "tenability" of some particular view about them. If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer. In the present cases, the law requires us to measure sections 4(2)(b) and 16(1)(a) against the requirements of customary international law, something that we cannot do without deciding what those requirements are.'

108. In *Benkarbouche* itself, therefore, the tenability approach was not applicable. A hard edged question arose, whether the provisions of the State Immunity Act 1978 were compatible with Article 6 ECHR, which by this time had been incorporated into domestic law, and in order to answer that question it was necessary to determine what

were the relevant rules of customary international law on state immunity, not just whether any particular understanding of those rules was tenable. Nevertheless Lord Sumption's judgment, with which the other members of the Supreme Court agreed, acknowledged that there will be some situations in which the tenability approach is appropriate. An example given was where a decision on a contentious issue of international law would impede the executive conduct of foreign relations.

109. Since *Corner House* and *Benkarbouche*, the tenability approach has been further considered in at least two cases in the Court of Appeal in an environmental context, *R (Friends of the Earth) v Secretary of State for International Trade* [2023] EWCA Civ 14 and *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024] EWCA Civ 1227, both of which were challenges to the policy of the appropriate Secretary of State. It can therefore be taken as established, at least at this level, that this is the appropriate approach in some cases, although as the Court of Appeal emphasised in *Save Stonehenge*, this will always depend on the circumstances of the individual case:

> '146. In the light of relevant authority it seems clear that deciding whether the "tenability" approach is the appropriate means of reviewing the Government's understanding of an unincorporated international obligation will always depend on the circumstances of the individual case. The domestic courts have been inclined to caution in this area, heeding the constitutional and practical difficulties that can arise when the court sets about interpreting unincorporated treaties for itself (see the speeches of their Lordships in *Corner House*, at [44], [65], [66] and [68]; the judgment of Lord Sumption in *Benkharbouche*, at [35]; and the judgment of this court in *UKEF*[18], at [26], [29], [49] and [50].
>
> 147. Without seeking to lay down an exhaustive or definitive list, one can take from the case law some of the factors that the domestic courts have found significant. Seven considerations emerge: first, any previous case law or guidance on the interpretation of the obligation in question (Lord Bingham in *Corner House*, at [44], and Lord Brown, at [66]; and the judgment of this court in *UKEF*, at [50 (iii)]); second, the effect the interpretation will have on the conduct of international relations (Lord Bingham in *Corner House*, at [44]; and Lord Sumption in *Benkharbouche*, at [35]); third, the availability of other means to derive the interpretation of the obligations in question (Lord Bingham in *Corner House*, at [45]; and Lord Brown, at [65]); fourth, the importance of the interpretation to the operation of the treaty or international obligation (Lord Brown in *Corner House*, at [66]); fifth, the difficulty of interpreting, or ambiguity in the terms of, the obligation (Lord Brown in *Corner House*, at [66]; and Lord Sumption in *Benkharbouche*, at [35]); sixth, the question whether the correct interpretation is necessary to decide a justiciable issue (Lord Sumption in *Benkharbouche*, at [35]); and seventh, the question

[18] I.e. *Friends of the Earth*.

> whether the decision-maker was compelled by domestic law to take into account the obligations in question (the judgment of this court in *UKEF*, at [40(iii)] and [50(ii)]).'

Do the Strategic Export Licensing Criteria provide a domestic foothold?

110. In the light of this review of the case law, the question whether the SELC provide a sufficient domestic foothold to enable the court to decide whether the F-35 Carve Out is consistent with the international law obligations contained in the unincorporated treaties on which the Claimant relies can be answered relatively shortly. As already explained, section 9 of the Export Control Act 2002 requires the Secretary of State to issue guidance about the general principles to be followed when exercising licensing powers and the SELC contain that guidance, although neither the Act nor the SELC incorporates any international law obligation into domestic law. It can be argued, therefore, that the guidance is analogous to the guidance in issue in the *KTT* and *EOG* cases, so that the source of the public law obligation on which the Claimant relies is the Secretary of State's declared policy contained in the guidance to implement a range of international legal commitments and not to grant a licence if to do so would be inconsistent with such commitments.

111. However, that analysis only takes the Claimant so far. For three independent reasons, it does not enable the court to determine whether the F-35 Carve Out is consistent with the unincorporated treaties on which the Claimant relies.

112. First, while it may be possible to envisage circumstances in which the licensing of military exports does not involve the vital interests of the UK in matters of defence, international peace, national security and the conduct of foreign relations, all of those matters are fully engaged in the present case. As we have explained at para 44 above, the true nature of the decision which the Secretary of State had to make was not, or not merely, whether to continue to supply F-35 components to Israel, but whether the UK would continue to participate in a defence programme with other nations which is of profound importance for international peace and security and the defence of the UK. That is a decision which is reserved under our constitution to the judgment of the executive which is democratically accountable to Parliament and the electorate. It is not for a domestic court to decide whether the decision of the executive on that issue is in accordance with unincorporated treaties operating on the plane of international law.

113. Second, even if in general it would be open to the court to determine whether the F-35 Carve-Out was in accordance with the guidance contained in the SELC, and thus indirectly to interpret and apply those unincorporated treaties, that could only be so if the Secretary of State had purported to apply that guidance. But he did not do so. Rather, the Decision Letter described the F-35 Carve Out as an exceptional measure and, when announcing the decision to Parliament, the Secretary of State referred to the fact that the SELC themselves recognise that their application would be 'without prejudice to the application to specific cases of specific measures as may be announced to Parliament from time to time'. Clearly the F-35 Carve Out was such a specific measure in an exceptional case.

114. The Claimant submitted that the only departure from the SELC was from Criterion 2(c) (clear risk of violation of IHL) and that the Secretary of State did purport to comply with Criterion 1 (respect for international obligations), so that the issue of compliance

with Criterion 1 was justiciable, but that is an unrealistic distinction. The fact that the Secretary of State considered that the F-35 Carve Out was consistent with the UK's international obligations does not mean that he was purporting to apply the policy contained in the SELC. The better view is that the F-35 Carve Out was a specific decision taken outside the framework of that policy. That is the way in which the Secretary of State was invited to approach his decision in the Ministerial Submission quoted at para 38 above ('it is open to you to decide to depart from the SELC for F-35 components') and, in our judgment, that is the effect of the decision which he made. For that reason also, the ECAT cases culminating in *EOG* have no application in the present case.

115. Whether there was good reason to depart from the policy is a separate issue, considered below under Ground 12.

116. Third, even if the Secretary of State had purported to be applying the SELC, and even if the SELC can be regarded as the source of a domestic public law obligation, this is clearly a case where the tenability approach is appropriate. The issues of international law arising are contentious and arise in a context which is highly sensitive and political, as is apparent from our analysis of the issues which the court would be required to determine under Ground 8. They affect the conduct of international relations by the executive, not only with Israel but with other partner nations participating in the F-35 Programme. Issues of national security, defence of the UK and international peace and security requiring political judgment are engaged. The court is not compelled by domestic law to determine the content of these international obligations. It would be inappropriate for a domestic court to attempt to determine these issues definitively, which in any event it could not do.

Does the Secretary of State's self-direction provide a domestic foothold?

117. The Claimant's alternative case is that the self-direction in the Decision Letter that the F-35 Carve Out was 'consistent with the UK's international obligations' enables the court to determine whether that direction was correct. We reject that case. It cannot stand with what was said in *CND* and *Corner House*, which in this respect are indistinguishable. It is in any event to be expected that the Government would seek to comply with the UK's international obligations as it understands them to be, and the fact that it says so does not render those obligations justiciable in a domestic court. Alternatively, if the issue is justiciable at all, the tenability approach is appropriate for the same reasons as already discussed in relation to the SELC.

Conclusion on Ground 8

118. For the reasons which we have explained, the issues raised by Ground 8 are not justiciable. Alternatively, if justiciable at all, the correct approach is to ask whether the view taken by the Secretary of State is tenable as a matter of international law. We conclude that it is, essentially for the reasons put forward by the Secretary of State as summarised above. However, as our primary conclusion is that these issues are not justiciable, it would be inappropriate to engage with them further.

