Case No: CO/1306/2016

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 7th February 2017

BEFORE:

LORD JUSTICE BURNETT
MR JUSTICE HADDON-CAVE

BETWEEN:

CAMPAIGN AGAINST ARMS TRADE

Claimant

- and -

SECRETARY OF STATE
FOR BUSINESS INNOVATION

Defendant

MR MARTIN CHAMBERLAIN, QC, MR CONNOR McCARTHY (instructed by Leigh Day) appeared on behalf of the Claimant

MR JAMES EADIE, QC, MR JONATHAN GLASSON QC, MS KATE GRANGE (instructed by Government Legal Department) appeared on behalf of the Defendant

MR ANGUS McCULLOUGH, MS RACHEL TONY appeared on behalf of the Special Advocates

MR SUDHANSHU SWAROOP QC, MR NIKOLAUS GRUBECK, MR ANTHONY JONES appeared on behalf of the First, Second and Third Interveners

A

PROCEEDINGS

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(10.25 am)

LORD JUSTICE BURNETT: Yes, now, Mr Chamberlain. Before you introduce all the parties, may I just mention one or two things. First of all, I am sorry that the accommodation here is rather crowded and that a number of people are obviously, not seated in an especially comfortable position. I am afraid we have to be in one of these courts down here as all counsel will appreciate, because in the course of these proceedings we will be going into a closed session and all the relevant facilities for documents are attached to this court. So, I am sorry about that. I hope that you will manage but no doubt, as the morning goes on, numbers might thin out, I don't know, that usually happens.

The second matter is this. We have had a request, I am not sure from whom it came, whether we would be content for members of the press to Tweet from court. We are entirely relaxed about it but those who do it need to remember that Tweeting must be accurate and responsible. I also emphasise, especially for those who are not very familiar with these types of proceedings, that nobody may use recording devices or take photographs. That is not precious on our part, it is simply that a Statute says that that is the position, so I hope that is clear.

The last matter, just by way of introduction before I hand over to you and, in particular, inquire of you regarding timetable, is that we are enormously grateful to all of the parties and interveners for the clearly great industry which has gone into producing the written arguments which are before us. It is, perhaps, genuinely a case where to describe any of them as "skeletons" would not be accurate. We are not complaining as it happens, because it has enabled us to navigate the papers and we hope that it will enable all of you to be able to be fairly economical in the arguments that you advance broadly.

MR CHAMBERLAIN: My Lords, I appear with Mr Connor McCarthy for the claimant, Campaign against the Arms Trade. Mr James Eadie, QC, Mr Jonathan Glasson, QC, Ms Kate Grange, shortly to be QC and Ms Jessica Wells represent the defendant, the Secretary of State for International Trade. Formally, I should say that the Secretary of State for Business Innovation and Skills is named as defendant but it is common ground that the responsibility for this area has transferred and therefore, the Secretary of State for International Trade should be substituted.

Mr Angus McCullough, QC and Ms Rachel Tony represent the claimants' interest as special advocates. Mr Sudhanshu Swaroop QC, QC, Mr Nikolaus Grubeck and Mr Anthony Jones appear for the first, second and third interveners, Human Rights Watch, Amnesty International and Rights Watch UK. The fourth intervener, Oxfam, are not represented in court, but you have their written submissions by Professor Zachary Douglas QC and Ms Blinne Ni Ghralaigh.

Housekeeping. You should have the following open documents. Five volumes of hearing bundles. Now, various additions have been made over the last two days to them and we have done our very best to ensure that your bundles are updated in line with everybody else's. We cannot absolutely guarantee that that will have

happened in every case. If it has not and we come across a document that you do not have, then we have copies in court to rectify that problem.

LORD JUSTICE BURNETT: Thank you. I think both of our clerks have done their best to insert the various things that have been arriving.

MR CHAMBERLAIN: Yes. As far as authorities are concerned, you should be three yellow, or at least in our case, they are yellow volumes, maybe they are not.

LORD JUSTICE BURNETT: I think we have rather more low grade files. They are the very cheap black ones.

MR CHAMBERLAIN: Ah, right, well. We all three volumes of whatever kind of joint authorities.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: There is then an additional bundle of authorities supporting the Secretary of State's response to the first three intervener's submissions and that came, at least, to me in a bundle from, I think, it must be from Ms Grange.

LORD JUSTICE BURNETT: Yes. I think she is just handing those up. Thank you.

MR CHAMBERLAIN: Then there is another bundle also from the Secretary of State of additional authorities, supplemental authorities bundle.

MR JUSTICE HADDON-CAVE: Have they got 15 tabs?

MR CHAMBERLAIN: Thirteen in my version.

MR JUSTICE HADDON-CAVE: Yes, 13.

MR CHAMBERLAIN: Then you have a very small ring binder from us, the claimant's supplementary authorities which should have just four tabs in it.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: Now, I apologise obviously, that there are so many different authorities bundles, but you will have seen that the timetable that was allotted for this case has been quite tight, so we have done our best to do everything in on time. You should have, by way of skeleton arguments, a skeleton argument from each of the claimant, the first three interveners, the Secretary of State and, in addition, a response by the Secretary of State to the arguments of the first three interveners which we received yesterday afternoon.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: You should also have an open version of Part 1 of the Special Advocate's detailed grounds.

LORD JUSTICE BURNETT: Is this B1705?

MR CHAMBERLAIN: Yes. That has been slotted in there. You will also obviously, have closed documents. Subject to the court's view and in light of the email that we received from your clerks, we have agreed a provisional timetable, according to which we hope to conclude the open part of the hearing by lunch tomorrow.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: That will include an opening by me which I hope to finish by 3.15 pm today. There may be a minute or two leeway. Thirty minutes of submissions by Mr Swaroop, 30 minutes of submissions by Mr Eadie in open, which would take us to 4.15 pm today. Mr Eadie would then continue tomorrow morning and aim to conclude his open submissions by 12.30 pm tomorrow and I would then reply for 30 minutes, which would take us to lunch tomorrow. At that point, my team and Mr Swaroop's and everyone else, apart from the Special Advocates and the Secretary of State's team will leave and then we have the whole of Wednesday afternoon and Friday enclosed.

We are conscious, obviously, that it is evident to us just from the redactions, never mind the other material which you may or may not have, that a substantial part of the evidence in these proceedings is enclosed, and we are very conscious of the need to allow time for that to be considered with the special advocates and the Secretary of State's team.

LORD JUSTICE BURNETT: Are you content then, Mr Chamberlain, that there would be no need to come back at the end of the closed case for any reason?

MR CHAMBERLAIN: We, for our part, are content with that. We just, as a matter of experience to come back and make a closing conclusion on the basis of material that one has not heard is not something I have particularly found useful when I have been sitting in other capacities in these proceedings.

LORD JUSTICE BURNETT: Yes. It strikes me that that is an entirely sensible and realistic approach. That is not to say that something might occur in connection with that material which could require your return, but it is most unlikely so we will not timetable it in.

MR CHAMBERLAIN: No. If of course there were a need. We are told that the close can be comfortably accommodated within a day and a half and so, if there were a need, if something arose during the course of the hearing and that meant that there were a need for us to come back, of course, we would be willing and able to do so.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: My Lords, this is a claim for judicial review, challenging first the ongoing failure to suspend existing export licenses for the sale or transfer of arms and military equipment to the Kingdom of Saudi Arabia for possible use in the conflict in Yemen. Second, a decision communicated on 9 December 2015 to continue to grant new licenses for the sale or transfer of such equipment. The claim proceeds, as your Lordships will know, with the permission of Gilbart J granted after a hearing on 30 June 2016.

With your Lordship's permission, I would like to make submissions under six heads. First, a summary of the open case. Second, the constitutional propriety of the exercise that we invite the court to undertake and the tests that the court ought to apply in analysing the arguments that we put forward. Third, the legal framework governing export control and the requirements of international humanitarian law or "IHL" as we will call it, in international and non-international armed conflicts. Four, what the government knew by the time of the first challenged decision on 9 December 2015 and by 16 February 2016 when the decision was maintained after a further review in the light of this challenge. Fifth, the information available to the government from 2016 to date and sixth, why we say at each of these stages, the government could not lawfully conclude that the clear risk test, and I will come to deal with that in a moment, was not met.

May I move then to a summary of our open case. I can sum up our positive case in five points. First, the government's own policy, as announced in Parliament, is that it will exercise special caution and vigilance before granting licenses for the export of arms to countries where serious violations of human rights had been established by competent bodies of the UN or EU. It is common ground that Saudi Arabia is such a country.

Second, the criteria also provides that the government will not grant a license for the export of arms or military equipment if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law. Third, the open evidence in this case includes a large number of apparently authoritative reports and findings, not just from non-governmental organisations such as Amnesty International and Human Rights Watch, but also from an expert panel appointed under a UN Security Council Resolution and from the European Parliament, which show that the Saudi Arabia-led coalition has committed repeated violations of IHL, some of them serious. Some of these, such as the designation of an entire city as a military target, appear on their face to be deliberate and fragrant others, such as attacks on Médecins Sans Frontières clinics and other protected targets may or may not have been deliberate but in any case, appear to constitute serious failures to respect the principles of proportionality and distinction. Two fundamental principles applicable to all armed conflicts, including non-international ones.

Forth, if this open material stood on its own, no reasonable decision-maker could have concluded in December 2015 that the clear risk test was not met. By February 2016, when the decision was reconsidered, the UN expert panel had reported and the position was, in our submission, even clearer. Since February 2016, there have been a series of further incidents that on the open material appear to constitute further violations of IHL, some of them serious. Concern over Saudi targeting practices has been such as to cause the United States in December 2016 to end exports of airdropped precision-guided ammunitions

Fifth, to conclude in the light of this material that there is no clear risk that UK-supplied weapons might be used in the commission of a serious violation of international humanitarian law the government would, as a matter of logic, have at each stage when the matter was concerned, to have closed material that enabled it either (a) to reject the findings --

LORD JUSTICE BURNETT: Can you slow down, Mr Chamberlain. Thank you very much.

MR CHAMBERLAIN: They would have to have at each stage closed material that enabled them either (a) to reject the findings that there had been violations of IHL or, (b) to show that notwithstanding serious violations in the past, there was no clear risk of recurrence.

The government's reply to this case has three strands, all dependent, to some extent, on closed material. Some key parts of the closed material have been disclosed pursuant to the disclosure process under Part 82 of the CPR. The three strands are these. First, the MOD system, known as the "tracker" for monitoring alleged violations of IHL. Second, the UK's understanding and knowledge of Saudi Arabian military processes and procedures, in particular, through its liaison officers in Saudi Arabia and through training initiatives. Third, ongoing dialogue with Saudi Arabia and the 14 investigations so far undertaken by the Joint Incidents Assessment Team or JIAT of the Saudi Arabian-led coalition.

LORD JUSTICE BURNETT: Could we avoid acronyms as much as possible. For my benefit, if no one else's.

MR CHAMBERLAIN: I will do my very best.

LORD JUSTICE BURNETT: Do not worry about the very obvious ones.

MR CHAMBERLAIN: If I slip in that regard, I hope your Lordship will remind me to expand the acronyms.

LORD JUSTICE BURNETT: So 14 investigations.

MR CHAMBERLAIN: Yes. Now, the extent to which these three strands of defence are capable of displacing the weight of open evidence of Saudi violations is a matter you will have to consider on the totality of the evidence, both open and closed, but certain conclusions, we submit, can be drawn on the open evidence alone. In summary, we say they are these.

As to the tracker, what the government initially told Parliament was that the MOD had concluded that Saudi Arabia had not breached IHL. That was said three times in very clear written administerial statements to Parliament. But as the government now admits, that was untrue. In fact, the MOD has never reached that conclusion. It follows that what was said to the claimant in pre-action correspondence in this case was also untrue and in the Secretary of State's skeleton argument there is no attempt to defend it.

The open evidence shows that the MOD is, generally, in no position to say whether IHL has been breached in any specific case or not. The MOD's analysis is limited, materially, to examining after a strike, whether a military target can be identified for that strike and in the great majority of cases, three quarters in the last reporting period of which we are aware, a military target cannot be identified. I will come to the numbers later but just so that you have it in mind, the latest open evidence tells us that the MOD have been tracking around 122 incidents of

potential IHL concern and of those, they cannot identify any military target in around 90 cases. This is despite the fact that there are a large, or certain number anyway, of military officers, UK military officers in Saudi Arabia and despite the fact that the UK asserts it has a good relationship with Saudi Arabia.

Now, we know from the special advocates that the so-called tracker is, in fact, a spreadsheet which used to have a column marked "IHL breach?" but that column was never filled in and was subsequently, in subsequent iterations of the tracker deleted altogether. We also know that in the special advocates submission, no other material disclosed in open or closed suggests that the process adopted by the defendant through the FCO or MOD or otherwise includes any routine attempt to reach an assessment in any individual case to identify whether the responsible parties' actions are compatible with IHL or not.

What about the second strand; liaisons between Saudi and UK military officers and training. Well, on that the open evidence reveals that the input provided by UK officers is strictly limited. They do not provide direct advice on how to conduct the campaign in Yemen, nor are they involved with targeting decisions. If they were, they would be likely to render the UK liable as a matter of international law for any internationally wrongful acts committed by the Saudi Coalition. So, not surprisingly, the government says that they are kept separate from these decisions.

Furthermore, although the Secretary of State claims to have some insight into the targeting process used in pre-planned strikes, the documents make clear that the MOD has little insight into the processes for so-called dynamic strikes. Now, we will come to see what "dynamic" means in due course, but there is one place, at least in the papers, where it is given a fairly vivid description. It is where the pilot in the plane decides, perhaps after a conversation with his officers back at base, to launch munitions from the cockpit as it were and so that is what we understand to be a "dynamic strike".

We are told that these dynamic strikes and also further category of strikes that occur as part of combat engagement have less robust processes in place than those in place for pre-planned strikes and that the proportion of all strikes which involve dynamic targeting has increased. Now, in principle the provision of training could be relevant to the question whether the clear risk test is met but on the facts of this case, it is, we suggest, impossible to see how that training could negative the open evidence of what has been happening on the ground. To give one example, there have been three courses run by the UK military at the Air warfare centre in the UK covering targeting in accordance with international humanitarian law. They were in July to August 2015, January 2016 and July to August 2016. Just two months after the last of these, Saudi Arabian aircraft attacked a funeral in Sanaa. Reports of that attack show that 140 people, including children, were killed and some 500 more were injured.

We know from material disclosed in these proceedings on Friday of last week that that attack caused the UK ambassador to the United Nations to propose that the security council issue a statement strongly condemning the attack. He described it as "appalling". Reports also show that the UN expert panel concluded that the attack employed the "double-tap" tactic, launching a second attack to target first

responders tending to the wounded and condemned it as constituting a violation of IHL.

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As we understand it, this strike was one of ten in 2016 but according to news reports, have been considered by the UN expert panel in its final report to the Security Council's Sanctions Committee. We have not seen that report but you do have it, we understand from the Secretary of State enclosed. It is due to be published in a matter of weeks. If it has been summarised accurately by Reuters, it concludes that in all ten cases, it is almost certain that the Saudi-led coalition did not meet IHL requirements of proportionality and proportions in attack and that some of the attacks may amount to war crimes.

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As to the investigations carried out by the Joint Incidents Assessment Team (I hope I have the right expansion of that term), we make three further points. First, the 14 investigations that have so far reported cover only a tiny minority of the total cases in which a violation of IHL has been alleged and the government has itself acknowledged the slowness of the investigative process, "frustratingly slow" as the Under Secretary of State for Foreign and Commonwealth Affairs put it in Parliament.

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Secondly, the methodology of the JIAT has been subject to detailed criticism and its findings have differed markedly from those of the UN and other observers. You have, and I am going to come to some of them, the exiguously recent findings in the bundle. We say they can be seen on the face of it to be manifestly inadequate, even on those cases where an investigation has reported. Third, we say that even in circumstances where the government professes or in circumstances where the government professes not even to know whether Saudi Arabia's domestic law prohibits violations of IHL, let alone whether it has any effective enforcement mechanism, vague statements about holding individuals to account can count for very little.

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Summarising our case, my Lords, taking the government's open case at its highest, we say there is only one conclusion that can properly be drawn. The Secretary of State did not and does not have any proper basis that is sustainable in law for concluding that the clear risk test is not met. At the very least, the government had no proper basis for failing to invoke its suspension mechanism given the absence of clear information necessary for the application of the clear risk test on the government's own case.

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My Lords, that is the overview, I now need to get into the detail. Our second head was the constitutional propriety of the exercise that we invite the court to undertake and the test to be applied. In their summary grounds, I am going to give you the references but I do not necessary ask you to turn them all up because if we did, I think I would go over my allotted time. This is at footnote six in the summary grounds, bundle 1, page B70. The Secretary of State refers to the case of **Hassan** which is a judgment of Collins J in another judicial review application concerning arms exports. He refers to that case as an authority for the proposition that in the area of arms export, judicial review is a remedy of last resort and is only needed if appropriate cannot be obtained by another route. The Secretary of State goes on to submit that Parliament provides the first-choice route for holding the government to account. At paragraph 49 of the summary grounds on page B84, he

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returns to that theme making specific reference to the Combined Arms Export Committees which, as you know, have been looking into these matters recently.

As to that, may I just draw your Lordship's attention to what we have said in our skeleton argument and I do it by ref to the skeleton argument which has the references in so that you can go to the underlying documents if you want to. We have certainly dealt with this at paragraph 13 of our skeleton argument and following. We have set out at paragraph 13 in the indented quote the conclusions drawn in the joint report of the Business Innovation and Skills and International Trade Committees on 14 September 2016. They concluded that:

> "In the case of Yemen, it is clear to us that the arms export licensing regime has not worked. We recommend that the UK suspend licenses for arms exports to Saudi Arabia capable of being used in Yemen pending the result of an independent United Nations-led inquiry into reports of violations of IHL and issue no further licenses."

We set out at paragraph 14 an exert from the separate report of the Foreign Affairs Committee and you can see there the conclusion:

> "It is difficult for the public to understand how a reliable license assessment process would not have concluded that there is a clear risk of misuse of at least some arms exports to Saudi Arabia and noting that the courts are the appropriate body to test whether or not HMG is compliant with the law."

We make the point at paragraph 15, this is a case of last resort and the Foreign Affairs Committee has expressly endorsed the propriety of this court exercising its proper constitutional function of inquiring into whether the Secretary of State has lawfully complied with his own policy.

Now, we have said and we continue to say, my Lord, that this is an ordinary judicial review claim challenging the exercise of a statutory discretion. The subject matter may be unfamiliar, but the principles are not. The decision-maker has to ask himself the right questions, he has to gather the evidence necessary to answer them in the particular way that he has and he must reach a conclusion that is open to him on the evidence. On the facts here, we say the Secretary of State has failed to do this, whatever margin of discretion is appropriate and we rely, as you will have seen, on the classic statement of rationality means from Sedley J, as he then was, in the case of **Belkin**. May I just ask your Lordship's just to turn that up.

LORD JUSTICE BURNETT: It is not unfamiliar.

MR CHAMBERLAIN: Well, maybe I will not ask you to turn it up. You have it, in that case, at paragraph 71 of our skeleton argument.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: I just remind the court.

LORD JUSTICE BURNETT: Could you give us the reference and the paragraph number please?

MR CHAMBERLAIN: Yes. It is authorities bundle 2, tab 19 and it is on page 9 of 11 in the print. Sedley J says this:

> "A claimant does not have to demonstrate, as respondents sometimes suggests is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term 'irrationality' generally means in this branch of the law is a decision which does not add up in which, in other words, there is an error of reasoning which robs the decision of logic."

We say that that test is applicable to a case where the test is pure orthodox Wednesbury rationality. We say that even if you apply that test, the claim should still succeed. May I explain why; the Secretary of State accepts and avers that the question whether the clear risk test is met depends on three things. See paragraph 15 of the summary grounds. I keep going back, by the way, to the summary grounds, because the summary grounds are the pleading in this case. The Secretary of State expressly said that they had to stand as detailed grounds, so that is summary grounds, paragraph 15, page B72. The three things that the Secretary of State has said will be taken into account are one, past and present records of respect for IHL. Two, intentions –

LORD JUSTICE BURNETT: Sorry, past and present, say that again?

