Case No: CO/1306/2016

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 8th 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

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(10.30 am)

LORD JUSTICE BURNETT: Yes, Mr Eadie.

MR EADIE: My Lord, good morning. Thank you for the change of court, I think it definitely is an improvement. We still have some standing, but only a few.

LORD JUSTICE BURNETT: Yes, I am afraid, I do not have any spare deck chairs, we are just going to have to do the best we can.

MR EADIE: Okay. IHL, I was moving onto.

LORD JUSTICE BURNETT: Yes.

MR EADIE: Could we have open for that purpose, because I am going to come to it directly in a moment, but it informs lots of thing and can be taken as a summary. In the key document section in bundle 1, you probably have the User's Guide, unless you have taken it out and used it separately. It starts, the relevant part starts at page 13, at the back of that, but the key point, my learned friend took you to 2.6 on page 59 using the bottom most numbers.

LORD JUSTICE BURNETT: Just pause for a second. As nobody is sitting in this box here, I am sure there is no problem. I am not even sure whose box that, strictly speaking is, but since there is no one in it, it is better to be in it than on the floor.

MR JUSTICE HADDON-CAVE: There is one more space over here.

LORD JUSTICE BURNETT: In the press box.

MR EADIE: My Lord, whilst that is being done, may I just check; we have placed on your desk, and I apologise it has come a little bit late, but the bundles were all prepared a bit late as you know. We put a cross-reference version of our skeleton argument on your desk. You may already have marked up the skeleton but even if you have, it may be useful to have that by way of reference.

LORD JUSTICE BURNETT: Thank you.

MR EADIE: That is a reference for the authorities and for the documentation, so hopefully you have that. **(Pause)**

LORD JUSTICE BURNETT: Is this from you as well?

MR EADIE: No. General points about the principles in play on IHL, if I may. If you have the User's Guide open, that will be useful. We know the general principles, the main ones we have set out in our skeleton, paragraph 33, and you have them in the raw on page 61 of that document, the final paragraph on the page.

LORD JUSTICE BURNETT: In the?

MR EADIE: In the bundle numbering.

LORD JUSTICE BURNETT: Yes.

MR EADIE: So the bottom right-hand corner, the lowest number is 61. Do you see the final paragraph on that page?

LORD JUSTICE BURNETT: The main principles.

MR EADIE: Exactly so.

LORD JUSTICE BURNETT: Yes.

MR EADIE: Does my Lord, Justice Haddon-Cove have that?

MR JUSTICE HADDON-CAVE: Yes.

MR EADIE: Those are the ones quoted, that is the paragraph quoted in our skeleton argument at paragraph 33 and they are well-known. As my Lords will be aware, the IHL principles permit the use of offensive and defensive force, and they permit status-based active targeting of combatants. You do not find that in the User's Guide, but that is a pretty well established non-controversial principle for international humanitarian law, the law of war.

Just by way of introduction, military targets, you had a bit of discussion about that yesterday, legitimate military targets in any species of armed conflict are, of course, not solely and not restricted to fixed physical locations with a military purpose. So, it is not just the hanger that contains the jet or the building that contains the tanks or the military vehicles. People and vehicles, combatants and their vehicles move. As you are well aware, often military vehicles are intelligence-led in armed conflicts but it will be a mistake to proceed on the premise or the assumption that fixed physical locations are it, that is a point I am going to return to. It is also legitimate to concentrate on particular areas where combatants may group. So you may have a tolerably large area in which your intelligence is revealed or the fact is the combatants group. That does not mean if they are mixed in with civilians, you do not have to respect the principle of distinction and/or proportionality, plainly, you do but you have to make decisions if you are engaged in an armed conflict about which targets you do and do not strike.

All of that means, sadly but inevitably, that civilian desks can and do occur. Those desks can and do occur by accident on accident. They can also occur as a necessary concomitant of or incidental to legitimate targeting. There is no necessary conclusion therefore or no necessary inference from the fact of civilian deaths, tragic though they are, that IHL principles have not been respected or that IHL has been breached. If one stands back, if one was saying well, how do we analyse just in broad terms whether or not IHL may have been breached in an armed conflict, the key questions in general terms, at least it might be thought, is who did it, if you have a coalition engaged or various forces engaged as almost inevitably in modern-armed conflict one does, Iraq, Afghanistan and (inaudible) coalition. Who did it, a question of particular

importance in the export context because there is no challenge to exporting arms to the Yemini side of things. Who did it, why did the incident occur? Was it targeting, was it a genuine accident, was it a deliberate attempt to target civilians, for example. Why did it occur and, perhaps as importantly, what lessons can be taken and are being taken if things have gone wrong? Is there a willingness and an ability, a capacity to learn. What is the attitude of the state conducting the military conflict?