Foreign Act of State

119. A further principle which bears on the issues raised by Ground 8 is foreign act of state. This is distinct from the principle which we have been considering so far because it does not depend on the interpretation or application of unincorporated treaties. It comprises a number of rules which were summarised by Lord Neuberger in *Belhaj v Straw*, whose summary was accepted by the Supreme Court in *'Maduro Board' v Guaidó Board'* as containing the *ratio* of that decision:

> '113. Lord Neuberger considered that the domestic cases suggested that there may be four possible rules which had been treated as aspects of the doctrine.
>
> (1) The first rule ("Rule 1") is that the courts of this country will recognise and will not question the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state ([2017] AC 964, para 121).
>
> (2) The second rule ("Rule 2") is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state (at para 122).
>
> (3) The third rule ("Rule 3") has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not to rule on it. Examples are making war and peace, making treaties and the annexation and cession of territory. Similarly, the courts of this country will not, as a matter of judicial policy, determine the legality of acts of a foreign government in the conduct of foreign affairs (para 123).
>
> (4) A possible fourth rule ("Rule 4"), described by Rix LJ in *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855; [2014] QB 458, para 65, is that "the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office" (para 124). …'

120. Reference should also be made to the judgment of Lord Sumption in *Belhaj v Straw*, albeit that he adopted a slightly different terminology:

> '237. Turning to international law act of state, the position is different. Where the question is the lawfulness of a state's acts in its dealings with other states and their subjects, the act of state doctrine applies wherever the relevant act of the foreign state occurs (save, arguably, if it occurred in the United Kingdom: see *A Ltd v B Bank* [1997] FSR 165 at para 13). The reason is, again,

> inherent in the principle itself. It is not concerned with the lawfulness of the state's acts under municipal systems of law whose operation, in the eyes of other states, is by definition territorial, but with acts whose lawfulness can be determined only by reference to international law, which has no territorial bounds. In the nature of things a sovereign act done by a state in the course of its relations with other states will commonly occur outside its territorial jurisdiction. States maintain embassies and military bases abroad. They conduct military operations outside their own territory. They engage in intelligence-gathering. They operate military ships and aircraft. All of these are sovereign acts. The paradigm cases are acts of force in international space or on the territory of another state. "Obvious examples", as Lord Pearson observed in *Nissan v Attorney General* [1970] AC 179, 237, "are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory".'

121. The Secretary of State submits that Lord Neuberger's third rule applies in this case because the Claimant's claim involves a challenge to the lawfulness of the act of a foreign state, Israel, which is of such a nature that a municipal judge cannot or ought not to rule on it, the conduct of war and peace ('acts of force in international space or on the territory of another state') being the paradigm example of such a case. The Claimant responds that what is in issue is not the conduct of Israel, but the lawfulness of the UK's own conduct in supplying F-35 components to the F-35 Programme, and that in any event the act of state doctrine does not apply as a matter of public policy to grave breaches of fundamental principles of international law (*Belhaj v Straw* at para 157).

122. We would not accept the first of these responses. The Claimant has insisted that it is an important part of its case that Israel has committed and is committing genocide (see footnote 10 at para 62 above), while the lawfulness of Israel's conduct under international law is at the heart of the case. As in *R (Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24, [2014] 1 WLR 872, a decision by this court that the F-35 Carve Out was contrary to the international obligations of the UK would necessarily entail a condemnation of Israel's conduct and would be understood in this way internationally. However, the second response involves more complex issues as to the scope and application of the public policy exception to the third act of state rule which it is unnecessary to decide in view of our conclusion that Ground 8 raises issues which are not justiciable on the ground that they require the court to interpret and apply unincorporated international treaties for which there is no domestic foothold. Accordingly, and because the scope of the public policy exception was only lightly touched upon in oral submissions, we do not propose to lengthen this judgment unnecessarily by addressing those issues.

Ground 9 – customary international law

123. The Claimant contends that the F-35 Carve Out was contrary to domestic law because it breached what are said to be three rules of customary international law which either have been or should be received into the common law. These are:

(1) the obligation to ensure respect for the Geneva Conventions;

(2) the obligation to prevent genocide; and

(3) the obligation not to facilitate internationally wrongful acts.

124. Accordingly Ground 9 covers much of the ground already covered by Ground 8, although the argument here is that these are customary international law obligations which should be held to form part of the common law, rather than unincorporated treaty obligations for which the SELC or the Secretary of State's self-direction provides a domestic foothold enabling the court to interpret and apply those obligations. The main consequence of this alternative route to the application of these international law obligations, according to the Claimant, is that, if they form part of the common law, the tenability approach will not be available and the court must decide definitively whether the F-35 Carve Out is inconsistent with the obligations in question.

Customary international law as a source of domestic law

125. It is now settled that customary international law does not automatically form part of the common law, but is a source of legal rules on which the common law may draw. However, it is equally settled that there are limitations as to the extent which it may do so, in particular that the reception of customary international law must be compatible with domestic constitutional principles, as explained by the Court of Appeal in *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075:

> '114. In older authorities the view of the relationship between the common law and customary international law was that customary international law simply was part of the common law: see e.g. *Triquet v Bath* (1764) 3 Burr. 1478, 1481 and *Trendtex Trading Corp. v Central Bank of Nigeria* [1977] QB 529. However, more recently it has been recognised that the better view is that customary international law is a source of common law rules, but will only be received into the common law if such reception is compatible with general principles of domestic constitutional law. Thus in *R v Jones (Margaret)* [2006] UKHL 16 [2007] 1 AC 136 the House of Lords held that the crime of aggression, recognised as a rule of customary international law, did not establish the creation of such a crime domestically in the common law, because the creation of new criminal offences is solely a matter for Parliament: see [20]-[23] per Lord Bingham of Cornhill and [60]-[62] per Lord Hoffmann. At [23] Lord Bingham approved as a general proposition that "customary international law is applicable in the English courts only where the constitution permits". At [63]-[66] Lord Hoffmann gave a second reason why the crime of aggression could not be treated as received into the common law, namely that this would be "inconsistent with a fundamental principle of our constitution" ([63]), in that the decision to go to war is a matter for the executive and not subject to review by the courts. The other members of the appellate committee agreed with Lord Bingham and Lord Hoffmann. See also *R (Keyu) v Secretary of State for*

Foreign and Commonwealth Affairs [2015] UKSC 69 [2016] AC 1355, [144]-[146] and [150] per Lord Mance JSC.

115. On the appeal in the present case, it was common ground that Lord Mance JSC accurately stated the position in *obiter* comments he made in *Keyu* at [150], as follows:

> "Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration."

116. In the *Keyu* case, an obligation to investigate a death caused by state agents was found not to be incorporated into the common law because (i) no such obligation was found to be established in customary international law and in any event (ii) Parliament had already legislated to cover the area of obligations to investigate deaths, hence it would be inappropriate for the common law to be developed in the same area, especially where the obligation alleged would potentially have wide and uncertain ramifications: see [112] and [117] per Lord Neuberger of PSC and [151] per Lord Mance JSC.

117. The presumption is that a rule of customary international law will be taken to shape the common law unless there is some positive reason based on constitutional principle, statute law or common law that it should not (for ease of reference, we refer to these together as reasons of constitutional principle). The presumption reflects the policy of the common law that it should be in alignment with the common customary law applicable between nations. The position is different from that in relation to unincorporated treaty obligations, which do not in general alter domestic law. In part, since the making of treaties is a matter for the executive, this reflects the principle that the Crown has no power to alter domestic law by its unilateral action: see *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500 (Lord Oliver) and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2017] 2 WLR 583. The common law is more receptive to the adoption of rules of customary international law because of the very demanding nature of the test to establish whether a rule of customary international law exists: see above. That is not something that the Crown can achieve by its own unilateral action by simple agreement with one other state. Accordingly, in the case of a rule of customary international law the presumption is that it will be treated as incorporated into the common law unless there is some reason of constitutional principle why it

> should not be. In the case of an obligation in an unincorporated treaty the relevant rule is the opposite of this, namely that it will not be recognised in the common law.'