MR CHAMBERLAIN: Past and present record of respect for IHL. Two, intentions as expressed through formal commitments and three, capacity to ensure technology is used consistently with IHL and not diverted. Just take the first of these, if, in fact, there were accepted evidence establishing a pattern of violations of IHL, that would, on any view, be a relevant factor. It would be the sort of factor which, if left out of account, would vitiate the decision on its own.

Of course, a decision-maker is not obliged to accept the findings of NGOs or the findings of a UN expert panel or the European Parliament on the question of whether there have, in fact, been violations of IHL in the past. However, he is obliged, at least if he takes the approach which the Secretary of State has in this case, to form a view about a recipient's past and present record of respect for IHL. If he cannot form such a view, then he ought to invoke the suspension mechanism. The essence of the Secretary of State's case is his submission in paragraph 46 of the summary grounds and in his skeleton argument that Criterion 2 imposes no burden on him at all to disprove or negative the findings of other apparently authoritative bodies and that Saudi Arabia has committed repeated violations of IHL. All he has to do is take those views into account, he does not have to negative them or rebut them.

We say, with respect, that that approach does not add up, to use Sedley J's language. If you are presented with apparently compelling evidence that there have been repeated violations and that fact is relevant to your decision which, on any view it is, you can do one of three things. You could say the bodies that made

these findings are, inherently, unreliable. However, the Secretary of State does not say that and realistically, he could not say that, given who the bodies are. Amnesty International, Human Rights Watch, Médecins Sans Frontières, the UN Panel of Experts, the European Parliament and so forth. Secondly, he could say well, the reports are not up to scratch. But apart from a few general statements about the limitations in the information available to the authors of the report, we have nothing, in open at least, showing any attempt to engage with or deconstruct the findings that we rely on.

The third option is, well, the reports are fine as far as they go, but we have other and better information which causes us to conclude that there have not been violations. That is what we originally thought the Secretary of State's case was. That is what the Secretary of State told us in answer to pre-action correspondence. We now know that the Secretary of State has not concluded that there have been no violations of IHL, he has simply been unable to conclude that there have been. We do not know what evidential standard he has applied in reaching that view, and we do not know what weight, if any, he has given to the reports that we relied on.

That analysis, we say, applies whatever standard of review you apply. It applies to an absolute orthodox analysis, rationality analysis as under **Balkin**. But we do say, in any event, that a stricter standard of review than that should apply and we set out our case on this in paragraphs 69 to 71 of our skeleton argument. Could I just take your Lordships to that. 68 to 70 really it should be.

We start with the, I think, now probably well-known statement by Mance L in **Kennedy v Charity Commission** [2014] UKSC 20 that the common-law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesday principle. Citing Bridge L in **R v Secretary of State for the Home Department Ex p Bugdaycay** [1987] AC 514**:**

> "The court must be entitled to subject an administrative decision to the more rigorous analysis examination to ensure that it is in no way flawed according to the gravity of the issue which the decision determines."

We say not only was this decision one of exceptional gravity, it was also one that required under Criterion 2b itself, special caution and vigilance. We accept, as we say in paragraph 69, that that is not the only matter relevant to the intensity of review. Another matter which comes out from a whole list of authorities which are very familiar, I know, to my Lord, is whether the decision depends in part, at least, on political judgment or judgments about the foreign relations of the United Kingdom and so forth. You will recall that there are a number of decisions, **Carlisle** is one of them where the courts have said that in deciding what is in the interest of the United Kingdom, you will recall the test in that case is whether it would be conducive to the public good to allow someone to enter the United Kingdom, you give weight, special weight to the expertise and judgment of the Secretary of State, both for institutional and for constitutional reasons.

We also draw attention to the distinction which has been drawn in the authorities, and we rely, in particular, on the case of MB with which I know my Lord will also

be familiar. It is in authorities bundle 2, at tab 28 and it is **MB** in the Court of Appeal, this particular point was not taken up when the case when to the House of Lords. It is the Court of Appeal, Phillips L, Sir Anthony Clarke, the Master of the Rolls and Sir Igor Judge, the President as they then were.

LORD JUSTICE BURNETT: Sorry, which tab is it?

MR CHAMBERLAIN: It is tab 28 of the second authorities bundle. In paragraph 63, I am not going to read them out, but essentially, we say what they do is they draw a distinction between two different questions which had to be considered there in the context of control orders. One question that had to be considered by the Secretary of State in asking the question whether a control order should be made was, are there reasonable grounds for suspicion that the individual has been involved in terrorism. The second question is, well, if there are such reasonable grounds, then are the measures which have been imposed under the Control Order necessary in the interest of national security.

A clear distinction is drawn between those two questions. The first is, essentially, a question of looking at the facts asking oneself what has happened. On that question, a court, particularly one who has access to both open and closed material is actually not in any fundamentally worse position than the Secretary of State.

On the very different question, what is necessary in the interest of national security, well, that is a question of judgment where one does have to give special weight to the Secretary of State. One sees there reference to the case of **Secretary of State for Home Department v Rehman** the well-known case in which that proposition was established. What do we say about that in this case? Well, we set it out in paragraph 70 of the skeleton argument. We say in the present case, there are three reasons why the court should apply a rigorous and intensive standard of review.

The first is a very fundamental one. The Secretary of State has at no point suggested that the decision in this case turns on a judgment about what is best for the UK's national security or foreign relations. We make the point in the footnote, footnote 12 and I just draw attention to it at this stage, he could not say that because his own criteria make that issue irrelevant. So, it is a pure question; is there or is there not a clear risk that these weapons will be used to commit a serious violation of international law.

We say the question for the Secretary of State involve the application of a legal test, the clear risk test in Criterion 2C to the open and close evidence and that was a task, broadly speaking, like the task in **MB** of considering whether there are reasonable grounds for suspecting that an individual is involved in terrorism that lies properly within the province of the court.
LORD JUSTICE BURNETT: Are you submitting that we should substitute our judgment on that?

LORD JUSTICE BURNETT: Are you submitting that we should substitute our judgment on that?

MR CHAMBERLAIN: I am not saying that. That would be too ambitious a suggestion. All I am doing is asking you to apply Mance L's dictum in **Kennedy** and say this is a case for intense scrutiny because of the gravity of the issue and because of the nature of the issue.

MR JUSTICE HADDON-CAVE: What does that mean in the context of this case?

MR CHAMBERLAIN: It means that there is no need for your Lordships to give special weight or deference, to put it in different ways, to the judgment of the Secretary of State on the question of whether there have, in fact, been violations or whether it is likely there have been violations of IHL. Particularly in circumstances where the Secretary of State himself says "I have not been able to reach a conclusion on that question".

The second factor is, of course, that the court has available to it closed material and so this is not a case where, as sometimes used to be the case in some of the case law looking at the exercise of standards of review, where the court can say, ah well, the Secretary of State has available sources that we do not look about. You will have seen everything that the decision makers saw and, indeed, you will have seen a great deal more than the decision-makers saw. The decision-makers will have seen a submission to Ministers and so forth. You will have seen more so you should not feel inhibited in reaching a view that the decision before you was flawed. It is the view that has actually been reached by a large number of actors in this case so far, including two parliamentary select committees.

The third issue is that this was not a decision that even the Secretary of State considered clear, and we have drawn attention to two places in the documents. In fact, there are even more, where every time this issue is considered the words, "finely balanced" are used. We will come, in due course, to see that some of the officials felt that the decision ought to have gone the other way. This was a very finely balanced decision. This is not the Secretary of State saying that the issue is clear and that is another feature which we say lends support to intense scrutiny, if I can put it that way, by this court.

LORD JUSTICE BURNETT: The question will remain whether the decision was open to the Secretary of State.

MR CHAMBERLAIN: Yes, indeed.

LORD JUSTICE BURNETT: The fact that a decision is finely balanced does not help your argument, because those are precisely the types of decision, if genuinely it be the case, where two people might reasonably come down on either side of the balance.

MR CHAMBERLAIN: If the right things have been taken into account.

LORD JUSTICE BURNETT: Of course. Of course.

MR CHAMBERLAIN: Which, of course, we say they have not.

LORD JUSTICE BURNETT: I appreciate that.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: I am simply suggesting that the fact it is finely balanced does not give us free reign to go in and substitute a decision that we might have made if we balanced it the other way.

MR CHAMBERLAIN: No, I agree with that. I agree with that, but what it does do is it contributes to the question, it feeds into the question what is the appropriate standard of review. Where you have a decision which does not, on its face, involve considerations of what is in the national security interest of the United Kingdom, which does involve consideration of closed material that you have seen, which does involve the application of a legal test to a set of facts and which was finely balanced, when one puts all of that into the melting pot, one can properly apply Mance L's dictum in **Kennedy v Charity Commissioners** and say this is the kind of decision which requires intense scrutiny by the court.

You have the first submission which is it does not actually matter what standard of review you apply. We say there was a structural flaw in the decision-making process and the structural flaw relates to the assessment of what had happened in the past.

May I move then to the question of the legal framework governing export control and the requirements of international humanitarian law in international and non-international armed conflicts. The starting point for this is the governing statute, which is the Export Control Act, 2002. That can be found in not the authorities but the hearing bundle, bundle 5, page F1 to F2. 5.1 tells us that:

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

If one moves then on to section 9, 9(1) says:

> "(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.

9(2) Gives the Secretary of State power to give guidance about the general principles to be followed when exercising licensing powers to which this section applies and 9(4) is important here to:

> "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) possible consequence of the activity being controlled of a kind mentioned in the table in paragraph 3 of the schedule.

This section does not restrict the matters which may be addressed in any 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."

So, it is statutory guidance of a familiar kind. If one then turns over, you have Article 32 of the Export Control Order, 2008 and that gives a power to amend suspend or revoke a license granted by the Secretary of State. Then if one then turns to the first hearing bundle, you have the common position, the EU common position.

The EU common position, just to put it in its context, is an instrument recording an act of the European Union under the common, foreign and security policy. Your Lordships will know that the common, foreign and security policy pillar is not one of the parts of European law which is given direct effect in UK law under the European Communities Act. That was one of the points made by their Lordships and their Ladyship in the case of **Assange** amongst other cases. However, it is, nonetheless, an Act which is binding on the United Kingdom as a matter of international law.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: One sees from Article 1 of the common position, that each Member State shall assess the export license applications made to it for the items on the EU common military list mentioned in Article 12 on a case by case basis against the criteria of Article 2. So, these are mandatory criteria as a matter of international law. One then sees the criteria set out in Article 2. I am not going to go through them because they are replicated in the consolidated criteria which I am going to come to in just a moment.

LORD JUSTICE BURNETT: The way that is done makes the consolidated criteria the policy which acts as guidance under the Act and which the government has said it will follow.

MR CHAMBERLAIN: Yes, exactly.

LORD JUSTICE BURNETT: True it is that this only operates at international law level.

MR CHAMBERLAIN: But they have said they will do it.

LORD JUSTICE BURNETT: They look pretty similar.

MR CHAMBERLAIN: Yes, exactly. While we are on this, I will just ask you to look at Article 13 which makes reference to the "Users Guide" which we will come to in just a moment, which is regularly reviewed. That shall serve as guidance for the implementation of this common position.

Over the page we have the written statement, parliamentary statement of 25 March 2014 by the then Secretary of State for Business Innovation and Skills, Mr Cable and he sets out in that written statement the consolidated criteria. You can see, if one turns over to page 8, one can see immediately above the heading "Criterion 1":

> "This statement of the criteria is guidance given under section 9 of the Export Control Act. It replaces the consolidated criteria announced to Parliament on 26 October 2000."

Criterion 1, one can see,

> "Respect for the UK's international obligations and commitments, in particular, sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects as well as other international obligations.
> (b) The UK's obligations under the United Nations Arms Trade Treaty
> (f) The OSC principles governing conventional arms transfers and the European Union common position defining common law."

So, that is Criterion 1, then Criterion 2, may I just draw attention to the heading. "The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law." What is said there is that:

> "Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the government will,
> (b) exercise special caution and vigilance in granting licenses 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 United Nations, the Council of Europe or by the European Union, and
> (c) not grant a license if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law."

That word, "Might" as we will see when we look at the user's guide is important. If one then turns over to criterion 5, one can see that:

> "The government will take into account the potential effect of the proposed transfer on the UK's defence and security interests or on those of other territories or countries as described above. While recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability."

An absolutely clear statement that whatever else may be taken into account in assessing compatibility with the criteria, you cannot use the UK's defence or

security interests as a way of saying well, okay, we will license the export of weapons even though Criterion 2(c) is triggered.

Then under the heading "Other factors", you see the same point made in relation to economic, social, commercial and industrial interests. "These factors will not affect the application of the criteria in the common position".

The User's Guide, may I start by asking you to look at section 2.6 on page 58. This is a part of the guide which is dealing with serious violations of human rights. One can see the point being made there that:

> "Regarding the qualification of the human rights violation is serious, each situation has to be assessed on its own merits, on a case by case basis, taking into account all the relevant aspects. The relevant factor in the assessment is the character/nature and consequences of the actual violation in question, systemic and/or widespread violation of human rights underline the seriousness of human rights situations. However, violations do not have to be systemic or widespread in order to be considered as serious or the Criterion 2 analysis. According to Criterion 2, a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe have established that serious violations of Human Rights have taken place in the recipient country. In this respect, it is not a prerequisite that these competent bodies explicitly used the term, "serious" themselves. It is sufficient that they established that violations have occurred. The final assessment whether these violations are considered to be serious in this context must be done by Member States. Likewise, the absence of a decision by these bodies should not preclude Member States from the possibility of making an independent assessment as to whether such violations have occurred."

Then at 2.7 there is the supporting guidance about the words "might". The combination, it says in the second sentence:

> "of clear risk and might in the text should be noted. This requires a lower burden of evidence than a clear risk that the military, technology or equipment will be used for internal repression."

Now, it is talking about "internal repression" there, but exactly the same word is used in relation to serious violations of humanitarian law, so it is drawing attention to the fact that the word "might" has been used. One can then go over to paragraph 2.10 to see what the relevant principles are established by instruments of international humanitarian law:

> "International humanitarian law, also known as the law of armed conflict or law of war comprises rules which in times of conflict seek to protect people who are not or who are no longer taking part in the hostilities. E.g. civilians and wounded, sick and captured combatants. To regulate the conduct of hostilities, i.e. the means

> and methods of warfare, it applies to situations of armed conflict and does not regulate when a state may lawfully use force. International humanitarian law imposes obligations on all parties to an armed conflict, including organised armed groups. The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, that is distinction between combatants and non-combatants. The rule against indiscriminate attack (which I will come to in just a moment) the rules of proportionality the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection."

Then it goes over and it says what are the important instruments.

LORD JUSTICE BURNETT: Well, we have those and then 2.11 and what is meant by "serious violations" of international humanitarian law.

MR CHAMBERLAIN: Indeed. So "serious violations of international humanitarian law include", so it is not saying that they exhaustively include but it certainly is saying that they include grave breaches of the four Geneva Conventions of 1949.

> "Each Convention contains definitions of what constitutes grave breaches. Articles 11 and 85 of the Conditional protocol 1 also include a broader range of Acts to be regarded as grave breaches of that protocol. For a list of these definitions, see annex 5."

Then the Rome Statute of the International Criminal Court includes other serious violations of the law and customs applicable in international and non-international armed conflict which it defines as war crimes. See Article 8. Then if one looks over to 2.13, that deals with the question of clear risk and it sets out the three areas of inquiries which the government says it has undertaken.

> "The recipients past and present record for respect for international humanitarian law, the recipient's intentions as expressed through former commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law."

One can see that:

> "Isolated incidents of international humanitarian law violations are not, necessarily, indicative of the recipient's countries attitude and may not themselves be considered to constitute a basis for allowing an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this could give cause for serious concern."

Then one sees over the page, "Relevant questions to be considered" halfway down page 67, "include is there national legislation in place prohibiting and punishing

violations of international humanitarian law". We will come, in due course, to see that the answer to that question, so far as the UK government is concerned is, "we have no idea".

> "Has the recipient country put in place requirements for its military commanders to prevents, supress and take action against those under their control who have committed violations of international humanitarian law? Has the recipient country ratified the Rome Statute."

And so forth, and there are various others set out on the next pages which I will read out. I will not read out all of them. What are the relevant rules of international humanitarian law? We have tried to set them out in our grounds of challenge in this case, which we have at page B17. May I start just by making the point which may well be obvious to the court in any event. The precise body of law which applies depends on whether you are dealing with an international armed conflict or a non-international armed conflict. Sometimes there is a dispute about whether you are dealing with an international or a non-international armed conflict.

LORD JUSTICE BURNETT: Yes, they are here. The Canadian Courts have looked at this, have they not? Does it matter actually?

MR CHAMBERLAIN: It actually does not, we say, and that is really the point I am coming to. The Saudi Arabians say that this is an international armed conflict, because they say that the Houthis are effectively being backed by Iran. The United Kingdom, I think, takes the view that this is a non-international armed conflict and that seems to be the position taken by the Canadian Court. We say it does not matter because –

MALE SPEAKER: My Lord, just in case there is any misunderstand, it might be that it has not taken a view either way, (**inaudible**) that might be on that issue.

LORD JUSTICE BURNETT: Yes, I think it is fair to say, I cannot remember whether it was in Mr Eadie's skeleton argument but in one of the documents I read yesterday, there was reference to the Canadian authority with quite a chunky footnote as I recollect.

MR CHAMBERLAIN: Yes. I am grateful for that confirmation but we say it does not matter for the purposes of this analysis because the principles we rely on as having been breached in this case are principles that would apply either to an international or to a non-international armed conflict.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: If it is a non-international armed conflict as the Canadian Courts seem to think, then the principles that apply, many of the principles that apply, apply through the medium of customary international law rather than under, for example, the Geneva Conventions. But the same principles apply and we have set out here what the principles are.

LORD JUSTICE BURNETT: We are now on page 17?

MR CHAMBERLAIN: We are on page 17. Just before we come to that, we have seen paragraph 2.11 of the user's guide and as I have said, that tells you what serious violations of international law include. May I just show you an authority in our additional bundle, the little one, because this phrase, "Serious violations of international law" is not, we say, synonymous with grave breaches of the Conventions. Just to make that point good, we refer to the decision, it is quite a famous decision now, in the case of Tadić by the Yugoslavia Tribunal. If one takes it up at paragraph 90, tab 1:

> "The Appeals Chamber would like to add that in interpreting the meaning and purpose of the expressions 'violations of the laws or customs of war' or 'violations of international humanitarian law', one must take account of the context of the statute as a whole."

The background here is that the statute which set up the International Criminal Tribunal for Yugoslavia conferred on that Tribunal jurisdiction to investigate serious violations of international humanitarian law, and you can see reference there to the statute of the International Tribunal in paragraph 90.

> "Article 3 of the statute then confers on the International Tribunal, (see paragraph 91) jurisdiction over any serious offence against international humanitarian law, not covered by Articles 2, 3 or 5. The point is to make the jurisdiction watertight.
> 92. This construction of Article 9 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely grave breaches of the Geneva Convention or violations of The Hague Law."

That is a reference, obviously, to The Hague Regulations.

> "But, if correctly interpreted, Article 3 fully realises the primary purpose of the establishment of the International Tribunal, that is not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed."

There is then reference, as you see in the next paragraph, to Article 89 of additional Protocol 1 which refers to serious violations of the Convention or of this protocol.

LORD JUSTICE BURNETT: I am so sorry, which, the protocol to which of the Conventions?

MR CHAMBERLAIN: It is the additional Protocol 1 to the four Geneva Conventions.

LORD JUSTICE BURNETT: Okay.

MR CHAMBERLAIN: Signed in 1977.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: If one then looks over the page, at 94:

> "The Appeals Chamber deems it fitting to specify the conditions to be filled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3. One, the violation must constitute an infringement of a rule of international humanitarian law. Two, the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met. See below, paragraph 143. Three, the violation must be serious, that is to say it must constitute the breach of a rule protecting important values and the breach must involve grave consequences for the victim. But, for example, the fact of a competence simply appropriating a loaf of bread in an occupied village would not amount to a serious violation of international humanitarian law, although it may be regarded as falling fowl of a basic principle laid down in Article 46 paragraph 1 of The Hague Regulations and the corresponding rule of customary international law whereby private property must be respected."

Then one sees the fourth requirement:

> "The violation of the rule must entail under customary or conventional law the individual criminal responsibility of the person breaching the rule."

We make a couple of points on that. One, this decision makes a distinction between grave breaches and serious violations of international humanitarian law. Two, it lays down conditions for a breach to be serious, namely there has to be a rule protecting important values and the breach has to have grave consequences for the victim. The third point that is really important here is that you can have a serious breach of international humanitarian law without there necessarily being individual criminal responsibility of the person breaching the rule. That is a separate requirement.

Obviously, that requirement is very important when you are prosecuting individuals and that is what this Tribunal was doing, it was prosecuting Mr Tadić. But what we are looking at, (see the heading to Criterion 2) is whether the country involved respects international humanitarian law. So, we are not necessarily looking at whether there had been breaches which could give rise to individual criminal responsibility for individuals.

MR JUSTICE HADDON-CAVE: The context of paragraph 94 is different, is it not, from this case, arguably, because it is about individual prosecution, not the wider picture.

MR CHAMBERLAIN: Well, paragraph 94.4 tells you that there is an additional criterion where you are prosecuting an individual, which is to say that the breach has to give rise to individual criminal responsibility. 94.3 is saying, first of all, you have to ask yourself is it a serious violation of international humanitarian law, that is our question and 94.4 is saying where you are prosecuting an individual, there is an additional hurdle.

MR JUSTICE HADDON-CAVE: But going back to 94.3 for the moment, read on, "The breach must involve grave consequences for the victim who convicts an individual(s)".

MR CHAMBERLAIN: Yes. Of course, the victim is an individual and I absolutely accept that you have to look at grave consequences so, taking a loaf of bread from someone is not going to constitute it. Killing them is, potentially.

LORD JUSTICE BURNETT: We have in the Guidance, I think it is in Appendix 5, a great long series of explanations of what constitutes matters that come within Criterion 2.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: We do not, I think, have any of the negotiating history which led to the emergence of the international law instrument. Your submission seems to be that because in 1995 the Yugoslav Tribunal in a different context sought to define the term, "Serious violation" that as a matter of construction, I suppose, the same meaning should be attributed within the International Law instrument.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: Even though there is no sign of it, as I recollect, in the Guidance, and that it should also be assumed to be part of the policy that is the domestic manifestation of this area of the law.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: There are quite a lot of steps before that, Mr Chamberlain.

MR CHAMBERLAIN: I agree. I agree.

LORD JUSTICE BURNETT: It seems to me, at the moment, to extend the metaphor, we have the stepping stones across the river, as it were, but we have no idea what is under the water we are jumping over.

MR CHAMBERLAIN: Yes, that may be a fair point, my Lord, and I do make this point. We do say that is the correct understanding of "serious violations" and, indeed, if they wanted to use the words "grave violations" which has an established meaning, they could have used that term and they did not. They advised or it would appear advised to have used a different term.

However, we do say ultimately, it does not matter because even if you assume, even if you assume the serious violations of international humanitarian law has the narrower meaning that the Secretary of State says namely grave violations of the Conventions, the claim is just as good anyway, and I will show you why that is. I will show you why that is now.

Take one of the instruments that is referred to in terms in paragraph 2.11 of the User's Guide and that is Article 84 of additional protocol 1. That is to be found in a couple of places I am afraid, but one of the places it can be found is in the second of the Authorities bundle at tab 41. Additional protocol 1 is an additional protocol to the four Geneva Conventions and it applies in international armed conflicts and one can see that from the heading, actually, right at the start of that tab:

> "Protocol additional to the Geneva Conventions and relating to protection of victims of international armed conflicts but (and I make this point in relation to a lot of the points) customary international law applies, essentially, the same rules in a non-international armed conflict."

I will come to show you that in just a moment.

LORD JUSTICE BURNETT: I have not understood that really to be in dispute.

MR CHAMBERLAIN: I do not think so, I do not think so.

LORD JUSTICE BURNETT: Well, we will hear if it is in due course.

MR CHAMBERLAIN: If we go to the Article that is actually referred to in the User's Guide and this does talk about "grave breaches" you will recall one of the points that was actually made in the Taditch case is that the words "grave breaches" are used in Article 85 but actually the words, "serious violations" are used in Article 89. So, it does look as though the two terms may not be completely synonymous.

LORD JUSTICE BURNETT: Sorry, Article 85, yes you have taken us to that, page 287.

MR CHAMBERLAIN: Yes it talks about repression of breaches of this protocol. So, if one just looks at that, that includes in paragraph 3 it says:

> "In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this protocol when committed wilfully in violation of the relevant provisions of this protocol and causing death or serious injury to body or health. (a) Making the civilian population or individual civilians the object of attack. (b) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such an attack will cause excessive loss of life, injury of civilians or damage to civilian objects as defined in Article 57, paragraph 2(a)(iii)."

Then we have to look at paragraph 57.2(a)(iii) which you have at page 269. That tells us that:

> "With respect to attacks, the following precautions shall be taken, (a) those who plan or decide upon an attack shall, (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injuries to civilians, damage to civilian objects or a combination thereof which will be excessive in relation to the concrete and direct military advantage anticipated."

Then if you look at 51.5 that defines for you what an indiscriminate attack is. So, on 265:

> "Among others, the following types of attacks are to be considered as indiscriminate (a) an attack by a bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects and an attack which may be expected to cause incidental loss of civilian life, et cetera, which would be excessive in relation to the concrete and direct military advantage anticipated."

We have made the point that these provisions which are applicable in international arm conflicts, also applied through customary international law in non-international armed conflicts. May I just ask you to look in that context at the ICRC manual of International Humanitarian law and that is in bundle 5, F52. Sorry, not F52, F37. Bundle 5, F37. Rule 11 is to do with indiscriminate attacks, I am not going to read it all out but I will just show you where it is dealt with.

LORD JUSTICE BURNETT: Forgive me, Mr Chamberlain.

MR CHAMBERLAIN: F37.

LORD JUSTICE BURNETT: I have it, I just want to see exactly what we are looking at.

MR CHAMBERLAIN: This is the ICRC IHL manual. Sorry, I am using a lot of acronyms again.

LORD JUSTICE BURNETT: Well, IHL, I think we are familiar with.

MR CHAMBERLAIN: ICRC is the International Committee of the Red Cross.

LORD JUSTICE BURNETT: Yes, I think we know that too. Thank you.

MR CHAMBERLAIN: If you look between 37 and 43, you have Rule 11, Rule 12. So, that defines indiscriminate attacks and then Rule 13, which is to do with area bombardment. I would just ask you to look at that. It is defined in terms which are very similar or, in fact, they are exactly the same as Article 51IA of the

Additional Protocol 1. That will be important when we come to see one of the attacks that Saudi Arabia undertook on a civilian area in 2015.

May I also ask you while you are on this point, just to look at 52, page F52, which is the rule about target verification. That is going to be important when we look at one of the very recent attacks by Saudi Arabia that I have already mentioned on a funeral gathering in the city of Sanaa. "Each party to the conflict must do everything feasible to verify that targets are military objectives."

MR JUSTICE HADDON-CAVE: I am sorry, I have not quite caught up. Where are you reading from?

MR CHAMBERLAIN: I am sorry, page F52.

MR JUSTICE HADDON-CAVE: Whereabouts on F52.

MR CHAMBERLAIN: Right at the top, the rule itself.

MR JUSTICE HADDON-CAVE: Oh I see, it is Rule 16, got you. Thank you.

MR CHAMBERLAIN: So those are the relevant rules. Let's just assume for the moment that my Lord thinks that the gaps between the stepping stones are a bit too large and is therefore not prepared to cross the stream to say that the Tadić case tells you what the conditions are for a serious violation and therefore, one would stick to the example that are specified in 2.11 in the User Guide of grave breaches and so forth. Then one would accept on that line that some mental element is required to establish a serious violation. The mental element need not be an actual intention to kill civilians, it may be sufficient that one has knowledge that civilians are going to be killed in excess of the importance of a military objective.

Obviously, my Lords, when you are assessing whether there had been serious violations of international law, you have to exercise some degree of caution, because you never know exactly what is going through the minds of the targeters. You also have to draw inferences from the facts and if the facts are that the target in fact was one where a large number of civilians were concentrated and all the publicly available information suggests that the targeter must have been aware of that then there is nothing wrong in those circumstances withdrawing the inference as the UN panel of experts has done on a number of occasions, that there must have been a serious violation of international humanitarian law or at least that there is a high probability that there was. We do say on this analysis, some inferences do have to be drawn but inevitably, you have to draw inferences from the available evidence.

When the Secretary of State says, as he does again and again, well, we are not inside the heads of these targeters and therefore, we do not really know what is going through their minds we say, we agree. You are in the same position as the UN panel of experts. The same position as the NGOs in that respect. I will come to what additional material the Secretary of State has later and what difference that makes. You do not know what was going through their minds but you have to draw the inferences that you can from the evidence that is available to you. When you are looking at, for example, and I will come to the examples in a moment, the

declaration that an entire city with 55,000 civilians in it is a legitimate military target or the decision to launch an attack on the Great Hall in Sanaa where it must have been clear there would be a large number of civilians, including children and women, then one can, legitimately, draw inferences and when we come to look at it, we see that actually, the UN panel of experts is quite cautious in the inferences it draws, and that the failure to draw any such inferences or, indeed, to deconstruct any of the findings made by either the NGOs or the UN panel of experts does represent, as we submit, a failure in logical analysis sufficient to satisfy the Sedley criterion, (if I may put it that way) of rationality.

May I move to my forth head which, I suppose, gets us into the facts of this case, and that is the information available to the Secretary of State on 9 December 2015 when he took the first challenged decision and on 16 February 2016, when he maintained that decision. In the statement of facts and grounds which accompanied our claim and in the annexes to that document, we set out in tabular form the various reports available to the government about the conduct of the conflict by the Saudi-led coalition. May I just give you the references so you have those, without going through them one by one.

Hearing bundle 1, B33 to 67, that is the original version of the annexes and the updated version which was put in just recently, is in hearing bundle 3 at B154 to 1581. The Secretary of State says at paragraph 63 of their skeleton argument that 14 of these are duplicates and 14 are too general to be regarded as a specific allegation. Okay, we are happy with that. That leaves 44 breaches of IHL. It will be impossible in the time available to go through all of them but I can give and I would, with respect, seek to give some examples. The first example is the systematic bombing of the city of Sanaa. That is dealt with in Human Rights Watch Report of June 2015 entitled, "Targeting Sanaa". That is in bundle 4, page D389 to D441. May I just ask you to look at D404, because this is a report of what was said by the Saudi Arabian military spokesman, Brigadier General Ahmed al-Asiri as he then was, he is no Major General al-Asiri.

LORD JUSTICE BURNETT: Sorry, page?

MR CHAMBERLAIN: D404 in bundle 4. He says:

> "Starting today and as you will remember, we have declared through media platforms and through the leaflets that were dropped on Moran and Sanaa and prior warnings to Yemenis civilians in those two cities, to get away from those cities where operations will take place. This warning will end at 7.00 pm today and coalition forces will immediately respond to the actions of these militias that targeted the security and safety of Saudi citizens from now until the objectives of this operation is reached."

Then this:

> "We have also declared Sanaa and Moran as military targets loyal to the Houthi militias and as a result, the operations will cover the whole area of those two cities and thus, we repeat our call from the

> civilians to stay away from these groups and leave the areas under Houthi control or where Houthis are taking shelter."

That is what he said. He is clear in saying that the operations will cover the whole area of the two cities, in other words, the entire cities are being designated as military targets. What actually happened is then set out or summarised at 394. 210 distinct locations, impact locations –

LORD JUSTICE BURNETT: This is in the summary?

MR CHAMBERLAIN: Yes. **(Pause)** I am just trying to find out where the 210 comes from. I will give you a better reference later but I understand it is here. 210 distinct impact locations in built-up areas of the city consistent with area bombardment. In other words, we would suggest a clear breach of the rule against area bombardment, the one that you have just seen in the ICRC manual.

It is important to understand, we would say, that the fact there may be military targets does not prevent the deliberate targeting of an entire city from constituting a breach of IHL and you have seen that from the rule against area bombardment and from the terms of Article 51.5A of Additional Protocol 1. That is the conclusion drawn by the UN expert panel in its report of 26 January 2016, and you have that at D102.

LORD JUSTICE BURNETT: Just say what was said at D102.

MR CHAMBERLAIN: Paragraph 128. The coalitions targeting –

MR JUSTICE HADDON-CAVE: Hang on a second, we have to find it.

MR CHAMBERLAIN: I am sorry. The same bundle 102, D102.

MR JUSTICE HADDON-CAVE: Yes.

MR CHAMBERLAIN:

> "The coalitions targeting of civilians through airstrikes either by bombing residential neighbourhoods or by treating the entire city of Sanaa and region of Moran as military targets is a grave violation of the principles of distinction, proportionality and precaution. In certain cases, the panel found such violations to be conducted in a widespread and systematic manner."

If you then look at the footnote, "See the Rome Statute for the International Criminal Court for the definition of crimes against humanity". So, there is absolutely no doubt that in the view of the UN expert panel, this was not just a serious violation of international law on the Taditch test, but a grave violation in terms of the statute, the Rome Statute.

May I just show you, because this is not all that they said about it, also paragraph 140 over the page on 104:

"On 8 May, the entire city of Sanaa and region of Moran were declared military targets by the coalition. Sanaa remains one of the most systematically targeted and devastated cities in Yemen."

LORD JUSTICE BURNETT: I am so sorry, Mr Chamberlain.

MR CHAMBERLAIN: I am sorry.

LORD JUSTICE BURNETT: I was just reading on from 128, could you give me the paragraph number again?

MR CHAMBERLAIN: I am sorry, 140. It is on page 104.

LORD JUSTICE BURNETT: Yes, I have it.

MR CHAMBERLAIN:

"…one of the most systematically targeted and devastated cities in Yemen attributable to coalition airstrikes and the targeting of the entire city in direct violation of international humanitarian law."

Then they show the satellite map, comparison of satellite images shows that Sanaa also faced systematic indiscriminate attacks, including on hospitals, schools and mosques by the coalition. Then if one looks forward –

LORD JUSTICE BURNETT: Where does it say that?

MR CHAMBERLAIN: I am sorry, it is at the end of paragraph 140. If one then go forward to 128, we can get a flavour, D128, sorry, it is the page number rather than the paragraph number, and this annex 56 to the report. We have only given you a selection of pages from this report, because other pages would have been too long. One can see from the photographs on D129, the kind of devastation that this bombing gave rise to in Sanaa. On 128, you can see that the Saudis dropped leaflets about an hour or two before the city was struck. If you look at the last paragraph on 128, warning leaf lets were dropped across Sanaa perhaps an hour to two hours before the strikes were conducted, and that was from a staff member of a UN agency, that is where that evidence came from. The same source, along with another UN staff member from a different agency stated that:

"Due to the fact that the attacks were occurring across an indiscriminate area, including civilian homes as well as schools and hospitals and that it is an area of high illiteracy, the leaflet drops were deemed largely, if not completely ineffective as a warning mechanism or alert system. In more recent discussions with an independent expert of IHL it was raised that even if leaflets had been dropped as an advanced warning mechanism, the main cause of concern was that a whole government had been labelled a military target and as such, a one or two-hour warning or evacuation notice period was simply not enough time to allow civilians to safely evacuate an area. A further confidential source told the Panel that Saudi Arabia had issued radio warnings

> approximately six or seven hours before the onset of airstrikes and also before the leaflet drops but along with a short timeframe for such a largescale evacuation, fuel shortages had impeded civilians' ability to leave the area within the prescribed timeframe."

Sorry, I am being given just a note that my reference to the 210 strikes is, in fact, on D406. Apologies for that. So, that is the first example that was before the Secretary of State. The second example of the evidence before the Secretary of State is Amnesty International's August 2015 report, "Nowhere safe for civilians. Airstrikes and ground attacks in Yemen". That is at D279 to 307. Yes, D279 to D307.

That report took the form of a detailed investigation into eight coalition airstrikes which between them killed 141 civilians and injured 101, most of them children and women, in southern Yemen. A summary of the findings can be seen on 289 to 290. At the bottom of 289 you can see the figures I have just given you there and over the page. At 290, one can see this:

> "Coalition strikes which killed and injured civilians and destroyed civilian property and infrastructure investigated by Amnesty International have been found to be frequently disproportionate or indiscriminate. In some instances, Amnesty International found that the strikes appeared to have apparently directly targeted civilians or civilian objects. International humanitarian law prohibits deliberate attacks on civilians and civilian objects and attacks which do not discriminate between civilians, civilian objects and combatant/military objectives or which cause disproportionate harm to civilians and civilian objects in relation to the anticipated military advantage which may be gained by such an attack. Such attacks constitute war crimes."

That is what was said by Amnesty International. There is then at 290 to 298, a set of detailed findings about each of the strikes and then there is a further report dated 6 October 2015 looking at the position in Northern Yemen, because this report is Southern Yemen, but there is a further report into Northern Yemen and that is at 308 to 347, detailing further cases of strikes that Amnesty International on the available evidence considered to be unlawful under IHL.

LORD JUSTICE BURNETT: Sorry what is that reference again?

MR CHAMBERLAIN: I am sorry, that is 308 to 347, so two Amnesty International reports. I am taking you to a selection rather than the whole of the material. The third example that I wanted to give you is the Human Rights Watch Report from November 2015 entitled, "What military target was in my brother's house? Unlawful coalition airstrikes in Yemen". That is at 450, D450 and following. The summary is at the bottom of the page on 455, "In the cases discussed in this report which caused at least 309 civilian deaths and wounded…"

MR JUSTICE HADDON-CAVE: Hang on; we have to find it.

MR CHAMBERLAIN: I am so sorry; 455.

LORD JUSTICE BURNETT: Because you know where you are going, Mr Chamberlain, and we do not.

MR CHAMBERLAIN: I am sorry.

MR JUSTICE HADDON-CAVE: You have also marked it.

MR CHAMBERLAIN: I marked it as well, that is also true.

LORD JUSTICE BURNETT: All right, 455 summary, yes.

MR CHAMBERLAIN: The bottom of the page, last paragraph on 455:

> "…309 civilian deaths, 415…Human Rights Watch found either no evidence for military target or that the attack failed to distinguish civilians from military objectives."

Just pausing there for a moment. Two bases, separate bases on which one could plausibly conclude that there had been a breach of IHL. Clearly, if a target has been attacked and there is no evidence to suggest a military target, then that is without more, a breach of IHL. What is more, it is likely to be a serious breach. At least, if it was known that there was no military target. Then separately from that, there is the question of whether the attack distinguishes…

LORD JUSTICE BURNETT: That perhaps over-states it a little, does it not? The deliberate targeting of something with no military value would be a breach.

MR CHAMBERLAIN: A serious breach.

LORD JUSTICE BURNETT: Yes, a serious breach. The fact that somebody not immediately involved cannot find evidence that it was does not, necessarily, tell you the answer.

MR CHAMBERLAIN: Of course, I absolutely agree with that, my Lord. The fact that you cannot identify military target does not mean in and of itself that there was not one. Where you have a pattern of attacks, where despite careful analysis and even when the MOD with its great access to the Saudi Arabian military itself cannot identify a military target, that does give cause for concern and it does require one to ask the question well, is there, at least, a clear risk that some of these attacks were attacks where there was no military target.

We will come to the numbers in just a moment, but when we see the numbers, we now have a situation where the MOD, and I am going to come to this in the detailed evidence, but we now have a situation where the MOD itself cannot identify a military target in three-quarters of the cases of concern that they are analysing. There comes a point where you do have to draw an inference and, indeed, there is only one inference you can draw when the test is not have you established that there have been violations, but is there a clear risk that they might be used in serious violations in international humanitarian law.

Just on this report, I will just show you the summary as said is as we have seen, the detailed analysis of the strikes are at 477 to 508. They include, and I will just give you the references for the moment, the strike on a prison killing 25 civilians that is D479, a strike on the city of Zabid killing 60 civilians D482. Strikes on markets in Amran killing 29 civilians, that is D489. A strike on a residential neighbourhood killing 23 civilians, that is D496. A strike on a power plant killing 65 civilians, D503 and a strike on a water bottling factory killing 14, D506.

My Lords, I fully accept, of course, that in wars civilians do get killed, and the fact of civilian casualties on its own is not enough to show a violation of IHL, let alone a serious one. But organisations like Human Rights Watch understand that too, and they set out their understanding of the relevant principles of IHL at 474 to 475. Obviously, a full assessment of whether a particular strike did or did not breach IHL requires inferences to be drawn. You visit and you photograph the site. You interview eye witnesses and victims. You take into account publicly available information about the extent to which there was fighting in the area and you look for evidence of a military target. You then draw an inference and the inference drawn by Human Rights Watch on the basis of a detailed analysis of a large number of cases is that there has been a pattern of conduct that is unlawful as a matter of IHL.