126. In *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] 1 AC 1355, cited by the Court of Appeal in this passage, Lord Mance referred to the Crown's discretionary powers in the making of war and disposition of the armed forces as one of the constitutional principles which may limit the incorporation of customary international law into domestic law:

> '145. However, as the appellants went on to recognise at least this further qualification exists in relation to CIL, beyond that stated by Lord Denning MR [in *Trendtex*], namely that:
>
> > "The recognition at common law must itself not abrogate a constitutional or common law value, such as the principle that it is Parliament alone who recognises new crimes: *R v Jones (Margaret)* [2007] 1 AC 136, para 29."
>
> Even that principle was only one of the reasons why the House held in *R v Jones (Margaret)* that the international crime of aggression could not form part of English law. The second reason, expressed in the speech of Lord Hoffmann with which all other members of the House agreed, was the constitutional reason that a domestic court could not adjudicate upon the question whether the state of which it formed part had acted unlawfully in the course of exercising the Crown's discretionary powers in the making of war and disposition of the armed forces: [2007] 1 AC 136, paras 63-67.'

127. Lord Hoffmann had described it as 'a fundamental principle of our constitution' that the making of war and disposition of the armed forces is 'a discretionary power of the Crown into the exercise of which the courts will not enquire'.

128. Similarly in *Law Debenture Trust v Ukraine*, the Supreme Court recognised that domestic constitutional principles, including principles of non-justiciability, may restrict the reception of customary international law principles into domestic law:

> '204. …the application by courts in this jurisdiction of rules of international law is clearly restricted by domestic constitutional principles, including principles of non-justiciability. Moreover, it is not possible to make sweeping deductions from broad statements of principle. The relationship between customary international law and the common law in this jurisdiction is far more complex. (See the judgment of the Divisional Court in *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin) at para 166.) It seems preferable, therefore, to regard customary international law not as automatically a part of the common law but as a source of the common law on which courts in this jurisdiction may draw as appropriate. (See *R v Jones*

> *(Margaret)* [2007] 1 AC 136 per Lord Bingham at para 11; Crawford, *Brownlie's Principles of International Law*, 9th Ed (2019), pp 58-67.) As part of this process they will have to consider whether there may exist any impediments or bars to giving effect to customary international law as a result of domestic constitutional principles. Moreover, as Lord Mance pointed out in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 (at para 149), it appears that judges in this jurisdiction may face a policy issue as to whether to recognise and enforce a rule of customary international law. However, given the generally beneficent character of customary international law, the presumption should be in favour of its application. …'

Establishing the existence of a rule of customary international law

129. The 'very demanding nature of the test' (as it was described in the *Freedom and Justice Party* case) for establishing the existence of a rule of customary international law was described by Lord Sumption in *Benkarbouche*:

> '31. To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (*opinio juris*): see conclusions 8 and 9 of the International Law Commission's *Draft Conclusions on Identification of Customary International Law* (2016). There has never been any clearly defined rule about what degree of consensus is required. The editors of *Brownlie's Principles of Public International Law*, 8th ed (2012), 24, suggest that "complete uniformity of practice is not required, but substantial uniformity is". This accords with all the authorities. In the words of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 186: "The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law: see *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131.'

The critical issues

130. Although other issues were argued, it seems to us in these circumstances that there are two critical issues arising under Ground 9. The first is whether, applying the *Benkarbouche* test, the obligations in question comprise rules of customary international law. If so, the second is whether their reception into the common law, at any rate in the circumstances of the present case, would be consistent with constitutional principle.

Is the Benkarbouche test satisfied?

131. As to the first issue, we are prepared to assume, without deciding, that the obligations in question are part of customary international law. But that is not to say that the content of those obligations is clear, so as to satisfy the 'very demanding' test for reception into the common law. For example, although the Claimant can point to statements by the ICJ that the obligation in Common Article 1 of the Geneva Conventions to 'ensure respect' for the Conventions 'in all circumstances' is derived from 'the general principles of humanitarian law to which the Conventions merely give specific expression' (*Nicaragua v United States of America*, para 220), it is apparent from what we have said at paras 47 to 51 above that the content of that obligation is disputed. It appears that there are indeed 'substantial differences of practice and opinion within the international community' on the question whether Common Article 1 requires a state to ensure respect for the Conventions by other states, as distinct from by other persons or entities within or subject to a state's jurisdiction.

132. Similarly, while the obligation to prevent genocide can be regarded as a rule of customary international law in view of the abhorrent nature of genocide as recognised by all civilised states (*Reservations to the Genocide Convention*, ICJ Reports 1951[19], p.12; the *Bosnia* case, para 161), the content of that obligation and in particular the extent to which one state is required to take action, and if so what action, to prevent the commission of genocide by another state is less clear.

133. In both these cases, so far as the actual content of any rule of customary international law is concerned, the material provided to us falls well short of 'a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation' (*Benkarbouche*). It is therefore not surprising that Parliament has chosen to legislate to give effect to the Geneva Conventions and the Genocide Conventions (see para 45 and footnote 7 above and paras 137 to 166 below), so as to make clear to what extent the obligations which they contain form part of domestic law.

Constitutional principle

134. We have already explained that a number of important constitutional principles are engaged in the present case. These include that the conduct of international relations is a matter for the executive and not the courts; that the national security and defence of the UK are the responsibility of the executive, which is democratically accountable to Parliament; and that the disposition of the armed forces is a discretionary power of the Crown into the exercise of which the courts will not enquire. We have concluded also that the nature of the F-35 Programme is such that the vital interests of the UK in matters

[19] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of May 28th, 1951).

of defence, international peace, national security and the conduct of foreign relations are engaged, and that the decision whether the UK would continue to participate in this programme with other nations, which is of profound importance for international peace and security and the defence of the UK, is reserved under our constitution to the judgment of the executive (see para 112 above). It follows in our judgment that any reception of customary international law rules into the common law must conform with these constitutional principles. The common law is sufficiently flexible to allow for the possibility of drawing upon such rules of customary international law in an appropriate case, without allowing them to trespass on matters which are not justiciable.

135. Thus the real question under Ground 9 is not the abstract question whether the rules identified by the Claimant should be received into the common law, but whether they should be received so as to constrain executive decision making in areas which under our constitution are the responsibility of the executive and not the courts. In our judgment they should not.

136. For these reasons we reject Ground 9.

Ground 10 – *ultra vires*/facilitation of crime

137. Ground 10 comprises the Claimant's contention that the F-35 Carve Out gave rise to a significant risk of facilitating serious crime and, consequently, in making that decision the Secretary of State exercised his powers under Article 32 of the 2008 Order in a manner that was *ultra vires* that Order and the 2002 Act. The criminal offences which the Claimant submits would be facilitated are offences under the Geneva Conventions Act 1957 and the International Criminal Court Act 2001.

138. Section 1 of the 1957 Act provides:

> '(1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions, the first protocol or the third protocol shall be guilty of an offence.
>
> (1A) For the purposes of subsection (1) of this section-
>
> (a) a grave breach of a schedule convention is anything referred to as a grave breach of the convention in the relevant Article, that is to say-
>
> …
>
> (iv) in the case of the convention set out in the Fourth Schedule to this Act, Article 147…'

139. Article 147 of the convention set out in the Fourth Schedule provides:

> 'Grave breaches … shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, … wilfully causing great suffering or serious injury to body or

> health, … unlawful confinement, of a protected person, … taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully or wantonly.'

140. Section 51 of the 2001 Act provides that it is an offence for a person to commit genocide, a crime against humanity or a war crime. The section 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. Although the Claimant relies on the 2001 Act, we do not understand it to contend that there is any risk of genocide, a crime against humanity or a war crime being committed by a UK national, resident or person subject to UK service jurisdiction as a result of the licensing of the export of F-35 components.

141. The Claimant's case is that the supply of components to the F-35 Programme would facilitate the commission of war crimes by Israeli military personnel and officials, extending all the way up the chain of command to the Prime Minister of Israel. Moreover, it contends that even factory workers in the UK participating in the manufacture of such components would have criminal liability as accessories, subject to proof of knowledge on their part that the components would be used by their recipients in Israel to commit war crimes. It is apparent, therefore, that the criminal offences under English law which the Claimant says would be at significant risk of being committed would be committed, if the Claimant is right, in a very wide range of factual circumstances.