Those are the three examples of the Open Source material.

MR JUSTICE HADDON-CAVE: Can you point us to the best passage on D474 to D475 that you rely on?

MR CHAMBERLAIN: Well, all I am relying on here is; I am not really relying on specific passages, I am just saying they set out here what their understanding is of IHL and we say it does not, when one reads it as a whole, that one does not get from that ah, Human Rights Watch just thinks that because civilians are killed, **ipso facto** there is a breach of IHL. No. They understand that it is more complicated than that and they set out the rules of IHL which they understand are applicable in a conflict such as this.

You will see that there is reference here to both Protocol 1, which is applicable to international armed conflicts and also Protocol 2, which is applicable to non-international armed conflicts. They also make reference to the ICRC IHL handbook, which sets out or which codifies the rules of customary international law in this respect.

May I move now to what is known about the Secretary of State's decision-making processes, because we say when you start from that background, you have to answer the question, well, here is a pretty vast body of material which on its face indicates violations of IHL. What material do you have to conclude that despite this Open Source material there is still, as the Secretary of State says, no clear risk that UK weapons will be used to commit serious violations of IHL. We start with the Secretary of State's response to Leigh Day's letter before claim on 16 February 2016. That is in E which is volume 5, 46.

Here is what we were told by the Secretary of State, paragraph 8B:

"The government takes allegations of breaches by HL by the coalition very seriously. In particular, (have a look at (a) and (b) but); (b) the MOD monitors all instance of alleged IHL violations by the coalition in Yemen that come to its attention. It monitors a range of information from government sources, foreign governments, the media, NGOs, Open Source and classified reports in order to identify such incidents. The incidents monitored include all of the specific allegations raised in your letter. The available information is assessed to identify whether the alleged event occurred as reported, who was responsible for the event and whether the responsible parties' actions are assessed as compliant with IHL or not."

That was not just a slip of the pen, as we see by looking further on in that letter at paragraph 20 on page E50:

"All allegations that come to the attention of MOD are tracked and assessed to identify whether the alleged event occurred as reported, who was responsible for the event…"

MR JUSTICE HADDON-CAVE: Where are you reading from?

MR CHAMBERLAIN: Paragraph 20 on page E50.

"All allegations that come to the attention of MOD are tracked and assessed to identify whether the alleged event occurred as reported, who was responsible for the event and whether the responsible parties' actions are assessed as compliant with IHL or not."

That is what was said to us at the time. We pointed out in our skeleton, and perhaps I will just take this from our skeleton so that you have the exerts there. This is actually consistent with what was being said in Parliament at the time. We set out what was being said at Parliament at paragraphs 48 to 49 of the skeleton. This is a response to a written question tabled by Hillary Ben, MP, asking the Foreign Secretary what assessment he has made of whether the 119 Saudi-led coalition sorties documented in the final report of the UN Panel of experts in Yemen represent potential violations of international humanitarian law. The Foreign Secretary's answer, I will not read it all out but you can see the underlined part which we have quoted at paragraph 48 of our skeleton:

"Looking at the information available to us, we have assessed that there has not been a breach of IHL by the coalition but we consider to monitor the situation closely."

Exactly the same answer was given on the 15th to another written question, also from Hillary Ben. Two further written questions, same answer given on 15 February. Then at paragraph 50, you can see that in a Westminster Hall debate on 8 June 2016, the Minister of State at the foreign office, Mr Ludington, gave the following answer:

> "The MOD assessment is that the Saudi-led coalition is not targeting civilians. The government has now acknowledged that these statements were all untrue."

We see that from the correction statement on 21 July 2016 which you have in bundle 2, page B1055. This correction statement was issued on the last day of the parliamentary session before the summer recess. I think it was the last day, it certainly was towards the end.

LORD JUSTICE BURNETT: It does not matter whether it was or was not, does it?

MR CHAMBERLAIN: No, the date is what you need, it is 21 July 2016. According to that statement, when the foreign secretary said, "We have assessed that there has not been a breach of IHL by the coalition" this was wrong. He should have said, "We have not assessed that there has been a breach of IHL by the coalition". When the Minister of State said, "The MOD assessment is that the Saudi-led coalition is not targeting civilians", this too was wrong and he should have said, "The MOD has not assessed that the Saudi-led coalition is targeting civilians".

It appears to us to follow the statement made in the Secretary of State's response to the pre-action letter:

> "All allegations that come to the attention of the MOD are tracked and assessed to identify whether the responsible parties' actions are assessed as compliant with IHL or not"

was also wrong. You will have seen from sections paragraphs 57 to 58 of our skeleton that we tried to get the Secretary of State to acknowledge this, but without success. I will just show you, if I may, E119 in bundle 5, it is a short letter and he said:

> "It appears that it is your position that the following statements are both true. One, all allegations that come to the attention of the MOD are tracked and assessed to identify whether the responsible parties' actions are compatible with IHL or not."

MR JUSTICE HADDON-CAVE: Sorry, which page?

MR CHAMBERLAIN: I am sorry; 119, "and two, neither the MOD nor the FCO reaches a conclusion as to whether or not an IHL violation has taken place in relation to all specific incidents". We asked well, think there has been a mistake because these two statements are contradictory. We have not had an answer to that. Maybe Mr Eadie will tell us in due course whether he now accepts the first statement was wrong.

My Lords, the true position as to the analysis undertaken by the MOD is, as we understand it, in these proceedings to be found from Mr Watkins' statement. He is the MOD official who has given a statement in these proceedings and he tells us what analysis the MOD actually undertakes. We have his statement in bundle 2, page B490 and following. I will just ask you, if you would not mind, to pick that up.

LORD JUSTICE BURNETT: Could I have the page number again? I am sorry, I am so lost in this bundle.

MR CHAMBERLAIN: Yes, it is B490.

LORD JUSTICE BURNETT: Four-nine-oh?

MR CHAMBERLAIN: Sorry, B479 to 508 that is where the statement is. I was going to move, that is the start of the statement, B479, I am going to move to 490 which is the bit that actually tells you what the MOD does. We have set this out just for your note in our skeleton, 59B so that you have the references there.

The first thing is that, "Allegations of breaches of IHL come to the MOD from a variety of sources. Media, NGO reporting, UN bodies" and so forth. That is at paragraph 42. We then known from paragraph 43, "All such allegations are recorded in a central database known as 'the tracker'". If one then goes forward to 46, the issues addressed by the MOD in its analysis are, one, whether it is possible to identify a specific incident. Two, is the incident likely to have been caused by a coalition strike. That is obviously coalition strike as opposed to the other side. Three, is it possible to identify the coalition nation involved and four, is a legitimate military object identified. Five, was the strike carried out using an item that was licensed under a UK export license.

The second of these issues which is whether the incident was likely to have been caused by a coalition airstrike is one to which sensitive material, in particular, mission reports may be relevant. But even here, the bit of the MOD that does the analysis which is another acronym I am afraid, "PJHQ", Permanent Joint Headquarters, has, and we see this from 54, "No insight into incidents caused by artillery attacks or attack helicopters as we have almost no visibility of coalition ground force operations

Furthermore, when considering the fourth issue, which is whether a legitimate military object is identified, and this is at 57, and quite important we would respectfully submit, it is on page B495, paragraph 57:

> "The MOD do not have access to any of the operational intelligence which the coalition used and without being directly inside the RSAF (I understand that to be "Royal Saudi Arabian Airforce) and understanding the rationale and the specific situation on the ground at the time of the strike are not in a position to interpret whether a target was legitimate or not from a mission report."

Then if one goes over to a different statement, and I am just going to ask you to flick to that different statement now, if you would not mind, and that is at B325 in the same bundle. This is a statement of Mr Crompton of the Foreign Office and if one looks at paragraphs 60 and 66B, one can see that it is more difficult to assess dynamic than pre-planned targeting, and the assessment in January 2016, so if one looks at paragraph 60, the update records, that is the November 2015 update records that:

> "It's information about Saudi targeting indicates that it remained broadly consistent with Mayfair standards but notes that most coalition missions were deploying dynamic targeting which was more difficult to assess."

Then if one goes forward to 66B:

> "The January IHL update (that is January 2016) also raised concerns over the increased use of dynamic targeting by KSA. The update records that whilst the Saudi process for pre-planned targeting is comparable with NATO standards including a clear definition of acceptable military targets and a recognisable process to assess potential civilian casualties and assess proportionality, procedures for dynamic targeting were less robust. At that stage, our insight into the dynamic targeting process was limited but as the IHL update records, we continue to engage in order both to obtain a better understanding of this and to assist in improving that process."

A clear indication there that our insight into dynamic targeting was less. Note that the issues that are considered by the MOD do not include the alleged consequences of a strike, including the reported civilian casualties. That is a point made by Mr Watkins in his second statement at paragraph 26, and that is in bundle 3, B1322, I am sorry, I am not necessarily going to ask you to turn it up. I will give you the reference again. It is Watkins 2, paragraph 26, bundle 3, page B1322.

LORD JUSTICE BURNETT: So do not make a note of civilian casualties. That is the point, is it?

MR CHAMBERLAIN: Yes, they do not analyse the alleged consequence of a strike, including the reported civilian casualties.

MR JUSTICE HADDON-CAVE: Could you just give me the reference for the paragraph you have just read?

MR CHAMBERLAIN: Yes. It is Watkins 2, paragraph 26.

MR JUSTICE HADDON-CAVE: Yes, I have that but the one you have just read.

MR CHAMBERLAIN: The one I have just read –

MR JUSTICE HADDON-CAVE: At B327.

LORD JUSTICE BURNETT: Oh, 66B.

MR CHAMBERLAIN: Oh, I see, 66B, yes. That is B327, yes.

LORD JUSTICE BURNETT: Shall we just turn up that document about Watkins.

MR CHAMBERLAIN: Yes, of course. Absolutely, I am very happy to do so, yes.

LORD JUSTICE BURNETT: Watkins number 2.

MR CHAMBERLAIN: 3B1322, yes.

LORD JUSTICE BURNETT: Just to see precisely what language he uses. **(Pause)**

MR CHAMBERLAIN: Yes, for the avoidance of doubt and as explained in my last statement at paragraph 57, when the MOD analysis alleged breaches of IHL no view is expressed on the alleged consequences of a strike, including the reported civilian casualties.

One of the points my learned friend makes about this because it was raised in our skeleton is that well, the alleged consequences of a strike in and of themselves directly relevant to the question of proportionality because the question you have to look at is the anticipated consequences. We accept that that is a fair point to make, but when you are assessing the compatibility with International Humanitarian Law of a strike. One of the key pieces of information that you will have are how many civilians actually were killed in the strike. You then, obviously, have to go on to ask the question, well, is that something that should have been known or must have been known to the targeter?

Obviously, that second-half of the question is something about which you will have to draw an inference, but it is something about which you can properly draw an inference. One can see that actually from Mr Crompton's statement at paragraph 58, B325 because he, himself, says, "High levels of civilian casualties can raise concerns, particularly around the proportionality criteria". If you have a number of incidents, clearly, the NGOs do not have access to what is going through the heads of the targeters when they call in these strikes. The NGOs and the UN panel of experts does have access to the facts on the ground and they see that schools are being targeted and hospitals and mosques and residential areas and they count up the number of civilian casualties and they look for a pattern that is occurring in these strikes. They conclude that these strikes give rise to a pattern that gives rise to serious concern in relation to IHL. Indeed, they go further and actually draw conclusions that there have been breaches of IHL. You will see, when we come to it in due course, that if the reports of the second UN Panel of expert reports are accurate, they have said it is almost certain that there were breaches of IHL in ten cases.

When your Lordship and my learned friend puts to me, "Ah, well, of course that all depends on intent", we agree, of course, if you were sitting here as an international criminal tribunal judging whether an individual was guilty of a war crime, obviously, you would want to look at the question of intent and knowledge and what did that individual know when the strike was called in. But you have to draw inferences from the facts you have, and when we look at what the Secretary of State knows about the state of knowledge of the targeters, what we actually find is that the Secretary of State's knowledge is not materially better than that of the international NGOs and the UN Panel of experts, because the Secretary of State is not inside the head of the targeters either, and he makes very specific and clear distinction between having imbedded personnel, which he says, oh no, we do not

have impeded personnel, if we did, we would be liable, the United Kingdom could incur liability as a matter of international law for the wrongful consequences of these strikes. We do not have that, we do not have access to the targeting decisions, we do not have access to the operation intelligence and therefore, we essentially have to go on the same information plus what is in the MOD's tracker as the NGOs and the UN expert panel have.

We also know, and this is a point which one sees and we have made in the skeleton, that another thing the MOD does not consider alongside the actual number of civilian casualties is whether the strike was against a target such as a hospital, for example, that attacks special protection under IHL. We have referred to the special protection which hospitals have under Article 11 of additional protocol 2. We do say that that is a matter of some importance, given that a tax on hospitals and clinics have been a feature of this conflict. See generally the material from Médecins Sans Frontières in bundle 4, page D254 to D274.

That is a summary of what we knew when we filed our skeleton argument last week, this time last week, Monday of last week. We now know something else from the open part of the special advocates detail grounds, paragraphs 11.1 and 11.2. We know, and I will just ask your Lordship's to turn that up. I am afraid I have it lose.

LORD JUSTICE BURNETT: We need to put one or two away before we pick another one up.

MR CHAMBERLAIN: Yes. I have it loose but I think it is also in the bundle at the end of tab B.

MR JUSTICE HADDON-CAVE: Yes, I have taken it out, as it happens.

LORD JUSTICE BURNETT: This is the special advocates' open submissions?

MR CHAMBERLAIN: Yes, the ones that we put clear –

LORD JUSTICE BURNETT: At B1705.

MR CHAMBERLAIN: Yes. If one then goes to paragraph 11 which is on 1709, 11.1 and 2, we now know that in its initial format, the tracker including a question for each incident. The question was, "IHL breach?" but in no case was an assessment of this question addressed in the box provided. That question was removed from subsequent versions of the tracker and the special advocates have asked the Secretary of State on the 11 January to clarify when this was done and why. We hope, my Lords, that that is a question to which you will have an answer in the closed part of the proceedings. Obviously, we say no more about it.

But we also know from paragraph 11.2 of the open submissions that no other material, open or closed, suggests that:

> "The process adopted by the Secretary of State through the FCO, MOD or otherwise, includes any routine attempt to reach an

> assessment in any individual case to identify whether the responsible parties' actions are compatible with IHL or not."

That, of course, is a quote as your Lordships will know from the letter we were sent on 16 February 2016. We are beginning to build up a picture here of a large body of Open Source reports containing detailed analysis of particular strikes and drawing the conclusion that in those strikes, there was a violation of IHL and in some cases, a serious violation. We now know that the MOD conducts no routine attempt to reach an assessment in any individual case to identify whether the responsible parties' actions are compatible with IHL or not.

Mr Bell's statement, Mr Bell is the head of the Export Control Organisation and that is the body that advises the Secretary of State on export control decisions. We know from his statement that the department with responsibility for assessing compatibility with Criterion 2 or for giving advice at least on that is the foreign office. If you want the reference, without turning it up, it is paragraph 14 of Mr Bell's statement, bundle 1, page B127.

We also know that on 16 November 2015 officials met to coordinate a response to Leigh Day's letter before claim. That is bundle 1, page B131, paragraph 24 and on 3 December, they sent a draft response to the Secretary of State for business, innovation and skills for approval. On 8 January, the claimant's letter before claim was sent and on 26 January, officials advised the Foreign Secretary to recommend that licenses should not be suspended.

A redacted version of that submission is at 2B454, bundle 2, tab B454. You can see that the submission was endorsed by the Director for Defence and International Security at the Foreign Office as being finely balanced and should be kept under review, given the significant proportion of dynamic targeting strikes.

LORD JUSTICE BURNETT: I am so sorry, I again have not caught up, I am so sorry. We are on 454.

MR CHAMBERLAIN: Yes, if you look at 454 under the heading "Comment".

LORD JUSTICE BURNETT: "Comment", all right.

MR CHAMBERLAIN: The Director of DDIS, that is defence –

MR JUSTICE HADDON-CAVE: Yes, so just direct us to the page, the part of the page.

MR CHAMBERLAIN: I understand, I apologise. It is under the heading, "Comment"

> "Director DDIS (that is defence of international security) the questions are finely balanced and given the significant proportion of the situation …(reading to the words)…including in the context of (something) the questions are finely balanced and given the significant proportion of dynamic targeting strikes."

We know the significance of that, it is that although MOD feel they have insight into the pre-planned, they do not have insight into the dynamic targeting. At least

not in the same degree. Then if one goes forward to 458, and this is the submission itself, paragraph 10, second sentence, does your Lordship have that?

> "Having regard to all the available information and, in particular, the MOD assessments, we have not reached the view that there has been a serious violation of IHL by Saudi Arabia."

No indication there, or whether there is in the closed parts, we obviously do not know, but I can only make submissions on the open parts, but no indication there that the MOD does not routinely attempt to reach any conclusion at all about compliance with IHL. A fact which, we suggest, the Secretary of State might have wished to know when considering how much weight to place on the lack of any conclusion that there had been a breach of IHL.

It is a short point, my Lord, but perhaps it is an obvious one. If you are going to say to the Secretary of State, "The starting point of our analysis is the MOD has not found any breach of IHL" that is the starting point of our analysis, it would be quite useful to add at that juncture, "and by the way, they do not even address that question because their tracker and the information available to them does not enable them to". That is a shorthand, my Lord, and I should have inserted the word, "routinely" because that word was not in the special advocate's submissions.

LORD JUSTICE BURNETT: It is a rather tantalizing word, is it not?

MR CHAMBERLAIN: My Lord, we are tantalised by it, and we hope that light will be shed later in these proceedings, even if that light does not reach us. Over the page on 462 is the annex to the Foreign Office submission and it shows the first paragraph under the heading, "Summary" on 462, that up to 10 January 2016, the MOD was tracking 104 alleged incidents of potential concern of which over a third were assessed as probably coalition airstrikes. Of these, the MOD has been unable to identify a legitimate military target for the majority. We are going to see in due course my Lords, that the percentage of strikes in which the MOD is unable to identify a legitimate military target has gone up and it is now three-quarters. I have made the point before but it is worth just emphasising it here. We accept, of course, the fact you cannot identify a military target does not in and of itself mean that there was not one. When the incident you are looking at has been identified by NGO's or the UN expert panel or both as one where IHL has or may have been breached, the fact that the MOD, with all its secret information and all its supposed access to the Saudi military cannot identify a military target should perhaps start to set alarm bells ringing. When there is no identifiable military target in the majority of cases investigated, we do suggest that the alarm bells should have been quite loud.

It is then said in the summary, "Pre-planned targeting processes comply with NATO standards but processes for dynamic targeting are, 'less robust and we have little insight into these'." That is in the paragraph under the heading "What has changed since October 2015. We also know from the white writing on the redacted part, it is assessed that an increased proportion of airstrikes now involve dynamic targeting. As I have said, redactions in the remainder of the document make it difficult for us to say positively whether the Foreign Secretary was cited on the key facts that the MOD does not routinely even attempt to address whether

a strike complied with IHL or not. The overall assessment which you have on 464 towards the bottom of the page under the heading, "Overall assessment of Saudi compliance with IHL" is a little confusing and maybe less confusing when you can see under the redaction. But we see it little confusing. What is said is:

> "From all the information available, we have not reached the view that there has been a violation, including a serious violation of IHL by Saudi Arabia. We have not reached the view that there has been any violation. In relation to some incidents, there is insufficient information to conclude that KSA have violated IHL in relation to any individual strikes in the Yemen conflict. However, we nonetheless have significant concerns around IHL compliance in relation to some KSA processes and the judgment as to whether the b has been met is finely balanced."

That is the overall assessment. So, we know that what then happened is that the Foreign Secretary advised on 1 February 2016 that there should be no suspension. The FCO advice is summarised for the business secretary who was actually the decision-maker here. The Foreign Secretary gives the advice but the decision-maker was the business secretary, a Mr Javed(?) at the relevant time. That is summarised at 261, B261 which is, in fact, in the previous bundle. My Lords, I see the time.

LORD JUSTICE BURNETT: Shall we quickly look at that then?

MR CHAMBERLAIN: I wonder if we might.

LORD JUSTICE BURNETT: So this starts at page 259?

MR CHAMBERLAIN: Yes, it does. That is the submission to the Secretary of State for Business innovation and skills, but the summary of the FCO advice is at 261. You can see the numbers of incidents are given, it says,

> "MOD have been tracking 114 incidents of potential concern. This is only a very, very small percentage of the overall coalition airstrikes carried out. Preliminary analysis of the UN Expert Panel report has revealed a further 19 and the MOD have certainly become aware of more, bringing the total to 145. But based on all the information available, we have not established any violations of IHL by the coalition in this conflict. Any violation, serious or otherwise."

They acknowledge gaps in knowledge but there are always gaps in knowledge,

> "Saudi Arabia is seeking to comply with IHL and broadly has IHL compliant processes in place. While there is a risk here, the risk is not clear."

There is then a reference to a Saudi Arabian investigation into a strike on a Médecins Sans Frontières clinic on 26 October 2015. Just looking at the rest of the submission, on 262 under the heading, "Our concerns", there were concerns

about and acknowledged gaps in knowledge about Saudi targeting processes and about the military objectives of some strikes. He says:

> "First, although a third of the incidents being tracked were coalition strikes, the MOD was only able to identify a military target in the majority of cases."

We agree that that would have been concerning if true. In fact, as we know from the FCO advice, it was unable to identify a military target in the majority of cases. So, that appears to be a misreading of the FCO targets. Second, the vast majority of strikes are not being tracked at all and the FCO cannot be certain that these are IHL compliant. Third, the FCO appear to have very little insight into so-called dynamic strikes where the pilot decides to dispatch munitions and these account for a significant proportion of all strikes.

The submission then goes on to say that "the issue is finely balanced", words that you see again and again. Just finally, before we leave this point on 269, we have an email at the bottom of the page from Mr Bell, the head of the export control organisation saying this:

> "To be honest, and I was very direct and honest with the Secretary of State, my gut tells me we should suspend. This would be prudent and cautious given the acknowledged gaps in knowledge about Saudi operations. I put this directly to the Secretary of State in these terms."

My Lords, I wonder if that would be a convenient moment to stop for lunch?

LORD JUSTICE BURNETT: Yes, just give me a moment. All right, 2.00 pm then.

(The luncheon adjournment)

LORD JUSTICE BURNETT: Mr Chamberlain, we have made some inquiries about whether we can have a bigger court for the morning when we are still in open and efforts are being made to try and find one. As you can appreciate, it is a question of decanting and moving and so on. All I can suggest is that for tomorrow morning, if everybody would care to look on the website to check which court we are in, but we may be somewhere a little bit more comfortable for those who are currently having to sit on the floor.

MR CHAMBERLAIN: My Lord, I am very grateful for that. Just before the short adjournment, I finished going through the materials and, in particular, the submissions and summaries that were before first, the Foreign Secretary when he, on 1 February gave his advice to the business secretary and secondly, the materials that were before the business secretary, summarising the foreign secretary's advice which led to the decision on 11 February by the business secretary, Mr Javed, to take the decision to continue to allow exports of arms to Saudi Arabia.

Much of what was before the two Secretary of State's, the Foreign Secretary and the Business Secretary is, of course, enclosed, and you will hear from the Special Advocates about that. There are five points that we would wish to make at this

stage based on the open materials alone. These are submissions, so I am not going to take you to any evidence, it is submissions based on the evidence that we have just seen.

The first submission is that if, as the claimant had been told, the MOD assessed in each case whether IHL had been breached or not, the conclusion that the FCO and/or MOD had not established any IHL violation would, potentially be a matter of weight. Second, if, on the other hand, as we now understand to be the case, the MOD makes no routine attempt to address whether IHL has been breached or not in any case, the fact that it has not established any IHL violation tells one very little indeed. Third, there is nothing in the open evidence to suggest that the Foreign Secretary actually understood when he made his recommendation to the business sectary that the MOD do not routinely attempt to assess compliance with IHL. Indeed, assuming he believed what he said in his written answers to Parliament on 12th and 15th February and we, of course, do make that assumption, he appears to have been under the impression at that time that the MOD had positively concluded that there had been no violations of IHL by Saudi Arabia.

If so, his "finely balanced" recommendation on which the Business Secretary relied for his own "finely balanced" decision appears to have been taken on the basis of a critical misunderstanding about the nature of the analysis undertaken by the MOD. Fourth, neither the submission to the Foreign Secretary nor the submission to the Business Secretary, at least insofar as we are able to see from the passages of those submissions which have been opened, contains any clear assessment of the significance of the fact that in the majority of incidents considered, the MOD were unable to identify a legitimate military target. As far as we can see, that fact does not seem to have rung alarm bells at all.

MR JUSTICE HADDON-CAVE: I am so sorry. **(Pause)** Thank you.

MR CHAMBERLAIN: Fifth and again, as far as we can see, there is nothing to indicate any reasons or discounting or rejecting the findings of the NGO's or the analysis of the UN expert panel. It is said that they were taken into account, but we cannot see any analysis of why it is justifiable to discount or reject the findings made by those bodies. Those five propositions are, if you like, my submissions based on the information that was before the Secretary of State, both at the time of the December decision and then, subsequently, at a time when that decision was reconsidered in February of 2016.

My fifth head of submissions, which I am going to move onto now, is the information before the Secretary of State on February 2016 to date and the Secretary of State's consideration of that information. The reports of apparent IHL violations that post-date February 2016 are, perhaps, best summarised by the first three interveners in their written submissions and in bundle 3, page C21 to 24. I will just ask your Lordship's to turn that up. Bundle 3, tab C, page C21 to C24.

You have there, perhaps, a neater summary than we have been able to give of some of the incidents of concern in 2016, not by any means all but some of them. They include strikes on a market, strikes using UK manufactured cluster bombs, a further strike on an Médecins Sans Frontières Hospital killing at least ten people, including medics and patients. A strike on a water drilling facility and on

8 October 2016, the strike on a funeral which I have already mentioned and which we understand killed some 140 people and wounded 500 more.

A

I am not going to go to the detail of that, but you have the references in the Intervener's submissions. The reason why these strikes have been referred to by the Interveners are not because they are the only ones of concern, it is because these are strikes in respect of which there are specific reports and findings and the reports and findings are references in the footnotes that you see there.

B

May I just take you in a bit of detail to reports of what happened on 8 October 2016, because that is, we would respectfully submit, a pretty significant incident on any view. If one turns back in the same bundle, that is bundle 3, to page B1428, and this is a report from ITB News. The numbers killed, I am not going to read the reports but you have them there, the numbers killed are estimated based on UN figures, as I understand it, to be 140 and there is a further detailed report on the strike from Reuters at 1431. "140 people killed according to one UN estimate, a different estimated given by the Houthis".

C

If one just looks at 1431, this is a report by Reuters of what the JIAT found:

> "The Saudi Coalition Internal Investigation team had found, a party affiliated to the Yemini presidency of the General Chie of Staff wrongly passed information that there was a gathering of armed Houthi leaders in a known location in Sanaa and insisted that the location be targeted immediately, the investigators concluded according to a statement."

D

Then the Joint Incident Assessment team said in a statement:

E

> "The coalitions air operations centre in Yemen also failed to obtain approval for the strike from commanders for violation of protocol. The JIAT calls for a review for the rules of engagement and for compensation for the compensations for the families of the victims. It also said appropriate action should be taken against those who caused the incident without elaborating."

F

Over the page it said that could include judicial proceedings. There are then several reports at 1433 to 1434, 1436 to 1437 and 1438 to 1441 which report conclusions drawn by the UN Expert Panel in relation to the strike. If we look at the first one on 1433, it says:

G

> "The UN Panel of Experts has accused the Saudi Arabia-led coalition of a deliberate double-tap airstrike on a funeral gathering in Yemen earlier this month. In a report to the UN Security Council obtained by IRIN (the website concerned) the Panel says that the coalitions second strike, in particular violated its obligations under international law and it did not take effective precautionary measures to minimise harm to civilians, including the first responders on the scene."

H

That is the report. Now, obviously, I am limited in what I can say about that, you are not, in the sense that your Lordships have enclosed, as we understand it, the UN Expert Panel final report to the Security Council and you have it in full. No doubt, the Special Advocates will make submissions on that. Just noting for the moment what the JIAT said about it, so going back to 1431, they identified that the strike occurred because information had been passed by the Yeminis insisting that this gathering of some one thousand individuals be targeted. The only violation they actually acknowledge is a breach of protocol because the air operation centre in Yemen failed to obtain approval from commanders before initiating a strike.

We make a number of points in relation to this strike. The first is that this does not appear…well, it is unclear whether you would classify this as a dynamic strike or some other kind of strike but certainly, it was not one which the pilot of the plane decided to undertake on his own, according to this, he had authority from the Air Operations Centre in Yemen, albeit those in that centre did not get authority from their commanders. We have had, very recently, disclosed to us, in fact on Friday, some documents indicating the views of the UK government about this strike and you have those in the same bundle 3 at B1288E. This is a note of a statement made by the UK Ambassador to the United Nations, Mr Matthew Ryecroft, sorry, the UK Permanent Representative to the United Nations, I think it amounts to the same thing, by Mr Matthew Michael Ryecroft to the UN Security Council on 31 October 2016. One can see from that that he says at that meeting that the UK government was shocked and appalled by the terrible loss of life and "immediately underlined our deep concerns at ministerial level".

Over the page, that is the last paragraph on page 1280, if one goes over the page to 1288F, one can see from the first paragraph on that page that the UK government, in fact, tried to get the Security Council to issue a press statement which would have strongly condemned the attacks. What you do not see anywhere in the open documents, whether you do in the closed documents we obviously do not know, is any concrete conclusion drawn by the UK government that this strike involved a violation of IHL. Perhaps Mr Eadie will be able to tell us in open whether the United Kingdom government now accepts that it did or if not, why not. Certainly, we do know now from this disclosure that the UK government felt it appropriate to invite the Security Council to issue a statement strongly condemning the strike.

More importantly thought, given the emphasis that is placed by the Secretary of State on the training provided by the UK military to the Saudis, just note at this stage there had been two training sessions at this point in time conducted in the UK. One in July/August 2015 and a second in July/August 2016. That had been training about targeting. What conclusion do you draw from the fact then that after the second of these training sessions, not two months after the second of these training sessions, there is a strike on what is palpably a civilian target or at least a target including a large number of civilians killing 140 people and injuring 500 more.

MR JUSTICE HADDON-CAVE: It appears, Mr Chamberlain, not to have been targeting but a failure of intelligence from B1431.

MR CHAMBERLAIN: My Lord, what is said by JIAT in relation to this strike is, "We were asked by the Yeminis to call in this strike, and so we did". There is then the

question as to why there was a second strike when first responders arrived on the scene, which would be a very clear breach of international humanitarian law on any view, but let's just concentrate on the strike in the first place. One of the bits of customary international law that I showed you when we were looking at the ICRC manual is the obligation to verify targets. I will take you back to that since your Lordship has asked the question. It is bundle 5, tab F and it is rule 16 which you have on page F52. So, each party to the conflict must do everything feasible to verify that targets are military objectives. That is a rule of customary international law. In a sense, my Lord, it should not be too surprising that that is a rule of customary international law. It is not good enough, with respect, to say well, the Yemenis phoned us up and said, "Please could you call in a strike on the Great Hall in Saner". It is not even good enough to say "the Yeminis insisted that we strike the Great Hall in Sanaa", because before you call in that strike, you are under an obligation to do everything feasible to verify that target is our military objective.

In relation to that particular strike, if the Saudi's had actually looked at the publicly available material, they would have known this was a gathering of nearly one thousand people. It was well publicised that this gathering was going to take place when it was taking place. Any kind of sensible targeting process would have asked questions before simply saying, "Yes" to the request from the Yeminis and no doubt, that is why the United Kingdom ambassador thought it appropriate to invite the Security Council to strongly condemn the strike. It is the kind of thing that does, in our respectful submission, give rise to very serious concern as to breach of IHL. Not just very serious concern, but we will see or you will see from the UN Expert Panel, it does appear to be one of the strikes that they have considered as part of their analysis of ten separate incident, as we understand it, in which IHL was found by that Panel, almost certainly to have been breached.

MR JUSTICE HADDON-CAVE: In terms of loss of life, this Great Hall one was the most significant.

MR CHAMBERLAIN: Yes, that is right. 140 people and 500 injured. Just on that question of the UN Panel, obviously, as I have said you have it, I do not want to dwell on it too much because you will have it in close and you will be able to draw more from it than we can, but I will just show you what we have in open about it. It is at E145 and this is a Reuters report:

> "The annual reports by the experts who monitor sanctions on the conflict in Yemen (this is the second paragraph) seen by Reuters on Saturday, investigated 10 coalition airstrikes between March and October that killed at least 229 civilians, including some 100 women and children."

Maybe this one is not included, in fact, it is difficult to know.

> "In eight of the ten investigations, the Panel found no evidence that the airstrikes had targeted legitimate military objectives the experts wrote in a 63-page report presented to the Security Council on Friday."

Just pause there for a moment; "eight out of ten no military objectives", we note that that figure, eight of ten, 80% is very close to the three-quarters figure which we have independently from the MOD. So, on the MOD's own analysis, three-quarters of the cases they analyse, no military objective identifiable. Then this:

> "For all ten investigations, the Panel considers it almost certain that the coalition did not meet international humanitarian law requirements of proportionality and precautions in attack, the report said. The Panel considers that some of the attacks may amount to war crimes."

What we seem to have from that is first a conclusion that in ten out of ten of the investigations, it is almost certain that there was a breach of IHL. Obviously, they are drawing an inference from the facts and your Lordships are absolutely right to say that in some cases, one has to look at the mental element and so forth. They are drawing an inference from the facts that they have ascertained, and they find it almost certain. Then some of the attacks may amount to war crimes. Now, why are they being more guarded in relation to war crimes? Well, because there, they understand, as anyone else does, that a certain degree of mental element may be required there and so, they again have to draw inferences. But they, nonetheless, consider it appropriate to say that some of the attacks may amount to war crimes.

That is what we know about the conclusions that they are drawing. Just going on, on the same page at 145, the Panel finds, this is just immediately above the capital letters, "Widespread systematic violations":

> "The Panel finds that violations associated with the conduct of the air campaign are sufficiently widespread to reflect either an in effective targeting process or a broader policy of attrition against civilian and infrastructure, the report said."

Again that is recognising that the Panel does not know what is going through the minds of the targeters but it is drawing inferences from the available information. In that context, obviously, the court has well in mind the test here is not can you be sure that there have been serious violations in the past, the test is, is there a clear risk. The test is set in that way, because everyone knows that it may be difficult to reach firm, sure conclusions. One has to do the best one can on the information that is available.

Now, what on the open material did the Secretary of State at the relevant time? We are looking for this time period we are concentrating now, February 2016, to date. The first place to look at are the gist that you have in bundle 3 at page B1712. These are, for the most part, gist of the sensitive IHL updates which the Foreign Office produced every month or most months anyway or some months. I think there may have been periods when they were not produced when there were temporary cessations of hostilities which then petered out and turned back into full-blown conflict. So, it is B1712. I hope your Lordships have that, because that is one of the documents which were put in late.

LORD JUSTICE BURNETT: Well, I am afraid it is not in my file. I will just check it is not one I have taken out. What is the document called?

MR CHAMBERLAIN: It is called "IHL Gist, table number 1" and then "IHL Gist table number 2".

LORD JUSTICE BURNETT: Do you have, by chance, another copy of it?

MR CHAMBERLAIN: Yes, I think we do have that, so we can hand that up. It is quite an important document so I will wait until you have that my Lord. **(Handed) (Pause)**

LORD JUSTICE BURNETT: All right, I am going to keep it separate for the moment because I think if I try to put it in, I will cause myself even more problems than I think I have.

MR CHAMBERLAIN: Yes. If we just look at B1712.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: If you can see the column, the row which begins "May 2016":

> "In May 2016, there were 188 incidents of potential concern of which around a third are assessed as probable coalition air strikes. So about 60-odd. Of these, no military target was identifiable for the majority of cases.

Then in June 2016, we are up to 194, of which around a third are probable coalition airstrikes. Of these, no military target was identifiable for the majority of cases. In July 2016, 204, of which around a third are assessed as probable coalition airstrikes. Again, no military target identifiable for the majority. If we then go over the page to 1714 and IHL Gist table 2, we have 236 incidents of potential concern in October 2016, of which in the region of half are identified as probable coalition air strikes. Of these no military targets identifiable for around two-thirds. So, just putting the figures on that, that would mean about 118 coalition airstrikes all together and no military target identifiable in about 79 or 80 cases.

We can also see from there that there has been a one-fifth increase in the number of incidents since July and "Insight (that is into Saudi targeting processes) although improved remains limited". Then the December update has 244 incidents tracked, of which around a half are assessed as likely coalition airstrikes. Of these, no military target identifiable for around three-quarters. So, around 122 likely coalition air strikes and of these no military target identifiable in around 90 cases.

Over the page at 1715, we see a comment made in a ministerial submission to this effect:

> "A very significant proportion of the value of the UK defence exports to KSA (Kingdom of Saudi Arabia) are currently in the air sector, including weapons)".

My Lords, we are not in a position to, and do not build a case or an argument out of that isolated comment because, of course, we do not know the context in which

it was made. But we do encourage the court and the Special Advocates to consider that context and ask itself whether the context indicates the taking into account of any impermissible consideration.

My Lords, may I stand back and summarise the information that is now before the Secretary of State once we have been through this analysis, about the conduct of the conflict in 2016. Again, if I may, I would like to make five points.

First, the Secretary of State has a series of Open Source reports summarised by the first three Interveners in their submissions. Some of them are summarised in their submissions, detailed what appear, on their face, to be violations of IHL. Second, one of these apparent violations conducted some two months after the latest UK-sponsored training session, killed 140 people and injured 500 more and was described by the UK's ambassador to the UN as "appalling". Third, if press reports are accurate, the UN Expert Panel has recently concluded its investigation into ten separate incidents between March and October 2016 and concluded that it is almost certain that IHL was breached in every one of those incidents. It also concluded that some may amount to war crimes. Four, the MOD does not itself, routinely, even attempt to consider whether a particular incident does or does not give rise to a breach of IHL and fifth, the MOD's own analysis reveals, at the last count that is disclosed in open, a total of about 122 likely coalition airstrikes and in about 90 of them, no military target can be identified.

That then is the background against which the Secretary of State's case that the clear risk test is not met, it was open to him to conclude that the clear risk test is not met, falls to be considered. As we have said, we, with the help of the open part of the Special Advocate's submissions, understand his case to be based on three strands. One, the tracker, two knowledge and understanding of Saudi military processes and procedures through engagement with the liaison officers and training and three, ongoing engagement with Saudi Arabia and post-incident dialogue. So, we recognise, of course, that your analysis of these three strands is going to depend on open and closed, but we seek to make what points we can on the open evidence that we have on those three strands.

I hope I have made most of the points about the tracker already, but may I just summarise them. The first is, we know it does not routinely attempt to answer the question whether IHL has been breached in any particular case and the result reported as to the proportion of strikes where there is no identifiable military target indicate, at minimum, very serious cause for concern.

We also note here that there is something of a tension in the government's argument, because great stress is placed on the closeness of the relationship with Saudi Arabia and the information that is received from the Saudi's. Yet, there is no explanation, at least in open, why the government is unable to ask the Saudis what was the military target in these 90 cases? After all, there are liaison officers, UK military liaison officers in Riyadh whose purpose is to liaise. One might ask the question; why has that question not been asked.

There are two possibilities it seems to us, and it may be that the closed materials will enable you to understand which of those two possibilities is, in fact, the right one. Maybe it has been asked and not answered. If so, that would, on the face of

it, provide the clearest possible evidence that there were no military targets in these cases. If that were so, this would point strongly in the direction of a large number of serious violations of IHL. They would have to be serious because whatever interpretation one gives to that term, whether one says it is different from grave breaches or not, if you have an attack where there is no military target, that is going to be a grave breach. Highly likely to be a grave breach. The UN Expert Panel, as we have seen, at least if the Reuters report is an accurate one, has said it is either that what is happening, that they are actually targeting civilians, they simply are military targets or, at the very least, there are serious deficiencies with the targeting process.