142. We have to say that some of the Claimant's submissions on this aspect of the case, in particular those concerned with the potential accessory liability of UK factory workers, seem far-fetched. Throughout the period in the lead up to the September Decision, the ECJU sought to assess not only whether Israel was committed to compliance with IHL, but also whether there was a serious risk that genocide or other war crimes would occur. As we have described at paras 26 to 36 above, even with the benefit of the evidence available to the ECJU, that assessment was complicated by the difficulty of obtaining reliable information in circumstances where deliberate misinformation was provided by both parties to the conflict and where the conflict was taking place in a densely populated urban area in which Hamas personnel adopted a deliberate policy of using civilian facilities for military purposes. Proof of the necessary state of mind for accessory liability would therefore present challenges.

The parties' submissions

143. The foundation for the Claimant's case on Ground 10 is that it is a principle of statutory interpretation that Parliament is presumed not to require the performance of a statutory power or duty where to do so 'would facilitate the risk of serious crime, unless Parliament has made the contrary plain'. The Claimant submits that this principle was established by the Court of Appeal in *R v Registrar General ex p Smith* [1991] 2 QB 393. This case concerned a statutory duty, expressed in unqualified terms, to provide a birth certificate, but the Claimant contends that the principle applies, *a fortiori*, to the exercise of discretionary power. The purpose of the interpretive principle is to promote public policy so that the performance of a statutory duty, or exercise of a statutory power, does not lead to a risk of facilitating crime. The Claimant accepts that the operation of the principle will depend on the interpretation of the legislation in question

and the facts of the case, but submits that nothing in the scheme of the Export Control Act 2002 goes against the grain of this interpretive principle because there is nothing in the Act to show that Parliament plainly intended the Secretary of State's licensing power to be used in circumstances which would facilitate the commission of serious crime.

144. The Secretary of State submits that *Smith's* case was a wholly exceptional case which predated *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357 and in which *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 was not cited or considered. The Secretary of State relies on *Rusbridger* (and the consideration in that case of *Imperial Tobacco*) for the propositions that it would only be permissible for a civil court to make a finding of prospective criminal liability in a truly exceptional case, and that a case cannot be categorised as truly exceptional if it is 'fact sensitive' (citing *Rusbridger*, Lord Steyn, para 23). The Secretary of State contends that the matters advanced by the Claimant are acutely fact sensitive and controversial. This civil court would be required to engage in a speculative, theoretical exercise involving untested issues which sit at the limits of the criminal law of England and Wales, and would necessarily involve consideration of military operations overseas in the context of a complex and highly contentious conflict, to which the United Kingdom is not a party.

145. The Secretary of State contends that, applying *Rusbridger*, the court should dismiss Ground 10 at the threshold stage as a matter of discretion. The Claimant cannot circumvent *Rusbridger* by relying on a risk that the F-35 Carve Out might facilitate crime. Alternatively, the Secretary of State submits that Ground 10 is non-justiciable, and should be dismissed by applying the foreign act of state doctrine, in circumstances which are indistinguishable from *Noor Khan*.

146. The Claimant contends in response that the objections based on *Rusbridger* and *Noor Khan* fall away once it is appreciated that the Claimant is not inviting the court to conduct its own assessment but invites the court to determine the public law consequences that flow from the Secretary of State's own assessment of risk. It submits that the conclusion that the F-35 Carve Out gives rise to a significant risk of facilitating war crimes follows from the Government's own assessment that there is a clear risk that Israel may commit serious violations of IHL.

Analysis of the interpretive principle and threshold objections

147. It is important to understand that *Smith* was a development by analogy of the established principle of legal policy, which the court should take into account when interpreting legislation, that a person should not be allowed to profit from their own wrongdoing: see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. (2020), para 26.6. Even in that context, it was clearly an exceptional case, of limited application.

148. In *Hicks v Secretary of State for the Home Department* [2005] EWHC 2818 (Admin), Collins J held that the rule of public policy preventing a person from benefiting from their own criminal behaviour is limited to the sort of situation, as in *R v Secretary of State for the Home Department, ex p Puttick* [1981] QB 767, in which the entitlement to registration as a British citizen was achieved by means of the claimant's criminal behaviour. It did not apply in *Hicks* because the claimant, although alleged to have given active support to terrorists, had 'not done anything wrong in order to establish the necessary conditions to be registered as a British citizen' (para 29).

149. That established interpretive principle does not, and is not alleged to, apply here. Reliance is not placed on any criminal offence that is alleged to have been committed, or any past wrongdoing. Nor is it alleged that any licence-holder or exporter has done anything wrong in order to establish their continuing entitlement to export F-35 parts into the F-35 Programme. The Claimant relies on the extension of the principle in *Smith*'s case.

150. *Smith* concerned a challenge to a decision of the Registrar General refusing the applicant's request, pursuant to section 51 of the Adoption Act 1976, for a copy of his birth certificate. The applicant had been convicted of the murder of a stranger he met in a park, and then two years later, while serving a sentence of life imprisonment, he had killed a fellow prisoner. In respect of the latter offence, he was convicted of manslaughter by reason of diminished responsibility. He said that he 'thought he saw his foster mother in the corner of his cell', and believed he had been attacking her rather than another prisoner 'with whom he apparently got on well' (Sir Stephen Brown P, 398B). He was transferred to Broadmoor where he was detained under the provisions of ss.47 to 49 of the Mental Health Act 1983. The Registrar General had refused his application on public policy grounds, after obtaining medical reports, on account of the risk posed by the applicant to his birth mother if he learned of her identity.

151. The Divisional Court dismissed the applicant's claim for judicial review, and the Court of Appeal upheld that decision. In doing so, the Court of Appeal extended the interpretive principle that a person should not be allowed to profit from their own serious crime (citing *Puttick*), to deny the applicant a statutory entitlement to be given information as to the identity of his birth mother so as to prevent grave crime being committed in the future.

152. Sir Stephen Brown P accepted the submissions of the *amicus curiae*, Mr Laws, that the court should interpret the *prima facie* unqualified obligation in section 51 of the Adoption Act 1976 as embracing an 'implied exception on public policy grounds' (401C-D, F). He described the facts as 'wholly exceptional' (401F), observing:

> 'I do not believe that Parliament intended to provide an absolute right to the relevant information "come what may".
>
> The possible consequences of a contrary conclusion are in my judgment quite horrifying. The instant case concerns a double killer with an abnormal personality. The circumstances of the second killing in particular cannot fail to arouse a very real and present apprehension for the safety of the as yet unidentified natural mother of the applicant. It is not too extreme to say that to identify her to him might even be tantamount to signing her death warrant. Public policy surely cannot permit that.'

153. Lord Justice Staughton noted that the applicant's counsel 'was prepared to concede that it would be a natural extension of existing public policy if the courts declined to enforce statutory duties when a person required performance for the purpose of a crime which he intended to commit' (402H-403A). He expressed:

> 'some concern as to whether we should even accept what [counsel] is prepared to concede, as it would have wide consequences' (403C);

continuing at 403E-H:

> 'A principle that statutory duties, although apparently absolute, will not be enforced if performance of them would enable a person to commit a serious crime or to cause serious harm is fraught with difficulty. …
>
> There is, moreover, a practical distinction between declining to enforce a statute when to do so would enable the person to benefit from serious crime in the past (as in *Reg. v Chief National Insurance Commissioner, Ex parte Connor* [1981] Q.B. 758 and … *Puttick* …) and declining to enforce a statute because it is apprehended that to do so would facilitate serious crime in the future. In the former case one can tell with reasonable certainty what the consequence of enforcement would be; in the latter, it may be a matter of speculation.'

154. Nevertheless, Lord Justice Staughton held (403H-404D):

> 'I am persuaded that some such principle exists and that [counsel's] concession was rightly made. If it be the law that Parliament, even when enacting statutory duties in apparently absolute terms, is presumed not to have intended that they should apply so as to reward serious crime in the past, it seems to me that Parliament must likewise be presumed not to have intended to promote serious crime in the future. That is consistent with the growing tendency … towards a purposive construction of statutes …
>
> Nor would I limit the principle, as [counsel] does, to cases where performance of the statutory duty is required for the purpose of a serious crime which the applicant intends to commit. It 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. Parliament is presumed not to have intended that, unless it has said so in plain terms.'