If, on the other hand, the question has not even been asked, perhaps for fear of antagonising or embarrassing the Saudis, then it becomes impossible to place the weight that the government appears to place on the information obtained from the Saudis. Because one is driven back to this question that if your channels of information are so good, why can you not ask the question? If you cannot ask the question, then it is very difficult for the government to come to court and say, ah, well, our secret sensitive information enables us to rebut the findings or to reach a view that there is no clear risk in the face of these findings from NGOs and the UN Expert Panel and so forth that there have been.

What about knowledge of Saudi processes and procedures? Well, we know that the UK has, and I will just give you the reference here, it is Mr Crompton's first witness statement, bundle 2, page B322, footnote 3. I am happy if your Lordships want to turn that up, but I can read it out otherwise. So, it is bundle 2, B322, footnote 3.

> "The UK has a very small number of staff working in Saudi headquarters in a liaison capacity only. (Just note how careful the Secretary of State is to make this point) These liaison officers are not imbedded personnel taking part in the Saudi Arabian-led operations and are not involved in carrying out strikes directing or conducting operations in Yemen or selecting targets and are not involved in the Saudi targeting decision-making process."

One can very readily understand why the Secretary of State is keen to point that out, because if it were not so, some of the allegations being levelled against the Saudis by, for example, the UN Panel, would no doubt be levelled against the United Kingdom personnel as well. So, one can quite understand why every effort is made to ensure that that should not be so.

Just on that point as well. I wonder if your Lordships could also look and, again, this is one of the pages –

LORD JUSTICE BURNETT: Sorry, which point?

MR CHAMBERLAIN: I am sorry?

LORD JUSTICE BURNETT: That they are not involved?

MR CHAMBERLAIN: That they are not involved.

LORD JUSTICE BURNETT: We know that. That is what has been said, has it not?

MR CHAMBERLAIN: Well, yes. We know that but I am just seeking to make another point which is what one draws from that as to the level of knowledge that they have about the Saudi processes.

LORD JUSTICE BURNETT: I see, yes.

MR CHAMBERLAIN: There is no dispute that they are not involved, the question is, what do you draw from that about the Secretary of State's case that, ah well, we have this great liaison relationship and therefore, we know all kinds of things that the UN Panel does not know and the NGOs do not know. On that, I just ask your Lordships to look at the Secretary of State's response to the Select Committees which have gone in late, so am not sure whether they will be in your bundle, but I would like them to be.

LORD JUSTICE BURNETT: Let's have a go.

MR CHAMBERLAIN: I would like them to be there, if possible. Bundle 3, 1824.
(Pause)

LORD JUSTICE BURNETT: Yes, it was in the pile that was just passed up.

MR CHAMBERLAIN: Yes, oh, well I am very glad, I am very glad you have it now. 1824. If you look at the paragraph about a third of the way down the page starting, "UK Defence Personnel", it is the government's response to the two Select Committees which, as you will recall, recommended immediate suspension of licensing. The Secretary of State said this:

> "UK Defence personnel are unable to form a complete understanding of the coalition's regard for IHL in its operations in Yemen as they do not have access to all the information required to do so."

MR JUSTICE HADDON-CAVE: One needs to read on though, does one not?

MR CHAMBERLAIN: Absolutely, I am very happy for you to read on:

> "The insights obtained by defence personnel into Saudi processes and procedures contribute to our overall view on the approach and attitude of Saudi Arabia to IHL as part of the wider information available to us and this, in turn, forms the FCO risk assessment made against the consolidated EU and national arms export licensing criteria."

But we do have, really throughout the evidence here, the Secretary of State making the point throughout that there is very little insight into how these decisions are actually made. That point is acknowledged by Mr Watkins as well in his statement, bundle 2, page B495, paragraph 57. May I just at this stage give you a

series of references, without necessarily taking you to all of them, bearing in mind the time.

For the proposition that the Secretary of State has acknowledged that he has particularly little insight into dynamic targeting processes, you will recall that those are the processes where the pilot in the cockpit decides to fire a weapon, normally with the authority of the control centre. So, you have the FCO, 26 January summary which his bundle 2, B462, "Saudi processes governing dynamic targeting are less robust than those governing their pre-planned targeting and we have little insight on these".

Then you have the 4 February summary for the business secretary, drawing attention to the fact that we have, this is at bundle 1, page B262, drawing attention to the fact that we have very little insight into dynamic strikes and noting that these account for a significant proportion of all strikes. 12 February, MOD submission, bundle 2, B522, less insight into Saudi dynamic targeting processes. Watkins, paragraph 66B, which you have already seen, bundle 2, B327 as at January 2016, insight into the dynamic targeting process was limited, however there was continued engagement on this. Then Watkins 84A, sorry 84A(a), bundle 2, B331, less insight into dynamic targeting processes, although in fairness, there is over the page at 85A, an assessment that these have significantly improved over the course of the campaign.

Then in the April IHL update which you have in bundle 2, page B1712 to 1713, we learn that the proportion of dynamic targeting had increased significantly over the last two months and then by October 2016, the IHL update in bundle 2, B1714 is saying that insight, although improved, remains relatively limited.

So, on the Secretary of State's own case, his insight into dynamic targeting processes was relatively limited. We do not know, as I have said, whether the strike on the Great Hall in Sanaa on 8 October 2016 was classified as a dynamic strike. If so, that may provide an example of the robustness of the Saudi process or dynamic strikes. That example is hardly, we would respectfully submit, an endorsement of the robustness of the process.

LORD JUSTICE BURNETT: But given it appears to have been as a result of intelligence, the inference would be that it was not a dynamic strike it was planned. Would that be right?

MR CHAMBERLAIN: Well, no, all we know and your Lordships may know more in due course from the close, but all we know from the Reuters report is that we do not know whether it was the result of intelligence or not. What we know is that the Yeminis told the Saudis that they would like the Saudis to strike this target because they were Houthi figures there. Indeed, that they insisted upon it. That is actually what we know. As I have said, it was incumbent on the Saudis, as a matter of international humanitarian law, Rule 16, to verify that target. It is no good, as a matter of international humanitarian law to say –

MR JUSTICE HADDON-CAVE: You are going back to the point that you made before. My Lord's question was really whether on what we have seen of that incident, it is dynamic or not.

MR CHAMBERLAIN: We do not know.

MR JUSTICE HADDON-CAVE: We do not know.

MR CHAMBERLAIN: Part of the reason I do not know the answer to that question, my Lord, is because I am not satisfied that I, from the materials that we have seen, actually know what "dynamic" really means in this context. There is in fact reference in Mr Watkins' second statement to a third category of strike, which is a strike which occurs as part of combat engagement.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: So, where exactly you put it, I do not know, but I raise these points in case further light is shed on them in the closed material.

LORD JUSTICE BURNETT: Well, and also that the term, "military target" is relatively opaque as well. To take an entirely different example, but one, sadly, we read about almost daily in the papers at the moment, the conflict going on in Northern Iraq to unseat ISIS, the so-called ISIS, I call them that so as not to call confusion.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: One reads daily that the fighters are hiding amongst the civilians and sometimes using the civilians as shaders. Military target or not, I mean, some of these things are not entirely clear-cut. It certainly does not mean, sort of, depo full of trucks or something of that sort.

MR CHAMBERLAIN: Of course not, no. If you have got fighters hiding amongst civilians that can be a military target, of course. That does not mean it will be lawful under IHL to strike it.

LORD JUSTICE BURNETT: No, no, no.

MR CHAMBERLAIN: Because one has to also apply proportionality analysis.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: That analysis appears in many of these cases to have been lacking, we would respectfully suggest, when one looks at the Open Source report. But when it is said, well, we cannot identify any military target, what is actually being said is we cannot identify any at all. There is just no evidence of there being any military activity in this area at all, and that is actually what the NGOs are looking at. When they go into the areas which have been hit by these ammunitions, they are asking themselves and some of the reports you will see, some of the NGO reports, they are not by any means whitewashing the position. In some of the cases they will say well, actually, there was evidence of some military activity here but, you know, we question whether it was compliant with the principle of proportionality. In a lot of them they say there is just no evidence at all of any military activity anywhere near this site. So, in those cases when one says well, you cannot identify a military target, that is identifying something which

gives rise to serious cause for concern, not just as a breach of IHL but as a potential serious breach of IHL. Of course, I absolutely accept that the fact you cannot identify one does not mean there was not one there. But the fact you cannot identify one and you cannot get the Saudis to help on that question does seem, in our respectful submission, to indicate more than just a little cause for concern.

On the Secretary of State's own case, his insight into dynamic targeting is limited, "relatively limited" are the words that you see in the October 2016 update. As to training, we say it is important just to understand the chronology here. The Secretary of State sets out the training at paragraph 75 of his skeleton argument, I will just invite your Lordships to look at paragraph 75 here. International targeting courses in the UK and Saudi Arabia had been run on four occasions, July to August 2015, January 2016 to July to August 2016 and in the KSA in October 2015. Individual training in the use of specific precision guided munition such as Paveway 4 and Storm Shadow and aircraft is provided and also RSAF (Royal Saudi Airforce) Typhoon pilots that is the Eurofighter Typhoon in relation to which the UK exports a large quantity of different kinds of military equipment have undertaken the qualified weapons instructors course in the UK and then there was a further workshop on something called "Spins" from 19 to 11 January 2017.

But then look at the caveat in paragraph 76:

> "By virtue of the fact that the UK is not a party to the Yemen conflict and is not a member of the coalition the access of liaison officers who remain under UK command and control is understandably moderated and controlled by KSA. As the UK is not involved in the conflict or at present on the ground in Yemen, it is difficult to know whether processes observed in KSA are being complied with. In other words, it is difficult to know whether the training is actually reflected in practice on the ground."

If we look at the points made in the sub-paragraphs of paragraph 76, the Secretary of State says, "The UK has extensive accesses to KSA processes", but we know that its access to dynamic targeting processes is relatively limited. So, for extensive access but relatively limited in relation to dynamic. Then (b), "Friendly and mutually important relations with the Kingdom of Saudi Arabia". Well, that may be true and that may lead Saudi Arabia to make public statements designed to assuage UK concerns. Whether these statements are reflected on the ground is another matter. (c) The Secretary of State has access to post-strike coalition mission reporting. We observe, not enough access to ask the question what was the military target in the 90 or so cases where none can be identified. (d) Incidents are analysed by MOD in the light of all the information available to it but no routine attempt, as we understand it, by the MOD to address whether in any of these cases there was a violation of IHL or not.

Finally, in assessing what difference the training actually makes, it is a small point but we do just draw attention to it, invite attention to bundle 3, page 1331, paragraph 9 which is a submission to the Secretary of State from officials in the MOD, it was a submission to the Defence Secretary seeking authorisation for the

training workshop which we understand took place in January last month. Second sentence at paragraph 9:

> "This would assist with the ongoing assessment of IHL compliance and may provide additional evidence to support our defence of the judicial review."

LORD JUSTICE BURNETT: What is the point you make on that?

MR CHAMBERLAIN: Well, simply that when one looks at what one can draw from these training sessions, one feature of the motivation which went to the question whether to run them was in the judicial review.

LORD JUSTICE BURNETT: This is the one that was run two weeks ago.

MR CHAMBERLAIN: Last month, yes. That is right.

LORD JUSTICE BURNETT: Okay.

MR CHAMBERLAIN: May I turn now to the third of the Secretary of State's three strands, which is dialogue with Saudi Arabia and investigations. We deal with these at paragraphs 38 to 42 of our skeleton argument, making three points

MR JUSTICE HADDON-CAVE: Sorry, which paragraph?

MR CHAMBERLAIN: I am sorry, 38 to 42.

MR JUSTICE HADDON-CAVE: 38 to 42?

MR CHAMBERLAIN: Yes. The first point we make by reference to a statement made by the Under-Secretary of State ion the Foreign Office on 12 January is that progress has been slow. There is another statement where he described it as "frustratingly slow" back in April 2016, and that is in bundle 3, B1407. I do not ask you to turn it up, but that is the statement for reference. The second is that to date, whatever the speed with which they have been produced, only 14 reports have been produced. The third, and perhaps the most important point, is that the JIA team and the investigations themselves have been subject to serious criticism. As to the team, if you just turn to B1537, you can see a report that is in bundle 3, about one of the members of the team.

LORD JUSTICE BURNETT: Sorry, who is this a report from? Is this another Reuters one?

MR CHAMBERLAIN: It is the independent

LORD JUSTICE BURNETT: Oh, the independent, thank you.

MR CHAMBERLAIN: The team member concerned is military lawyer Mansur El Mansur or Bahrain who presided over the prosecution of hundreds of peaceful protestors and have been criticised by international Human Rights

groups. That is a reference to the Arab Spring protests in the spring of 2011 in which this individual achieved some notoriety.

As to the investigations themselves, the best place to look –

LORD JUSTICE BURNETT: I am sorry, there is some difficulty in dealing with pretty skimpy news reports which tell us nothing more than a headline and a few things.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: This is a military lawyer who is, if this is an important point, he is a military lawyer in?

MR CHAMBERLAIN: Bahrain.

LORD JUSTICE BURNETT: Well, yes, but is a Saudi?

MR CHAMBERLAIN: No he is Bahraini.

LORD JUSTICE BURNETT: He is Bahraini, okay.

MR CHAMBERLAIN: If you look over the page at E1538, I am sorry to take it quickly, but I obviously appreciate that if it is a good point, it needs to be made good. 1538 at the top of the page just by the first hole punch:

> "The Colonel gained notoriety in dealing with the testers in the wake of the Arab Spring in Bahrain in 2011, running a Tribunal which prosecuted hundreds of non-violent pro-democracy protestors, academics, writers and journalists, often handing down life imprisonment sentences."

Then underneath:

> "Dozens of those he sentenced, alleged torture and sexual assault while they were detained, which they said Colonel el Mansour ignored."

LORD JUSTICE BURNETT: Yes, thank you.

MR CHAMBERLAIN: I entirely accept that one can only take these things so far, but they are part of the context against which the Secretary of State's reliance on the JIAT falls to be assessed. As to the investigations themselves, you will see from 1614, B1614, a letter from Human Rights Watch – I am sorry not 1614; I will ask where it is. Hopefully someone will tell me if that is correct? It is 1641, I transposed the numbers, my fault. A letter from Human Rights Watch about the JIAT process. If one just turns over to 1642, the first full paragraph on the page:

> "Since August 2016, JIAT has released the initial results of investigations into 14 coalition attacks, releasing about a paragraph on each strike. While JIAT recommended the coalition pay reparations to victims for three of these attacks and that appropriate

> action be taken against officers involved in two, Human Rights Watch is unaware of any concrete steps taken to put a reparation process in place or to hold individual officers accountable for possible war crimes. JIAT's methodology including verification of information, the choice of incidents investigated, investigations of acts by non-coalition parties to the conflict and the status of its recommendations, vis-à-vis coalition members, has not been transparent. While the coalition admitted using munitions claiming to have done so in compliance with international law, to date JIAT does not appear to have examined a single attack involving clust ammunition. In ten of the 14 strikes JIAT investigated, it absolved the coalition of responsibility for alleged violations, often reaching different factual and legal conclusions than the UN or Human Rights organisations that had documented the same strikes. Below, we outline factual and legal discrepancies between JIAT and Human Rights Watch in five strikes that both Human Rights Watch and JIAT examined, as well as questions for JIAT regarding these discrepancies and JIAT's overall work. Other organisations, including Amnesty international and Médecins Sans Frontières have also come to different conclusions than JIAT following their own inquiries into other strikes JIAT investigated."

I am not going to read out the rest, but I do commend the detail of these reports to the court, because these are quite detailed criticism of the reports. If you look, for example, just to take one example, the Great Hall funeral strike on 8 October 2016. They set out in the bottom paragraph on B162, there is set out the JIAT conclusion. Then over the page at 1643,

> "Human Right Watch concluded that regardless of the faulty intelligence, coalition forces both in the Yemen Air Operation Centre and Riyadh either knew or should have known that any attack on the hall would result in massive civilian casualties. The date and place of the funeral ceremony was publicly available and the Hall would have been known to be crowded with hundreds of civilians at the time of the attack. Human Rights Watch interviewed 14 witnesses to the attack and two men who arrived at the scene immediately after the air strike to help with rescue efforts among other sources and reviewed video and photos of the strike site and weapons remanence. The strike was an unlawfully, indiscriminate or disproportionate attack on civilians and civilian objects in violation of the laws of war. The Great Hall appears to have been attacked wilfully, that is deliberately or recklessly, which would be a war crime and those involved should be criminally investigated."

That was the conclusion reached in relation to that particular strike. I was going to take you to another example, which I think I probably do not have time for. But can I just give you the references.

LORD JUSTICE BURNETT: Well, now, just before you leave this; this was written on 13 January.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: Posted more widely on 16 January, by the looks of it.

MR CHAMBERLAIN: Yes.

LORD JUSTICE BURNETT: Any reply yet that anyone knows of?

MR CHAMBERLAIN: No, that we are aware of. Mr Swaroop may know. He does not, he is shaking his head.

LORD JUSTICE BURNETT: No, all right. No doubt, if there had been one, someone will tell us.

MR CHAMBERLAIN: Of course. **(Pause)** Mr Swaroop says not to their knowledge. Now, I could give further examples, but I note the time. We say, taken as a whole, we have what the UK government have called a "frustratingly slow investigation into a very small proportion of the incidents where IHL concerns have been raised and where the outcome of the investigation" and you have, by the way, so that you can assess it for yourself, the actual paragraphs produced by JIA18, by way of inclusions in the bundle. I will try and find the reference for you so that you can look at it yourselves. We do say that the existence of these JIAT investigations against the background that we have described provides no lawful basis to discount the clear risk indicated by the Open Source material and certainly, before relying on the existence of JIAT process, the UK government would have to show that it had engaged with these concerns, both about the composition of the team and about the quality of the investigations and the open material, as far as we are able to see does not indicate that.

My Lords, that brings me to my sixth head of challenge and I see I only have five minutes left, and the sixth headed challenge is why we are right on all our grounds of challenge. Luckily, most of this is set out in the skeleton argument and in a sense, I have been making the points as I go along, so you will be glad to hear, my Lords, that I am not going to go way over my allotted time.

May I start with our grounds 2 and 3. We deal with these in our skeleton argument at paragraphs 68 to 77. I have already made the points in relation to the margin, the intensity of review which you should apply and I am not going to repeat those because it is a part of law which is very well known to both members of the court, I am sure. Applying that to the facts of this case, we say the starting point for any analysis of a clear risk test in Criterion 2 on the government's own case is an analysis of Saudi Arabia's past and present record of respect for IHL. That is what the User's Guide says at paragraph 2.13 and it is what the Secretary of State says he has done. See skeleton argument, paragraph 56.

The Secretary of State's analysis as at February 2016 was that the FCO and MOD between them had not been able to establish any violation, serious or otherwise, of IHL. Nothing at all to indicate what standard was being applied there and nothing at all to indicate any attempt to reach a view about the likelihood that there had been violations of IHL given the large volume of Open Source material indicating

that there had been such violations and given the severe limitations on the Closed Source material available to the MOD as we understand them and as I described in Open. Sorry I promised you the reference to where the paragraphs from the JIAT are set out, and somebody has provided me with that, so may I just give you that.

LORD JUSTICE BURNETT: Well, why don't you get somebody to put that on a bit of paper and give it in at the end. Do not take time now.

MR CHAMBERLAIN: All right. We do say nothing on the open material that engages with the question well, okay, so you cannot establish any breaches of IHL, but what do you think? Is it likely that there have been? Everyone else seems to think that it is likely there have been, why don't you? In short, we say that the analysis in February 2016 starting as it did with "We have not established any violation of IHL" was legally impermissible in the sense set out by Sedley J, as I said at the beginning. Let's leave aside all the points about intense scrutiny and just concentrate on whether there was actually an error of logic here. We say the only conclusion rationally available on the evidence we have shown you that was before the Secretary of State at that stage, was that there was cogent evidence suggesting repeated violations of IHL and cogent evidence suggesting that some of those were serious violations. That neither the FCO nor the MOD had been in a position to rebut or displace that evidence. So, any assessment of the question whether the clear risk test was met had to start from the proposition that they had been likely violations.

We know that the UN expert panel had concluded that at least some of the violations had been grave violations and it had expressly referenced the Rome Statute. We know, if the Reuters reports are accurate, but its final report evidences another ten cases where violations are found by it to have been almost certain, some of which may amount to war crimes. As the Secretary of State is at pains to emphasise, the United Kingdom government on the evidence that we have, is not in a position to assess what was going through the mind of the targeters at the relevant time so they, like the UN Expert Panel and the NGOs had to draw inferences. We say that the only inference that can properly be drawn, given the lack of information and the limited insight, to use the Secretary of State's own terms, into targeting processes is that there was, at least, a clear risk that some of the apparent violations of IHL were serious. Even if one takes the view that serious violations are synonymous with war crimes.

We make three points, which I am not going to read out but you have them in our skeleton argument at paragraph 73 to 75, where we criticise the Secretary of State's decision-making process and we say that when one looks at it, one can see that there was a logical flaw. The logical flaw, to summarise it in a sentence, is failing to engage with and rebut the findings made by the NGOs and the UN Expert Panel. When one looks at what the Secretary of State himself says about the limitations of his own understanding of the targeting processes and puts that into the mix, then we say there is only one conclusion open to the Secretary of State which is that the clear risk test is established.

As to suspension mechanism, you see the points we make at 76 and 77 in our skeleton argument. We say that at the very least, given what the Secretary of State says about the limitations of his understanding, this was a case where the

suspension mechanism should have been triggered and licenses, extant licenses should have been suspended.

My Lords, I have said very little so far about our ground one which is the failure to consider, I hope I can do it very quickly by reference to the skeleton argument, the failure to consider questions or even ask questions which are set out in the User's Guide as being relevant questions to ask. I just ask your Lordships to look briefly at what we say in the skeleton argument on this point. At paragraph 60 –

LORD JUSTICE BURNETT: How many questions altogether are there in the Guidance?

MR CHAMBERLAIN: Quite a lot.

LORD JUSTICE BURNETT: Forty, 50?

MR CHAMBERLAIN: Quite a lot.

LORD JUSTICE BURNETT: So a decision-maker, someone has to go through them all?

MR CHAMBERLAIN: Not necessarily. Not necessarily but this one was so fundamental to any analysis to a country's respect for human rights and IHL that it is difficult, with respect, to see how you cold properly assess that question without knowing the answer. We have identified three questions which we say fall into that category. Your Lordship will know the case law on **Thameside** and the duty to make proper inquiries. There are some things which are optional, you can either look at it or not, and there are some things which are so central to the analysis that you are performing that you have to look at it, and we say these fall into this category.

My Lord, if one just, sort of, stands back from it for a moment, we know what the Secretary of State said he was looking at, he was looking at Saudi Arabia's past and present record of respect for international humanitarian law. The first question that one needs to ask, set out in the User Guide on this point when answering that question is, "Does the Kingdom of Saudi Arabia have national legislation in place prohibiting and punishing violations of IHL?" We do say it is quite striking that when that question was asked in the letter before claim the answer was, "We simply can't advise. We don't know". There is no evidence at all to suggest that the Secretary of State, despite his apparently very close arrangement with the Saudi Arabian government, has asked that question since the claim was brought. So, that does in our respectful submission, give rise to a difficulty. "Not in a position to advise", that is what was said, as you can see, bundle 5, page E55 and no evidence that the Secretary of State has taken any steps at all to ask the question whether Saudi Arabian law actually prohibits breaches of IHL.

Why do we say that is important? Well, if you are going to place reliance, as the Secretary of State does, on the JIAT process, and on conclusions by the JIAT that where there had been failings, those will be followed up and individuals held to account, you need at least to understand under what procedure or under what law

those individuals can be held to account. There is simply no answer on that question.

We set out, obviously, the subsidiary questions that follow from that which are whether there are mechanism to ensure accountability and also whether the Kingdom of Saudi Arabia has an independent functioning judiciary capable of enforcing those norms, as to which we suggest no inquiry was made, that the answers would have been, at least to the last question, would have been clear if the inquiry had been made.

Finally, we make the point, as we have said throughout, that when one asks the question, "Well, does it matter?" Could the answers to these questions actually have affected things or is it just unreal to think that the answers to these questions would really have swayed the Secretary of State. Well, on that, we just put the question rhetorically in this way. Given the numerous references all over the papers to the facts that this decision was finely balanced, can you be sure that the Secretary of State anxiously considering this as he did, as the papers indicate, would have taken the same decision if he had been told that as far as officials knew, the Kingdom of Saudi Arabia may have no law, no disciplinary rules and no effective enforcement mechanism for prohibiting breaches of international humanitarian law. We say the answer is, you cannot be sure of that and for that reason the failure to ask those questions vitiates the decision.

My Lord, I have taken a bit more time than I had hoped. I have gone ten minutes over. I hope that those submissions are comprehensive. May I just check with those behind me that there is nothing I have missed out that I need to mention. No, I am told there is not.

LORD JUSTICE BURNETT: Thank you, Mr Chamberlain.

MR CHAMBERLAIN: My Lords, unless I can assist you, those are my submissions.

LORD JUSTICE BURNETT: Yes, Mr Swaroop.

SUBMISSIONS ON BEHALF OF

MR SWAROOP: My Lord, in short, the first intervener is saying that there is at least a **prima facie** case that the UK was and is in breach of its own international law obligations reflected in Article 16 of the International Law Commission Articles on state responsibility, in that the UK has and is aided and assisted the Kingdom of Saudi Arabia in the latter's breaches of IHL. That is our first headline point, "International Law". Secondly, we say that Criterion 1 of the criteria requires the UK to consider its own international law obligations arising from Article 16 but, and this is fairly clearly on the facts, the UK has failed to do so.

I will follow, broadly, the structure of our skeleton and may I ask your Lordships in addition to that skeleton, please keep to hand our detailed submissions which are in file 3, tab C, which we served on 16 January. I will refer to those submissions from time to time as well.

LORD JUSTICE BURNETT: Thank you.

MR SWAROOP: I will also try to minimise going to authorities given the time and will try just giving you the references where I can absolutely do that. Before I go into the substance, I should just make one initial comment about the defendant's skeleton. As I said, we served our submissions on 16 January. On 24 January, the defendants sent a letter saying that it did not intend to address these submissions but what we are putting is a standalone claim and the court should not determine these issues either. We prepared on that basis, we put in our skeleton on 30 January on that basis. On 3 February, the defendants skeleton repeated that position, and that was on Friday, so it came as something of a surprise when yesterday, about 3.30 pm, we were sent a 14-page further skeleton by the defendant plus a whole file of authorities, albeit the document they sent was headed, "Preliminary response" and albeit although they responded, at the same time they maintained that the court should not determine the issues that we raise.

I will come back to these point at the end but at the moment, I simply say this. I will deal substantively with what they say, I am not going to take any point about the lateness of that, but the court should recognise, a party cannot evade the determination of an issue simply by serving a skeleton late and then adding the word, "preliminary" to the heading of its document.

LORD JUSTICE BURNETT: Well, look, we, at least, speaking for myself, I would like your submissions without prejudice as it were, to whether some of these issue are really before us. You appear for interveners not for parties. You intervened in support of the claim advanced by Mr Chamberlain's clients which is a claim on which permission has been granted which is contained within the claim form. I think we could spend a great deal of time having a rather sterile, procedural debate now. I think we are just going to have to take in all your submissions, and we have obviously read them and we will hear what Mr Eadie has to say about them. Speaking for myself at least, I am going to have to reflect upon whether the Criterion 1 issue is properly before us.

I would also just put down a marker that from the way you developed your submissions from the outset, it appears that you all right inviting this court, positively, to make a finding that the Kingdom of Saudi Arabia has been in breach of its international human rights obligations.

MR SWAROOP: May I clarify. We are not asking the court to do that.

LORD JUSTICE BURNETT: All right.

MR SWAROOP: We say squarely in our detailed submissions that what we are putting is a **prima facie** case. We are not asking the court to find that the UK is actually in breach of Article 16 and we are not asking the court to find that Saudi Arabia has actually breached.

LORD JUSTICE BURNETT: That, if I may say so, comes as a relief, at least to me, given the rather bold contrary view. So, your argument evolves, does it, to the proposition here that the government, Secretary of State, did not consider these matters in the course of the decision-making or so you would submit would appear?

MR SWAROOP: Yes, that is the short point.

LORD JUSTICE BURNETT: All right.

MR SWAROOP: Did not consider these matters in circumstances where there was a **prima facie** case that the UK was in breach of Article 16.

LORD JUSTICE BURNETT: Thank you. Yes.

MR SWAROOP: Looking then at our skeleton, paragraph 5, we set out the test of Article 16 and just looking at the text, the words to note there are:

> "A state which aids or assists another state in the commission of an international wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the wrongful act."

As your Lordship will see there is a big debate about that action means, "and (b) the act would be internationally wrongful if committed by that State". I do not understand there is much debate about that.

The origin of these articles were work done over many years by the International Law Commission which resulted in 2001 in what is known as the Articles on State Responsibility. They were noted in a general assembly resolution of 2002 which is at tab 45 of bundle 2 of the authorities bundle. There has been ongoing debate about the extent to which the different articles reflect customary international law, but as regards Article 16, there is no debate as the government has confirmed, that it does reflect customary international law.

I would just follow the order of the submissions that we make at paragraph 6 of the skeleton. The first point, both at the ICJ level and at domestic law level Article has been taken to reflect customary international law and we see that from the **Bosnia Genocide** case, which is at tab 59 of bundle 3 of the authorities and also from a case from a German Constitutional court, **Al Bash Em(?)** which is at tab 63 of bundle 3, the requisite paragraph 47 of that judgment. I will not go there because in that case, the German Court accepted that Article 16 of CIL but did not have to apply it to the facts.

Secondly, this is our point two, "Both the UK Court and the UK Government has accepted that Article 16 reflects customary international law" and indeed, the defendant in its response has squarely accepted that. The one case we could locate where an English Court has considered Article 16 before is the case of **El Sadoon** and that is at tab 11 of bundle 1 of the authorities bundle. I would just like to go that very briefly, if I may.

That case was the trial of a number of preliminary issues relating, **inter alia**, to the treatment of the trainees in Iraq. One of the issues was, and if we look at page 504 at (b) to (c), we see the issues listed and the relevant issue for our purposes is (ii):

"The extent to where civilians who were not within the jurisdiction of the United Kingdom for the purpose of Article 1 although with a duty to investigate alleged violation of Article 3, where the allegation was not that the claimant had been tortured or mistreated by British Forces but that he had been handed over to the US or Iraqi authorities in circumstances of a real risk to such torture."

The relevant passage of Leggatt J's judgment is at paragraph 189 onwards, and in this passage Leggatt J is assessing the issue of whether there was complicity in torture. Then at paragraph 192 he says well, what is the content of that obligation. In order to assess the content of that obligation, he looks to Article 16 of the draft Article of a responsible. At paragraph 193 he confirms, by reference to the **Bott** (17.16.36) case that Article 16 does reflect customary international law. Moving down to paragraph 197 he makes the point that is really in issue between us today which is, what are the requirements of knowledge. In particular, in a handover case, what degree of certainty or imminence of mistreatment must the transferring state perceive. That is one of the issues that I want to address and focus on when I come on to develop my submission.

Again, on the facts of that case, he did not then have to apply the complicity argument because it just did not arise n the facts and we can see that at paragraphs 200 to 202.

LORD JUSTICE BURNETT: Presumably here, I have not read this for a little while, but a prohibited torture was under UNCAT, the United Nations Convention against torture.

MR SWAROOP: Yes.

LORD JUSTICE BURNETT: It was suggested that our forces were complicit and Article 16 was being looked at to find a juridical peg for complicity.

MR SWAROOP: Yes, to give content to the concept of complicity.

LORD JUSTICE BURNETT: Yes.

MR EADIE: My Lords, you might perhaps note that that case has gone to the Court of Appeal and there no reference whatsoever to Article 16 and the Court of Appeal judgment or indeed in argument before it. (Inaudible) considered the position of customary internationally law as a source of English law at 270 and following.

LORD JUSTICE BURNETT: Yes.

MR SWAROOP: Also, the Article 16 duty has been considered by the by the UK government, firstly in its reply to a report of the joint Committee of Human Rights regarding allegation of UK complicity and torture. That is at file 3, C35 to C45 and that is our main file not the authorities. Also, it has been decided by the UK government that its response to the joint Committee on Human Rights regarding the government's use of drones. This is the document that I want to take you to please.

This is at file 3 and then the reference is at page C66. Just to give some background to this, in May 2016, a joint committee on drones gave its report and it posed a series of questions to the government. In September 2016, the government gave its response. The relevant passage is at the bottom of C66 where the question is this:

> "In understanding what the legal basis on which the UK takes part in or contributes to the use of legal force outside armed conflicts…"

LORD JUSTICE BURNETT: Can you give me the reference please?

MR SWAROOP: C66. The joint committee is asking the government what is the legal basis upon which the government cooperates with these drone strikes by the US. In that context, the government says this:

> "In cooperating with other states, the government seeks to ensure that its actions remain lawful at all times."

Then the government cites Article 16. The point we draw from this is there is nothing new about Article 16, it is well-known to the government and they consider it and they apply it as a matter of policy in other contexts, in other very important contexts.

Thirdly, the sale and supply of weapons and military support from one state to another is a paradigm example of a situation why Article 16 may be engaged and that is a point we developed in our main submissions at paragraph 20. So that is C30 in paragraph 20. Fourthly, and this is the central substantive question on Article 16, what is the meaning of "knowledge of the circumstances of the international wrongful act"?

We say it is plain enough if knowledge relates to mere certainly or something approaching certainty, but we also say this. There is strong academic support for the proposition that wilful blindness is sufficient and we summarise the relevant citations at paragraph 14 of our main submissions. If your Lordships could please turn to C9, paragraph 14. This is the question of degree of knowledge. Then over the page at 14.2 we identify the fact that instructive knowledge, perhaps the lowest test has been suggested but then we make the point at the end of 14.2, "There is a paucity of support amongst eminent publicist for a constructive knowledge test".

We have tried very hard to be fair in these submissions and not to overstate the case but then we say this at 14.3, "There is however strong support for a wilful blindness standard", and we get that from three separate pieces of academic work. The first is from Professor Vaughn Lowe he says:

> "It is unlikely that a Tribunal would permit a State to avoid responsibility by deliberately holding back from inquiring into clear indications that this aid would probably be employed in an unlawful manner."

That is the authorities bundle, tab 70, bundle 3, page 10. Miles Jackson who is a lecturer in International Law at Oxford endorses that view. This is almost certainly correct as a matter of law and in principle. "Wilful blindness narrowly interpreted is a justified extension to the category of legal knowledge". That is at tab 71 of file 3 of the authorities bundle, page 162.

Then thirdly and most recently, November 2016, a research paper by Harriet Moynihan of Chatham House, formerly of the Foreign Office and she says this:

> "Wilful blindness might be defined as a deliberate effort by the existing state to avoid knowledge of illegality on the part of that state being assisted in the face of credible evidence of present or future illegality. Where the evidence stems from credible and readily available sources such as court judgments, reports from fact-finding commissions or independent monitors on the ground. It is reasonable to maintain that a state cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence."

Then later on in her conclusions she says:

> "If a state has not made inquiries in the face of credible evidence of present or future illegality it may be held to have turned a blind eye."

That is file 3 of the authorities, tab 73, firstly, paragraphs 44 to 46 and then the conclusion at pages 24 to 25. On the facts of this case your Lordships have heard a lot of submissions about that. I will not go back over those submissions. I do say in passing that it is the first intervener's position that is a non-international armed conflict but as Mr Chamberlain argued, that should not make a difference to the purpose of the rules we are arguing about. Principles such as the station, precaution and proportionality still applied.

On the facts of our case, at the very least, there is a **prima facie** case either that a knowledge standard is met or at the very least the wilful blindness standard is met. Like Mr Chamberlain, we obviously do not have knowledge of the closed material but what we do have knowledge of is the open ground served by the Special Advocate. In those grounds at paragraph 11, the Special Advocate says this:

> "The true position as it appears to the Special Advocate is that it appears that the defendant has deliberately decided not to make any assessment of the likelihood or otherwise of a breach of IHL in relation to any specific incident contrary to the most obvious interpretations of the assertions by the government legal department."

That comes very close to the formulation for wilful blindness. Bearing in mind I am not asking your Lordships to find acts of wilful blindness, I am talking at the level of a **prima facie** case, and we say the material before your Lordships certainly to the open material is enough to establish such a **prima facie** case. Of

course, we repeat all the material we have set out in our detailed submissions on this.

Furthermore, sixthly, the fact that apparently the UK has not assessed for itself the fact that Saudi Arabia has committed wrongful acts does not provide a defence under Article 16. This is the **Bosnia Genocide** case which we develop in paragraphs 13 of our earlier detailed submissions, but the key point is this. In that case, the issue was whether the Republic of Yugoslavia was complicit in genocide being committed in Bosnia for the purpose of the Genocide Convention. Again, in order to give content to the concept of complicity, the International Court of Justice looked at Article 16 and said, Article 16 reflects customary international law.

Upon the facts of that case it said complicity/Article 16 responsibility is not made out, but its key reasoning was this. It said because it was not conclusively showed that the decision to eliminate physically the adult male population of the Muslim community from (**inaudible**) was brought to the attention of the Balbrig authorities. That is paragraph 423 of the judgment. It follows that in order to engage responsibility under Article 16, it is not necessary for there to be a wide-range of analysis of attitude and such general matters. It can be enough if a simple fact that goes to the wrong, comes to the attention of the aid or assisting state.

By analogy from the **Bosnia** case, it might be said in this case that what has come through open source to the attention of the UK government was the May 2015 declaration by General al-Asiri about the targeting of entire cities Sanaa and Maran as targets in themselves. It may be said that is the analogy to draw. Of course, on the evidence, those issues were, in fact targeted in their entirety. So, again, at the level of **prima facie** case on the open material, we say that threshold is met.

Seventhly, the **prima facie** case on these facts is reinforced by the ongoing nature of the conflict, the evidence that breaches of IHL have not been one-off, that had been repeated, widespread and systematic, that the UN Expert Panel used the phrase widespread and systematic. Of course, finally, the absence of any positive assessment by the UK to rebut that evidence. That is our case on Article 16.

I now just want to address the case put by the defendant and from what we can see they make three points. Their first and big point is this; they painstakingly cite **Bosnia Genocide**, Professor James Crawford and one other academic, this is paragraphs 19 through to 27.2 of our skeleton, to support the submission that the test is not constructive knowledge, they say, contrary to what the interveners argued. They say that in terms at paragraph 27.2, the government's big point is based on a fundamental misreading of our case. As I have shown earlier, at paragraph 14.2, we expressly say yes, constructive knowledge has been suggested but then we say but there is a paucity of support for it. Our case, which remains unaddressed by the government, is wilful blindness, which is a different concept.

Secondly, they say there must be intention and we deal with this at paragraph 15 of our detailed submissions but in short, we say the text which I took your Lordships to earlier, the text of Article 16 says nothing about intention. At least one imminent publicist, Professor Vaughan Lowe has said it is clear there is no

intention requirement. But even if there is an intention requirement, there is strong authority for the proposition that one can infer intention from knowledge. We put the references in paragraph 15 but amongst others, Professor Crawford who the defendant itself relies on comes to that conclusion.

The third of their three points is about the threshold for aid or assistance and they say there has to be substantial involvement in order to qualify under Article 16. As to that, our position is paragraphs 17 to 18 and paragraph 24 of our submissions. In short, we say yes, substantive involvement would be enough and we get this from the commentary of Article 16 which is at tab 55 of the authorities bundle. The commentary makes the point that even if the level of involvement is incidental, that does not mean there is no responsibility, that question goes to the question of damages. In other words, if there is a minor or incidental contribution to the underlined damages, that simply means that the reparations which flow from that are limited. It does not mean there is no responsibility at all. We give the references in paragraphs 17 to 18 of our submissions.

Also on the facts, paragraph 24 of our submissions, the UK Joint Commission of Business Innovation, Skills and International Development have said in terms:

> "It seems inevitable that any violations of International Humanitarian Law have involved armed supply from the UK."

That is our first main heading, "International Law". The second major point, Criterion 1, the background is this. Section 9.2 of the Export Control Act gives the Secretary of State power to give guidance about licensing and export. Section 9.5 is a duty that the decision-maker shall have regard to that guidance when making the decision. As we see in the Guidance, it is the consolidated criteria which Mr Chamberlain took your Lordships through.