Lord Justice Staughton described this as a 'rule of law to be applied in the interpretation of Acts of Parliament, on the facts of each case' (404D-E).

155. Lord Justice McCowan considered that (405C):

> 'the correct formulation of the public policy in this context is that the adopted person will not be permitted to exercise his right

> under section 51(1) of the Adoption Act 1976 if there is current and justified apprehension of a significant risk that he might in the future use the information obtained to commit a serious crime.'

156. In *R (Crown Prosecution Service) v Registrar General* [2002] EWCA Civ 1661, [2003] QB 1222, Lord Justice Waller emphasised the unusual nature of *Smith*'s case. He observed:

> '13. … There is no difficulty in understanding that the exercise of an absolute duty would be likely to be subject to the limitation that it should not be exercised so as to allow a person to benefit from his or [her] own crime. *R v Secretary of State for the Home Department, Ex p Puttick* [1981] QB 767 is authority for that. It is more difficult however to articulate the precise ambit of the limitation where the public policy is said to be that an absolute duty is not to be used to facilitate the commission of a crime, which is exemplified by *R v Registrar General, Ex p Smith* [1991] 2 QB 393. *Smith'*s case, I would suggest, was a case with very special facts, in relation to which the obviousness of the risk, that the use of the information to be supplied might lead to serious harm being inflicted on, in that case, Smith's natural mother, was such that it was possible to say that Parliament cannot have intended the absolute duty to be employed for that purpose. …
>
> 16. … *Smith*'s case was decided on very extreme facts, where the provision of information amounted to the signing of the adoptive [sic] mother's death warrant. It is difficult to see that the exercise of the duty of the Registrar General would ever be likely to facilitate the very extreme type of consequences there envisaged. But I do not feel it necessary to decide that point.'

157. The Claimant seeks to distinguish *R (CPS) v Registrar General* on the ground that the case concerned the risk of facilitation of the avoidance of liability for crime, in circumstances where the prisoner was on trial for murder, and if he were to be granted a certificate enabling him to marry his partner (who was an important prosecution witness), she would cease to be compellable. However, the court was also concerned with the High Court's conclusion that issuing a marriage certificate to a prisoner might facilitate the commission of a crime, namely the perversion of the course of justice. While the Court of Appeal did not accept that entering into a marriage in such circumstances could be said to be perverting or attempting to pervert the course of justice, the consideration given to *Smith's* case by the Court of Appeal is instructive.

158. In *Rusbridger* the claimant sought a declaration that the publication of a newspaper article which advocated the abolition of the monarchy was lawful notwithstanding the literal wording of section 3 of the Treason Felony Act 1848. The House of Lords addressed the principles to be applied in determining whether a civil court should entertain a claim for declaratory relief on a question of criminal law.

159. At para 16, Lord Steyn endorsed this observation of Viscount Dilhorne in *Imperial Tobacco* at p.742:

> 'My Lords, it is not necessary in this case to decide whether a declaration as to the criminality or otherwise of future conduct can ever properly be made by a civil court. In my opinion it would be a very exceptional case in which it would be right to do so.'

160. Lord Steyn observed:

> '19. … Normally, the seeking of a declaration in a civil case about the lawfulness of future conduct will not be permitted. But in truly exceptional cases the court may allow such a claim to proceed.'

161. When examining the applicable criteria, Lord Steyn held, first, that the 'starting point must be that the relief claimed may as a matter of jurisdiction be granted' (para 21), and, secondly, that 'whether the case is fact sensitive or not … is a factor of great importance and most claims for a declaration that particular conduct is unlawful will founder on this ground' (para 23). He contrasted a 'question of pure law' which may more readily be made the subject matter of a declaration (para 23).

162. Although Ground 10 is characterised as a question whether the F-35 Carve Out was *ultra vires*, rather than as an abstract application for a declaration as to the effect of criminal law, many of the factors that underlie the approach adopted in *Rusbridger* are germane when considering the ambit of the interpretive principle applied in *Smith*'s case, and whether the interpretive rule for which the Claimant contends is established or applicable in this context. We consider that those factors are, first, that questions of criminal law are most appropriately decided by criminal courts in cases where the question whether a criminal offence has been committed has actually arisen. The civil courts should be cautious of usurping the role of the criminal courts. Secondly, the court must exercise great caution whenever it is asked to decide that future conduct (which necessarily comprises hypothetical acts) would *not* contravene the criminal law. More rarely still is it appropriate for a civil court to determine that future conduct *would* infringe the criminal law, and such a determination is rendered impossible if the matter is fact-sensitive. Thirdly, even greater caution is appropriate where the court is asked to assess future criminal liability without the benefit of representations from the body responsible for enforcing the law in question.

163. In our judgment, *Smith*'s case did not establish the broad interpretive presumption for which the Claimant contends. It was 'a case with very special facts', as Lord Justice Waller put it, in which the risk of disclosure enabling violent criminal conduct against a specified individual, by a convicted double killer, was so obvious that it could be described as tantamount to signing the birth mother's death warrant. The applicant's past criminal behaviour, established by his convictions, provided the foundation for the assessment of future risk, and for the court to extend the rule of public policy preventing a person from benefiting from their own criminal behaviour. The nexus between exercise of the statutory duty and the future conduct was compelling. The applicant's birth mother was at no risk from him while she remained unidentified; the fear for her

life would be *created* by giving the applicant the information to which he claimed a statutory entitlement.

164. This case is very far removed from that context. The Claimant does not contend that there has been the commission of an identifiable criminal offence, nor that an identified individual has committed a criminal offence, still less that an identified individual currently subject to the jurisdiction of the criminal law of England and Wales has committed a criminal offence (whether as a principal or a secondary party). Unlike in *Smith*'s case, the Claimant invites the court to engage in an *entirely* prospective exercise; and to do so at a high level of generality, without delving into the specifics of the future offences or potential principal or secondary offenders. Nor is the nexus comparable. The grave risk to life in the ongoing military operations in the Gaza Strip is not created by the F-35 Carve Out, and would not be removed by suspension of the export from the UK of F-35 parts into the F-35 programme.

165. The court's task in construing the 2002 Act and the 2008 Order is to ascertain and give effect to the true meaning of the provisions, bearing in mind their purpose and context. Caution is necessary when public policy is invoked as an interpretive tool, pulling the meaning in a particular direction. As Lord Sales has observed extra-judicially: 'Respect for democratic legitimacy imposes an obligation on the courts to try to be clear-eyed about what background understandings really are so commonly and powerfully held as to inform statutory interpretation…' (*Statutory Interpretation in Theory and Practice*, 20 March 2025). In our judgment, the 2002 Act does not show that Parliament intended that secondary legislation should impose an absolute duty on the Secretary of State to suspend a licence if there is a significant risk that it might be used to facilitate serious crime, irrespective of any harm to national security or international peace and security that such a suspension might entail, rather than - as contained in article 32 of the 2008 Order - a power to do so.

166. It follows that, in our judgment, the F-35 Carve Out is *intra vires* the Secretary of State's powers under the 2002 Act and 2008 Order, and so Ground 10 must fail. It is unnecessary, and would not be desirable, for this court to determine whether there is a significant risk that the F-35 Carve Out may facilitate the commission of offences under the Geneva Conventions Act 1957 or the International Criminal Court Act 2001. It is sufficient to hold that it was *intra vires* and to leave consideration of any future domestic criminal offences committed by individuals over whom the United Kingdom has jurisdiction to the prosecution authorities and the criminal courts on concrete facts.

Ground 11 – irrationality

167. As explained at the beginning of this judgment, the Secretary of State's decision to exclude F-35 components from the scope of his suspension decision was based on his concern, set out in the Decision Letter, 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'; and on his understanding, based on the Ministerial Submission dated 30th August 2024 (para 37 above), that the 'only way to avoid export of F-35 parts to Israel' would be to suspend the Open General Export Licence ('OGEL') and the four Standard Individual Export Licences ('SIELs') relating to the F-35 programme. He took into account the Defence Secretary's advice that:

> 'Such a suspension of F-35 licensing leading to the consequent disruption for partner aircraft, even for a brief period, would have a profound impact on international peace and security. It would undermine US confidence in the UK and NATO at a critical juncture in our collective history and set back relations. Our adversaries would not wait to take advantage of any perceived weakness, having global ramifications.'

168. By Ground 11, the Claimant contends that the F-35 Carve Out is based on an irrational assessment of the impact of suspension of licences for the export of F-35 components. It contends that it would not have been necessary to suspend the licences relating to the F-35 programme in their entirety in order to avoid the indirect export to Israel of F-35 parts manufactured in the UK; rather, this could have been prevented by what the Claimant describes as 'the simple mechanism of informing the [Global Spares Pool] operators that any UK manufactured parts must not be provided to Israel'.

169. Both parties acknowledged that submissions on this ground were primarily a matter for the CLOSED hearing, held on the afternoon of the final day of the hearing. Accordingly, the Claimant did not address this ground orally, leaving it to be pursued by the Special Advocates, having regard to the CLOSED evidence.

170. In this OPEN judgment, we outline the submissions made by the Claimant, the Secretary of State's OPEN evidence and submissions in response, and our conclusions and reasoning, to the extent that they are based on OPEN material. We have addressed this ground further in our CLOSED judgment. Evidence relevant to this ground has been given by the Director General Air within the Ministry of Defence, Air Vice-Marshall (ret'd) Keith Bethell CBE, who has given evidence in both OPEN and CLOSED witness statements.

171. First, the Claimant contends that so long as the contractors who operate the 'spares pool' and distribute parts 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, disruption to the F-35 programme, and the consequent damaging impacts, could be avoided. In any event, the Claimant submits that the Secretary of State's concern can only possibly have applied to the subset of F-35 components exported to the global spares pool, and not to those exported directly to assembly lines. This contention is based on the advice received by the Secretary of State that '[o]n the assembly line the end user is identified for the completed aircraft, which means the impact of export controls can be more easily monitored'.

172. Mr Bethell explains in his OPEN statement that the F-35 programme is 'an international collaborative defence programme'. There are eight 'partner nations': the United States, the UK, Australia, Norway, Denmark, the Netherlands, Canada and Italy. Israel is one of 12 F-35 Foreign Military Sales Customers. The United States is 'by far the biggest participant', and 'legal title to and ownership of all "sustainment assets" (including the support equipment and all JSF Air System spares) are vested in the US Government'. The F-35 programme is currently governed by an updated Memorandum of Understanding ('MOU'), signed in 2021.

173. Mr Bethell emphasises that the F-35 programme is 'highly integrated: the principle of cooperation lies at the heart of the programme. It is simply not designed to enable any

of the Participants to make unilateral decisions in relation to altering the organisation and structure of the programme'. He gives evidence that:

> 'It is not, therefore, the case that the UK Government can simply issue an instruction to the assembly plants, the regional warehouses, the Prime Contractors or the other Participants to the effect that UK manufactured components are not to be used in Israeli F-35s. Any such change to the programme would require consensus.'

174. We accept Mr Bethell's evidence that, contrary to the Claimant's contention, the nature of the F-35 programme is such that it was not possible for the UK to issue a unilateral instruction, whether to those operating the spares pool or the assembly lines, or otherwise, that F-35 components produced in the UK must not be transferred to Israel. Indeed, Mr Tim Buley KC, acting as a Special Advocate, expressly accepted in the CLOSED hearing that under the MOU it was not possible for the UK unilaterally to ensure that UK manufactured components did not reach Israel. We agree with this sensible, indeed inevitable, concession.

175. We note that the decision of the Hague Court of Appeals, which (according to the translation with which we have been provided) ordered 'the State to cease all (actual) export and transit of F-35 parts with final destination Israel within 7 days after service of this judgment', does not demonstrate that another partner nation has been able, whether unilaterally or by consensus, to prohibit the indirect export of F-35 parts to Israel. See OPEN Annex G to the Ministerial Submission of 24 July 2024 under the heading 'Netherlands' which makes reference to the fact that, following the 12th February court ruling, the Dutch Government amended the general licence for the F-35 parts hub to exclude Israel as a direct destination and has reiterated its position that the 'end user' is defined as the place where the goods are produced (US) not where they are used (Israel). NGOs brought a challenge before the Dutch Court to block the export of all F-35 parts which go to Israel via the US. The court has now ruled that there can be no restrictions on F-35 parts going to other countries, even if they may subsequently go on to Israel. A challenge to this approach is currently pending before the Dutch Supreme Court. In practice, therefore, it appears that there is at least no greater restriction on indirect exports of F-35 components from the Netherlands to Israel than has been put in place for the UK by the September Decision.

176. Secondly, the Claimant submits that even if, under the MOU, the supply of parts to one country cannot be suspended without the agreement of all partner nations, it would be surprising if the MOU was wholly incapable of amendment and that the UK ought to have explained its conclusion that Israel was no longer committed to compliance with IHL with a view to persuading other partner nations to suspend F-35 exports to Israel. The Claimant notes that the documents available in OPEN only indicate that 'informal discussions' had commenced, and do not evidence engagement with partner nations or detailed discussion of the modifications to the F-35 programme that would be necessary to restrict supply. The Claimant asks us to have regard to the CLOSED evidence on this issue. We have done so.

177. In his OPEN statement Mr Bethell states that there had been informal discussions with the Joint Program Office ('JPO') and Joint Strike Fighter Program Executive Officer ('JSF PEO'), the most senior official in the JPO, 'a number of times over the past

months'. The discussions had been initiated in February or March 2024 by his predecessor as Director General Air, Vice Admiral Sir Richard Thompson. The JPO's position was set out in April 2024. Having given details, in his CLOSED statement, of 'engagement with relevant entities since February 2024', Mr Bethell concluded that there were 'significant obstacles to any changes to the present situation' and 'the only way for the UK to ensure that its components do not reach Israel is for it to suspend all exports into the F-35 programme'.

178. For the reasons we have given in our CLOSED judgment, we accept that evidence, which represents the expert view of the key individual concerned. We reject the contention that the Secretary of State's assessment of the risks of suspension of the licences relating to the F-35 programme was rendered irrational by reason of an alleged failure to engage sufficiently with partners, with a view to establishing a consensus that would have enabled the UK to suspend indirect export of F-35 components to Israel. There was no such failure. Nor did the Secretary of State treat the MOU as taking precedence over other international obligations.

179. Thirdly, the Claimant suggests that the Secretary of State was concerned about the 'potential impact on UK/US relationship of any suspension of export licences to the F35 programme', but notes no evidence has been adduced in OPEN in respect of any such concerns. The Claimant speculates that the Secretary of State may have irrationally concluded (i) that UK-US relations are more important to international peace and security than the UK's compliance with its own legal obligations, (ii) that the UK's compliance with its own legal obligations would fundamentally undermine its relations with the US, such that they should be abandoned, and (iii) to similar effect, that the UK should jettison its own legal obligations for fear of incurring the displeasure of another state. However, those are not conclusions reached by the Secretary of State, and formed no part of the basis for the F-35 Carve Out.

180. In short, the Secretary of State reasonably concluded that there was no realistic possibility of persuading all other partner nations that F-35 exports to Israel should be suspended, an assessment with which (based on the CLOSED evidence) we would agree. Accordingly he was faced with the blunt choice of accepting the F-35 Carve Out or withdrawing from the F-35 Programme and accepting all the defence and diplomatic consequences which would ensue. The decision which he made was not irrational.