The major issue between us seems to be this. The government says well, looking at Criterion 1, the international obligations and commitments which it talks about do not include Article 16 or more generally they say, do not include any customary international law and obligations. My Lord, may we just turn to the Criterions which is in file 1, page 6.

LORD JUSTICE BURNETT: Yes, we have that.

MR SWAROOP: Yes. The simple point is this; Criterion 1 is the respect for the UK's international obligations and commitments. Then as a matter of language, pausing there, there is no limitation as regards the treaty obligations. That language naturally read means "The UK's international obligation commitment which will include both treaty and customary international law obligations". But the language goes further because then in three places the Criterion goes out of its way to make it clear it is not being exhaustive and so it says after the word "commitments in particular, sanctions adopted by the UN Security Council or the European Union" and then at the end of that passage it says, "as well as other international obligations". Then in the sentence beginning, "The government would not grant a license if to do so would be inconsistent with…" it has the words, "**inter alia**". So, it is a very simple point on the language. International obligations and

commitments means just that. It means obligations and commitments without limitation.

That construction we say is supported by the User's Guide. If we could turn to page 26 of the same bundle.

LORD JUSTICE BURNETT: I think you better just give us the reference.

MR SWAROOP: Yes, it is page 26, and we say that is where the Guide deals with question 1.

LORD JUSTICE BURNETT: Yes.

MR SWAROOP: It reinforces the point that it is dealing with international obligation commitments without limitation. Then finally on this area, I would like to take your Lordship just to one authority which is **R v Lyons.** If I may just hand this up and I will just give your Lordships, the reference. **(Handed)**

It is Hoffman L at paragraph 27 where he says:

> "Of course, there is a strong presumption in favour of interpreting English law where the common law or statute in a way which does not place the UK in breach of an international obligation".

That is paragraph 27. We say on the language, we do not need any presumptions but if there is ambiguity then that is the correct approach for construing this document. It is akin to a statute, it a document to which the decision-maker must have regard to pursuant to the statute.

LORD JUSTICE BURNETT: Well it the policy upon which the decision is made and the policy is informed by the European agreement which itself is informed by the Guidance.

MR SWAROOP: Yes, my Lord, but all we are doing here is trying to construe what does that policy mean and that is the objective meaning. We say the presumption Hoffman L speaks about, specifically in the context of the statute, applies equally here. But I say my primary case is we do not need the protection.

We also say in addition, and we have set this out in our submissions, one can get to the same conclusions by looking at provision 1F of Criterion 1 and the OSC principles which talk about international commitments. On the facts, we say it is clear the UK have never considered its duties under Article 16. There is no reference in the evidence, there is no reference in the skeleton that was served yesterday by the government.

Now, just addressing briefly the case put by the government on this. Their primary case is they say there is no expressed language in Criterion 1 indicating Article 16 or CIL is to be incorporated. There is a number of problems with that. It is the language, "International obligations and commitment" coupled with those three indications that the wording is not exhaustive. You do not need a specific reference to Article 16, you simply need to read those words in their natural

meaning. Secondly, the fallacy in the government's position is shown by paragraph 9.1 of its skeleton, because the government realises it has to try and give some meaning to Criterion 1 to make it sensible, so what they say is Criterion 1 relates to any legally binding treaty obligation/commitments. In other words, it is the government trying to read wording into this criterion 1 in order to have a sensible position. There is no reference here to treaty and there is no need to imply treaty.

Thirdly, based on **Lyons** if anyone needs to show clear wording it is the government because if there is a presumption, the presumption is interpret this document in a way consistent with the UK's international law obligations. Finally, it would be very odd if we needed some special reference to customary international law in relation to these criterions because Mr Chamberlain's submissions in relation to Criterion 2C as your Lordships noted, there does not seem to be a dispute. We are faced with customary international and humanitarian law yet in Criterion 2 there is no specific reference to customary international law. That is their main point.

In addition, they cite a whole plethora of authority on the relationship between customary international law and the common law. The short answer to those cases is we say they are completely irrelevant. None of them address the situation where there was a statute or even a policy issued under a statute where what the Court was trying to do was interpret that policy. I can address your Lordships further on that but perhaps the simple way to cut through it is, one of the authorities they cite is **Yan**, this is paragraph 11.3 of their submissions. **Yan** is at tab 4 of the defendant's authorities bundle. They quote paragraph 35 which talks about a common law decision-maker making exercising a common law discretion not having an obligation to refer to international law. What they do not cite is the earlier part of that same passage. If we go to paragraph 35. It is at the top.

LORD JUSTICE BURNETT: This is Mance L's speech.

MR SWAROOP: It is Mance L's speech.

LORD JUSTICE BURNETT: We have the judgment, yes.

MR SWAROOP: This is the point; the case does not concern the construction of a statute, right, duty or power which would otherwise be of uncertain disclosure in a context where it would be seen or presumed Parliament intended the statute to comply with the UK's obligations. In other words, the bit of this quote which is arguably relevant and has not been quoted, they go straight to the starting point, lower down in paragraph 35.

There is an additional point that is made which is, they seem to be saying that actually, not just was Article 16 not part of Criterion 1 but it would not be judicable for this court to have regard to Article 16 and in that regard, they cite the Gentle case which is at tab 3. We say again, that is misconceived. If your Lordships go to paragraph 34 of the Gentle judgment, this is Hope L.

LORD JUSTICE BURNETT: Is this in the same bundle?

MR SWAROOP: It is the defendant's authorities, tab 3.

LORD JUSTICE BURNETT: Yes.

MR SWAROOP: There were judgments given by every single one of their Lordships and they quote Hope L at paragraph 24 to support their non-judiciable argument. If one reads paragraph 24 one sees Hope L was not laying down some general rule that English Courts cannot have regard to principle to CIL or cannot do so where it impacts on relations between states. This was a very specific context about the UN Charter. This was a case about whether there was duty to investigate deaths in Iraq which raised questions about the legality of the invasion. Hope L based his comments specifically on Article 2 of the UN Charter and specifically Article 2.3 that all members must settle their international speech by peaceful means. What he says is that the issue of legality in this area of international law belongs to the area in relation to the different states. So, he expressly comments that there will be other areas in the law where it is okay for the court to look at CII.

LORD JUSTICE BURNETT: That, as a general proposition, may well be right. But may I try to bring you back to where this argument goes.

MR SWAROOP: Yes.

LORD JUSTICE BURNETT: You agreed that it is not part of the function of this court to find on the material before us or possibly generally in truth, that the Kingdom of Saudi Arabia has violated its international obligations in the way it has been conducting its airstrikes, which is what we are about.

MR SWAROOP: Yes.

LORD JUSTICE BURNETT: Criterion 2 bites if the Secretary of State concludes that the necessary risk that they will do so is engaged. What does Criterion 1 add? Because if one gets as far as being in the position as you will submit perhaps we should be, that the Secretary of State authorising private citizens to send weapons to Saudi Arabia makes the Secretary of State and thus the UK complicit for the purposes of Article 16. I mean surely, long before one gets there, one must have gone through the step that there is a real risk it is going to happen.

MR SWAROOP: My Lordship, first, the prior question which is whether Article 16 has been considered.

LORD JUSTICE BURNETT: Forgive me, just suppose for the sake of argument it has not. Suppose it did not cross anyone's mind that Article 16 had anything to do with this at all, where does it carry anyone when there is a very straightforward question, by which I mean the question is easily identified, answering it may not be, under Criterion 2. If the Secretary of State had answered that question "Yes" rather than "No", then that would have been the end of the matter. It is difficult to see how one could answer that question "No" and then be in the territory of being complicit. Because you would have to be complicit in something that you were satisfied was going to happen. It is not just a risk.

MR SWAROOP: My Lord, there are at least three answers to that or three parts to the answer. The first is this idea of wilful blindness.

LORD JUSTICE BURNETT: Yes to what?

MR SWAROOP: Well, wilful blindness to the question; this goes into the question of the relevant principles. The wilful blindness to the question of whether in the context of ongoing conflict there have been widespread breaches of IHL and therefore, whether there will be or are likely to be breaches in the future. So, it may be that the wilful blindness test is different and does yield different answers to the clear risk test. Secondly, it is the point I took your Lordships to from **Bosnia Genocide** the wording of Criterion 2C is premised on an analysis of a State's attitude to IHL. That is not the test that the ICJ contemplates in the **Bosnia Genocide**. In that case, it would have been enough if one simple fact had come to the notice of the UK government. I.e. the fact about Muslim men, the decision about Muslim men being separately killed, that would have been enough. So, there may well be a difference there.

Thirdly there may be a difference around the overall legal analysis going back to the question of wilful guidance.

LORD JUSTICE BURNETT: All right. Well, now, Mr Eadie has to get to his feet this afternoon and I think you have had a little bit more, quite a lot more than the half an hour.

MR SWAROOP: Yes.

LORD JUSTICE BURNETT: We are grateful for those submissions, we do understand your points and we will consider them. Thank you. Mr Eadie. We will aim to go as far as 4.30 pm if that is not very inconvenient for anyone.

MR EADIE: My Lords, the overarching point which point which we made right at the outset is the point about the nature of the challenge. It is a challenge which is accepted to be fundamentally based on rationality. Rationality is the standard in relation to the challenge of the substantive decision (several **inaudible** words). The rationality is also the standard against which the (**inaudible**) challenge falls to be judged, for reasons I will develop and the reasons which you will be familiar, I know, to both of my Lords. The (**inaudible**) duty is to make rational judgments about those and you have taken those into account, rational judgment about a decision-making process to the extent that the (**inaudible**) authorities for that proposition relying on Lloyds LJ in a case called **Kartoon**.

Rationality is a standard, in effect, for both of the limbs of challenge which has been made and I wanted to start, if I may, with some points at least about the decision-making process. I will come back to that and I will then move to make those initial points on the legal context and the various principles which are in play.

As far as the decision-making process is concerned, that is five points at the outset. Firstly, the process which you will have seen has involved and continues to involve multiple departments and consideration, advice and decision-making at the

top of government by Secretaries of State. The full decision is in the hands of the International Trade Secretary for Business, and that is because he has overall responsibility for export controls under the relevant legislation and the export control organisation, as the witness statements explained. He seeks advice and asks for recommendations from, if I can put it this way, specialist departments with an interest, in particular, to the foreign office and the Ministry of Justice. That this is a context in which the consideration of the clear risk question and as to how that clear risk question should be approached under the Secretary of State's policy has been of the fullest, most extensive and most careful kind and that, it might be thought, was at the very least unpromising starting territory from which to mount a rationality challenge, that is the first point.

The second point is that the process has parliamentary oversight built in. I make that simply as a structural point. You have seen various references to the committees on arms export controls. They have parliamentary oversight of this regime and as you have also seen, they exercise that oversight to secure Parliamentary accountability for governmental decision-making and they lodged an inquiry as you saw in March 2016.

I deliberately stop there, as it were to structure it, because you will be well aware that there are some serious difficulties with one side to litigation and sometimes the temptation is on our side, sometimes the temptation on the other the side of the room makes it overwhelming, but there are serious constitutional difficulties at one side or other seeking to rely, if only as it were implicitly, on conclusions coming out of that structure.

LORD JUSTICE BURNETT: It is not possible to do so if implicitly it is inviting the courts to agree with them, because it is equally implicitly inviting the court to disagree with them.

MR EADIE: Quite so.

LORD JUSTICE BURNETT: Although I am not sure all the authorities on that are in the bundle –

MR EADIE: I am not sure they are, but you will be well familiar with the ICC case on Article 9 of the Bill of Rights. It puts the person against whom the other finds in an impossible position. The disagreement and it might be thought to disagree with the conclusion or at this stage, thorn, as it were. So, I deliberately do not get into that, and I know my learned friend was, if I can put it this way, guarded or at least tolerably cautious of that, having cited it **in extenso** at the conclusion of (**inaudible**) committee in his skeleton argument. He went through a promotion of the, sort of, structural purpose. But I do put down that marker of concern and say no more about it.

The significance it might be thought however of the structure in terms of principle is that it may be of some interest at least to the question of how one approaches rationality. It indicates, at the very lowest that you are in territory where there is serious broader political interest in the express in these questions and where Parliament is through its various committees actively engaged in considering it. That, we respectfully submit, is the limit of that.

I make it absolutely clear we do not say that the **Hassan** case which my learned friend cited stands, as it were, as some sort of **quasi justice** the ability to bar this court looking at the issues that my learned friend invited you to look at. That was a very different case involving the question as to whether or not reasons needed to be provided. But it is, nevertheless of some interest for the points that I have just made, in that it emphasis that within this structure, parliamentary accountability is secured, you are in that territory. That is the second point, that parliamentary oversight is built in.

The third point is the obvious one to which I will refer and for equally obvious reasons and so, I state it shortly. The process involves considerations and judgment of all the various matters at all the various levels that feed in to the ultimately simply identified question of clear risk. That process involved consideration and judgments by those within government with particular expertise and experience to matters.

Fourthly, the context involves a series of prospective judgments and predictions. That is of obvious importance because it accepts the context for the purposes of rationality, and I will come back to the case law in relation to that probably tomorrow. But it is important also because the issue itself is prospective in nature, knowing what is known at the point of judgment, and the judgments can be made, as it were, monthly, weekly or on longer periods but at the point of judgment the question is, is there a clear risk that material supplied might be used in the future in serious violation of IHL? Of course, it follows from the nature of that question that past matters can inform but on no view determine that issue. One needs, therefore, to be very careful of recognising that the past may be relevant and potentially informative not, as it were, to collapse the issue so that it becomes a question as to whether or not there has been serious violations of IHL in the past.

The fifth and final point I have touched on already, but I make it as a separate point. The context is one in which judgments and the judgments which are to be made, involve multiple layers. That is perhaps a point that emphasis that clearly (**inaudible**) could do the importance of the experience and expertise when one actually breaks down what those grounds are. We know that the context focusses on international humanitarian law, the law of war, and that multi-layered exercise of judgment is of particular importance because, and it might be thought in this particular context, war fighting is almost by definition a context in which hard facts are difficult to come by and are difficult to assess. A context in which information is almost inevitably less than full. One only has to remember in recent past military operations in which the UK itself was doing the fighting and its troops were engaged on the ground, the difficulties of making assessments in that context. All the more so and therefore, all the more emphasis on the importance of judgments, the importance of experience and expertise in a context in which it is a friendly foreign sovereign state which is doing the war crime.

I said the context involved IHL principles, and I will come back to those, for obvious reasons, but those principles, even if one remembers the short paragraph in the User's Guide, very helpfully summarising in a paragraph the key principles that were in play; proportionality distinction, feasible proportions and matters of that kind. But one only has to state those principles and think about them in

relation to any hypothetical or real incident to work out and to see that you have exactly the sort of multi-layered judgments that I have been talking about and making any form of competent assessment about a past incident, let alone, when one adds onto that, the fact that this is a prospective judgment.

Finally, in relation to the context and the judgments which are in play, the context also necessarily engages foreign relations and diplomatic judgments. It is, it might be thought in this context, given the issue that is to be confronted. It is no accident that the United Kingdom diplomats, including her Majesty's ambassador to the Kingdom of Saudi Arabia has been as involved as they have been in these decisions, and also other personnel assisting within the Kingdom of Saudi Arabia and the issues which you have seen.

It might be thought that those judgments, that that flavour, as it were, of the judgments is all the more important perhaps in a sovereign state of the kind of Saudi Arabia where you have, as you have seen from the open elements, decision-making which is perhaps rather more personalised in nature, like a general structural point than the other issue. So, those are some initial points about the decision-making processes involved.

May I then turn to the legal context and I can take it probably shortly because my learned friend, Mr Chamberlain, unsurprisingly helpfully introduced that fully.

You have a full description, I hope, of all the relevant provisions and of the statutory and policy regime in the annex of the skeleton argument. I am not going to walk you through all the points there. You know the basic structure. Section 9 of the Export Control Act, 2002 provides for guidance to be given, including mandatory guidance in some circumstances, a consolidated criteria, a policy of the Secretary of State based on the European common position is to be treated as guidance given under section 9.5. As such, the Secretary of State appears the decision-maker under the relevant regime must have regard to it. Section 9.3, it is therefore a mandatory relevant consideration. That is its legal nature in public law terms.

We know that sitting underneath the primary legislation most of the guts of this regime is dealt with in orders in subordinate legislation. You have the relevant one which is really the 2008 order. Article 26 of that order deals with the granting of licenses and I do not invite you to turn it up. It deals with the granting of license to export military goods and other associated support. Article 28 includes a power to amend, suspend or revoke a license. The policy on suspension, just to focus on that for a moment, is dealt with in our annex to our skeleton at paragraphs 8 and 9 and also if we want it is in the law, as it were, in the evidence in Mr Bell's first statement at paragraphs 18 to 20, as you have already been taken in the core documents at the back of bundle 1, I think, of the trial bundle to the statement which was made to Parliament on 7 February 2012, which is the latest version of that.

It is intended to give, as it made clear in that guidance, general guidance, not to set rules in stone or to recreate legislation. It will not be invoked lightly, it may be triggered, for example (this is the suspension policy) when conflict or crisis conditions change the risk suddenly or make conducting a proper risk assessment

difficult. But it is evident, we would respectfully submit, from the form and terms of the policy that it is simply giving illustrative examples. The examples given are not promises to do so, it is simply identifying that suspension may be considered appropriate. Questions of degree and degree of difficulty and risk assessment will inevitably arise in making decisions about that.

Perhaps, my Lords, just having it open in front of you, as I make my last point on this, if you go to our skeleton, paragraphs 8 and 9 was quoted **(inaudible)**.

You see the words I quoted in the second sentence within paragraph 9 of the Act and this is **(inaudible)** I quoted the words:

> "Suspension will not be a matter to …(reading to the words)…lightly but triggered four examples in conflict or crisis conditions …(reading to the words)…conducting a proper risk assessment difficult."

Then the point is specifically and deliberately made and it emphasises the point I made earlier about there simply being examples. The next sentence says in terms on a "case by case assessment of a particular situation will be necessary to determine whether it is appropriate" but ultimately setting out a judgment on the basis of appropriateness with examples being given.

Then making the point in the first sentence of the next paragraph, "Any decision to suspend" that that decision will be based on advice from the relevant government departments or reporting from a diplomatic post. So, it is not, as it were, in the nature of a hard-edged test that says the moment you identify a difficulty is really the whole point, the moment you identify a difficulty you must suspend. That is not the nature of the policy at all. The nature of the policy is that the decision-maker on the advice will make a judgment about whether or not he considers it appropriate to suspend, and those are merely examples of a situation in which he might choose to do so. It is not in any shape or form a commitment to do so, it is only an example that can arguably be put into play.

We have seen the consolidated use, you have been taken to the consolidated criteria already and you know full well the nature of the public law legal effect. Based on the EU common law position of 2008, the EU User's Guide which again you have been taken to, again at the back of bundle 1, the latest version is 2015. It is designed to be and to provide assistance and it does, we respectfully submit, provide very helpful assistance in relation to the approach to the common position. We know that the key provision 2C is in material identical terms as between on the one hand the common position and on the other hand, the consolidated criteria. There is, as it were, a direct transposition in terms of the language and the concepts used. You have clear risk, you have might, you have serious violation of IHL. All those three concepts come over in exactly the same form from the common position and therefore, the User's Guide and the guidance it gives you about the nature of those concepts is equally relevant to both the common position and the policy which flows from it.

My Lords, I was going to go next to IHL and to the principles which are in play and to make some submissions in relation to clear risk and in particular serious

violation and what serious violation means, which we respectfully submit is an absolutely critical issue but maybe we can take that up tomorrow morning, if that would be a convenient moment.

LORD JUSTICE BURNETT: Yes, I am sure that would be.

MR EADIE: I think relevant to the time it is, yes.

LORD JUSTICE BURNETT: All right, well, thank you all very much. We will start again tomorrow morning at 10.30 am. As we indicated when we came in this afternoon, we may not be here. I was hoping for an indication.

MR CHAMBERLAIN: My Lord, I understand from my instructing solicitor that we are listed in court 1 tomorrow.

LORD JUSTICE BURNETT: Well, then we achieved what we hoped over the short adjournment. All right well court 1.

MALE SPEAKER: My Lord, court 1 is smaller.

LORD JUSTICE BURNETT: No, I think it is rather bigger, or I hope so, but prettier. We will certainly be back here for the closed session. All right, 10.30 am tomorrow.

(The court adjourned until 10.30 am on Wednesday, 8 February 2017)