Ground 12 – good reason to depart from policy

181. Public law requires that published policies must be followed, unless there is a good reason for departing from them: see *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, paras 68 and 69, where Lord Justice Laws described this as a principle that a published policy may only be departed from when that is 'a proportionate response … having regard to a legitimate aim pursued by the public body in the public interest'. As Sir Geoffrey Vos MR explained in *R (Duke of Sussex) v Secretary of State for the Home Department* [2025] EWCA Civ 548, the approach which the court must take to the question whether good reason exists will depend on the nature of the policy in question and the nature of the reason given for departing from it:

> '65. The first factor is as to the nature of the policy itself. As I said in *Good Law Project*, there is a spectrum of different kinds

of policy. The spectrum ranges from the most formal policies made, after public consultation, under a statute at the one extreme to the most informal internal facing guidance, such as the social media policies in *Good Law Project*, towards the other extreme. Here the ToR 2017 were neither informal, nor just in the form of guidance. But neither were they published or the subject of public consultation. Moreover, they concerned an area of national importance that was peculiarly within the expertise of law enforcement agencies, RAVEC and the Royal Household itself. The ToR were not public facing, but the subject matter brought with it Government and democratic accountability.

66. The second connected factor is the deference that the court ought to pay to the decision maker in deciding whether it had a good reason to depart from its policy. Even the Claimant accepts that some level of weight should be attached to the judgment of a specialist experienced decision maker, like RAVEC or Sir Richard. I have paid particular heed to the detailed explanations given by Lord Hoffmann in *Rehman* and by Lord Sumption in *Carlile* as to why both (a) the separation of powers, and (b) the need for the court to avoid usurping the function of the decision maker, demand that the court treads carefully in a case of this kind. It is critical to understand that the required deference, in relation to whether or not the decision maker had a good reason, is also on a spectrum. At the one end, there will be reasons given for departing from policies on the most sensitive issues of national security where the court can rarely second guess the expertise of Government agencies, and at the other end will be run-of-the mill decisions on routine cases (perhaps on immigration or benefits issues), where deference to the expertise of the decision maker may be less obviously required. That will be particularly so where a cogent explanation is lacking.

67. This second spectrum explains, in my judgment, why the SSHD is wrong to say that the court can only review an authority's reason for departing from a policy if it is *Wednesbury* unreasonable. Good reasons to depart from generally applicable policies followed in immigration cases, for example, would obviously be susceptible to review if they were not justifiable. The decisions in *Mandalia* and *Munjaz* HL make this clear. As Lord Bingham said in *Munjaz* HL (see [41] above): "[i]n reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires". There is, as I say, a spectrum. There is no bright line rule, in my opinion, that good reasons can only be reviewed if they are irrational or unreasonable.

68. In considering whether a decision maker had good reason for departing from a policy, one considers first where on the

> spectrum of policies the relevant one lies, and where on the spectrum of appropriate deference to the decision maker, the particular type of decision lies. Here, the policy in question is politically highly sensitive. Where questions of national or Royal security are concerned, the court must inevitably be astute to respect the experts in these fields. As the evidence filed for the SSHD repeatedly emphasises, the Government is responsible and democratically accountable for Royal security. These reasons also explain why the court has to respect the expertise of decision makers in this space, and must be careful not to usurp their functions. That does not, of course, mean that the decisions that RAVEC makes are any the less justiciable. But it does mean that the judge was right, as he did, to place weight on the reasoning of the witnesses, and in particular, Sir Richard, Mr Hipgrave and the current Chair.'

182. In the present case, the policy set out in the SELC is, in its own terms, intended 'to promote global security and facilitate responsible exports' and 'to protect the United Kingdom's security and our expertise by restricting who has access to sensitive technologies and capabilities'. The reason given for departing from the policy was, as we have already described, that the F-35 Carve Out was necessary to avoid 'a critical impact on international peace and security, including NATO's defence and deterrence'. That was, as we have described under Ground 11, a rational view for the Secretary of State to take. Accordingly both the policy and the reason for departing from it lie at or very close to the end of each of the spectra described by the Master of the Rolls. The policy was a formal policy issued under statute which took the form of a statement to Parliament, but it expressly contemplated departure from the policy in specific cases and it concerned an area of national importance peculiarly within the expertise of the executive. The reason for departing from it in the present case involved sensitive issues of national security where democratic accountability is of critical importance. The consequences of a suspension of exports into the F-35 Programme are explained more fully in the CLOSED evidence. It follows that a high degree of deference to the reasoning of the Secretary of State is appropriate.

183. The Claimant accepts, as we understand it, that the reasons given for departing from the policy were capable of constituting a good reason for doing so, but presents Ground 12 as a challenge to the rationality of the process which the Secretary of State followed. The submission was that the Secretary of State had taken account of (or, as it was put, had 'calibrated') the serious adverse consequences for the UK of suspending export licences for F-35 components, but had failed to carry out the same calibration exercise in assessing the severity of the consequences for the people of Gaza if such exports were allowed to continue. In particular, the Claimant submitted that the conclusion that Israel was not committed to compliance with IHL was based essentially on the treatment of detainees, but did not take account of the prospect or likelihood of more extensive war crimes being committed, or the severity of their consequences, and thus omitted the broader picture; in circumstances where the Secretary of State has not suggested that the risks to international peace and security arising from a suspension of licences could never be outweighed by the consequences for Palestinians in Gaza, there was a logical gap in the Secretary of State's approach if the calibration exercise was not undertaken on both sides of the equation.

184. We reject this criticism of the process undertaken by the Secretary of State. As explained by the Court of Appeal in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, [2019] 1 WLR 5765, a case also concerned with the SELC, albeit with the application of the policy rather than with whether there was a good reason for departing from it, such a challenge must surmount 'a deliberately high threshold':

> '57. Thirdly, the principal error of law which it is alleged was committed by the Secretary of State in the present case is that he acted irrationally in the process which he adopted in order to make the assessment required by Criterion 2c. … What is important for present purposes, and in particular in addressing ground 1 in the appeal, is that the only legal error which is alleged to have been committed is founded on the public law doctrine of irrationality. This sets a deliberately high threshold. The court is not entitled to interfere with the process adopted by the Secretary of State merely because it may consider that a different process would have been preferable. What must be shown by CAAT is that the process which was adopted by the Secretary of State was one which was not reasonably open to him.'

185. In the present case a careful and thorough process was undertaken in circumstances where it was difficult to assess the reliability of much of the information available. A clear and unqualified conclusion was reached that Israel was not committed to compliance with IHL. This was not finely balanced, and was not limited (for example) to Israel's treatment of detainees, but applied across the board and extended to the whole conduct of hostilities by Israel. It was, self evidently, a conclusion of the utmost seriousness. In those circumstances, and bearing in mind the high threshold and the deference which must be given to the Secretary of State in a decision of this nature, it is impossible for us to say that further investigation or 'calibration' was required or that the decision making process adopted was irrational.

186. It is correct that the CLOSED evidence does not provide any further calibration, beyond the conclusions that Israel is not committed to complying with IHL and that there is a clear risk that military equipment exported to Israel might be used to commit or facilitate a serious violation of IHL in Gaza, of the likelihood or gravity of any serious violation of IHL being committed by Israel.

187. Nonetheless, the more detailed explanation of the consequences if the UK were to suspend exports of F-35 components is a relevant part of the picture. It is obvious that the Secretary of State took the view that the risks of suspension of exports into the F-35 programme dramatically outweighed the risks arising from some F-35 components exported from the UK being supplied indirectly to Israel. Focusing on the process adopted, we accept that it was not irrational for the Secretary of State to take the view that a calibration exercise would not have been capable of so dramatically increasing the weight the Secretary of State would have given to the risks of export as to override the consequences of suspension.

Ground 13 – challenge to the decision not to suspend other licences

The decision to reject 'Option 2'

188. The Claimant's final ground challenges the separate decision not to select 'Option 2', that is, not to suspend all extant licences for export of military equipment to Israel, including those assessed not to be for use or incapable of being used in the conflict in Gaza, in order to 'send a political signal' (see para 37 above).

189. The Ministerial Submission to the Foreign Secretary dated 24 July 2024 advised:

> 'Should he choose to do so, the Foreign Secretary could additionally recommend suspension of a broader category of licences than is legally necessary. This is option (ii), which would result in all extant licences for the IDF being suspended regardless of their potential use. This would include items such as trainer aircraft, but also air defence components that are important for Israel to defend itself against Iran and Hizballah as well as rockets from Gaza. This option would constitute the "application to specific cases of specific measures", as envisaged in the Written Ministerial Statement issuing the SELC … and would require an announcement to Parliament. We would also need to explain to the public, Parliament and partners why Ministers had chosen to take this decision and the political signal they wished to send by doing so."

190. This advice was provided to the Foreign Secretary together with the capping submission of 26 August 2024 (as Annex C), along with an assessment by the Foreign Commonwealth and Development Office, the Ministry of Defence and the National Security Secretariat as to the implications of a suspension decision for regional peace and security (Annex D). The latter assessment, to which we have made further reference in our CLOSED judgment, identified that a decision to suspend arms exports to Israel would give rise to a 'need to manage our relationship with Israel' and 'to mitigate the risk – in so far as possible – of the decision being instrumentalised by Israel's enemies'. The Foreign Secretary recommended 'a targeted suspension focussed only on those items assessed to pose a "clear risk''.'

191. The Ministerial Submission to the Secretary of State dated 30th August 2024 advised (original emphasis):

> "The Foreign Secretary has also considered whether to recommend suspension of a broader category of licences than is strictly necessary under the SELC, namely all licences for the IDF regardless of their potential use. Those licences are the ones in scope of Option 2 as listed in **Annex C part 2**. <u>The Foreign Secretary has not recommended these are suspended</u>."

192. As we have said, the Secretary of State selected Option 1 (subject to the F-35 Carve Out), thus rejecting Option 2. In his written statement to Parliament (see para 5 above), the Secretary of State emphasised:

> "This is not a blanket ban but targets relevant licences that could be used in military operations in Gaza. "

The nature of the issue

193. The Claimant's pleaded case acknowledged that the Secretary of State 'had a discretion' in deciding whether to send a political signal by suspending licences assessed not to be for use in the current conflict in Gaza. It was not alleged that, applying the SELC, the Secretary of State was *required* to adopt Option 2. The challenge was to the Secretary of State's exercise of his discretion.

194. However, in its skeleton argument, the Claimant contended that the Secretary of State erred in deciding that the decision whether to select Option 2 was 'wholly one of political signalling' rather than *required* by the SELC having regard to 'Israel's history of undisputed breaches of international law outside of Gaza' and 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'. This was, in effect, a new claim, to the introduction of which the Secretary of State objected. The Claimant did not respond to this objection, making no application to amend. Nor, for reasons of time, did it make any oral submissions on Ground 13.

195. The need for procedural rigour in judicial review has been repeatedly emphasised: see *The Administrative Court Judicial Review Guide 2024*, para 2.1.2 and the cases cited in footnote 14. It would be unjust to permit the Claimant to pursue an unpleaded claim to which minimal attention was given at the hearing. Accordingly, we address Ground 13 on the basis that it is limited to a challenge to the Secretary of State's exercise of his discretion, based on an alleged failure to take into account considerations which the Claimant contends were mandatory, namely, the SELC, Israel's past conduct of hostilities, and past breaches of international law in relation to the Occupied Palestinian Territory.

Conclusion on Ground 13

196. It follows that this ground must be approached on the basis that the Secretary of State had a discretion to exercise precisely because Option 2 went beyond what was required by the SELC. The exercise of that discretion was highly political. The question whether to 'send a political signal' to a foreign state, engaged in an armed conflict, raises sensitive political and military issues. That would be obvious even without the CLOSED evidence, but that evidence underlines the highly sensitive, political and diplomatic nature of the Secretary of State's decision not to choose 'Option 2'.

197. In public law, a distinction is drawn between (a) considerations that a decision-maker is *required* to take into account ('mandatory relevant considerations'); (b) matters that must not be taken into account; and (c) those considerations which the decision-maker may choose whether or not to take into account. Where, as here, it is alleged that a decision-maker has failed to take into account a material consideration, it is axiomatic that such an omission will only vitiate a public law decision if the consideration fell into category (a).

198. In determining whether a matter was a mandatory relevant consideration the question is whether it has been expressly or impliedly identified by statute or policy as being required, as a matter of legal obligation, to be taken into account by the decision-maker, or whether, on the facts of the case, it was so obviously material as to require consideration. See *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, paras 182-

183, approved by the House of Lords in *In re Findlay* [1985] AC 318, and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221, paras 29-32.

199. It cannot be said that the considerations relied on (the SELC, past conduct of hostilities and past breaches of international law) were required by statute or policy to be taken into account when the Secretary of State was determining whether to exercise his discretion to go beyond the requirements of the SELC. It is far from obvious that those criteria should have been reassessed when making a decision whether to send a political signal to a foreign state. In the context of such a highly political exercise of discretion, engaging sensitive foreign policy issues, the threshold for determining that a matter was so obviously material that the Secretary of State was required to take it into account is exceptionally high. In our judgment, it has not been established that any of the matters relied on by the Claimant were considerations that the Secretary of State was obliged to take into account when deciding whether to select Option 2, rather than matters which it was open to him to consider.

200. In any event, the Secretary of State had regard to the matters identified by the Claimant. The assessment of Israel's commitment to comply with IHL, past conduct of hostilities, and compliance with Criterion 1 of the SELC, was at the heart of the decision to suspend licences for export of equipment for potential use in Gaza. An assessment against the other relevant criteria was undertaken, and was taken into account by the Foreign Secretary in advising the Secretary of State. The assessment noted that the consequences of the ICJ's Advisory Opinion regarding the Occupied Palestinian Territory[20], given on 19 July 2024, was being considered across government departments.

201. Accordingly, we reject Ground 13.

CLOSED Hearing

202. We held a CLOSED hearing on the afternoon of 16 May 2025, following the conclusion of the OPEN hearing, attended by the Special Advocates ('SAs') and Counsel for the Secretary of State. There were CLOSED statements served in response to the Claimant's original grounds, but these pre-date the September Decision. The focus of the SAs' and the Secretary of State's submissions at the CLOSED hearing was on the evidence given by Mr Bethell, directly addressing the F-35 Carve Out, and consequently that is the evidence on which we focus in our CLOSED judgment.

203. The principal ground on which CLOSED submissions have been made is ground 11. We agree with the submissions made by the SAs, and also on behalf of the Secretary of State, that grounds 8, 9 and 10 can be determined entirely in OPEN. The SAs had suggested in their skeleton argument that some features of the CLOSED evidence might bear on grounds 8 and 12. However, in the light of what he described as the disciplined approach taken by the Claimant to these grounds, relying solely on the Secretary of State's assessment of a clear risk of a serious violation of IHL, rather than seeking to augment that assessment by referring to additional material, Mr Buley made clear at the outset of his oral submissions that the SAs would take the same approach. The Secretary

[20] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)*, 19 July 2024.

of State has relied on some CLOSED material as providing further support for his position on grounds 12 and 13, and so we consider those submissions and the SAs' response in our CLOSED judgment. The CLOSED judgment does not alter the conclusion we have reached in OPEN that these grounds of challenge are rejected.

Relief

204. As we have concluded that the claim must fail, it is unnecessary to say anything about what if any relief would have been appropriate if the claim had succeeded or about the application of section 31(2A) of the Senior Courts Act 1981.

Conclusion

205. For the reasons given in this judgment, we reject all of the Claimant's extant grounds of challenge to the September Decision.

206. It is important to understand what this case has been about and what it has not been about. It has not been about whether the UK should supply arms or other military equipment to Israel. That decision has been made by the Secretary of State, who has decided, in the September Decision, that it should not. The decision not to supply such arms extends in principle to F-35 components which can be identified as destined for Israel.

207. Rather, this case has been concerned with a much more focused issue. That issue is whether it is open to the court to rule that the UK must withdraw from a specific multilateral defence collaboration which is reasonably regarded by the responsible Ministers as vital to the defence of the UK and to international peace and security, because of the prospect that some UK manufactured components will or may ultimately be supplied to Israel, and may be used in the commission of a serious violation of IHL in the conflict in Gaza. Under our constitution that acutely sensitive and political issue is a matter for the executive which is democratically accountable to Parliament and ultimately to the electorate, not for the courts.

208. Despite the skill with which the Claimant's arguments were presented, once the true nature of the issue is identified, it is clear that the claim must fail. Accordingly permission to bring a judicial review claim is refused.