Of course, all of those questions, even if one elevates them to that level of generality, it is evident from the very nature of those questions that as I submitted yesterday that would, even if you were trying the issue, which is obviously not us, but if you were trying the issue, that would be a trial with many layers, if you were seeking to determine even if a single incident was, in fact, in violation of IHL, serious complexities involve serious elements and a multitude of different elements that would need to be looked out, shopped through with judgments. Even if you have access full-blown to the military machine in question. So, even if it was, for example, the UK that was engaged in military conflict. It might be thought that that aspect of the investigation, just in general terms, leads one very swiftly to the view that it may well be extraordinarily difficult and, indeed, it may be thoroughly inappropriate to start trying to reach a concluded view or even a view about the likelihood of particular incidents being or not being in breach or in violation of IHL.

That need for caution is all the more pronounced, it might be thought, when you are examining or seeking to examine the conduct of a third party state, if I can put it that way and all the more so if you are coming to a particular incident after the event, in other words, after it has happened and if you have no access to the processes which led to the particular strike or the intelligence on which it might or might not have been based. I only emphasise those points as a matter of generality because they focus, in my respectful submission, on the sorts of considerations which are in play, but they also provide the context in which one comes at the concepts that are in fact used in criterion 2C. There are, it might be thought, two key features of 2C, two key concepts which were used. Firstly, a clear risk that…the materials in question might be used. It is that combination of clear risk and might which is the first of the features or the concepts.

Insofar as that concept is concerned, we submit that the correct approach is as follows. We submit, firstly, that past incidents that are of concern are, no doubt, relevant as informing the judgment which may be reached about the future, but the nature of the test is prospective as that wording plainly indicates. You are focussed on the future. It focusses on whether in relation to material supplied in the future, that material might be used as to the clear risk that it might be used in serious violation. Secondly, the risk must be clear. It does not have to be certain as the word "might" indicates but "clear" we respectfully submits adds and is intended to add something. It is not just any old possibility that cannot be excluded. My submission is that "clear" imports a stringency. It imports, at least, a strong shade of obviousness in terms of the nature of the risk.

LORD JUSTICE BURNETT: Well, in this context, "obvious" will be a synonym would it not?

MR EADIE: My respectful submission is that it would be. My learned friend, if you have the User's Guide open, my learned friend took you yesterday to page 58, still using the page number at the very bottom, in a different context because this was dealing with internal repression and it deals with clear risk in that context. But you see at least a flavour of it from there. If you look at the last two sentences on that page, page 58 in paragraph 2.7 that you saw yesterday, the combination of "clear risk" and "might" in the text should be noted.

> "It requires a lower burden of evidence and a clear to militant technology or equipment will be used for internal repression."

So all that is being done there is to distinguish clear risk from a certainty. It might be thought that a greater and more relevant guidance in our respect, focussing more directly on the word "clear" is in paragraph 2.13 on page 66, which is actually headed "clear risk". So 2.13 on page 66, you see the title to paragraph 2.13 and it contains the three factors to which I will return in the first sub-paragraph, "Past and present record of respect for IHL, recipient's intention, recipient's capacity" and so on, I will come back to the significance of that.

Then if you look at the final paragraph on page 66, the approach there is isolated so they do not necessarily do it, they do not necessarily reach a degree of obviousness if one wants to use that synonym. Even where you have a pattern of violations, whilst it says that should give cause to serious concern, it does not suggest that even in that circumstances you would necessarily cross the clear risk threshold. Then there are a myriad of questions that are then identified in the various bullets are designed in various different ways to assist in that analysis. In terms of principled approach, perhaps the bold submission is in relation to the clarity that is required of the risk.

So, that is clear risk, allied as we acknowledged so as to exclude the idea of merging clear risk with will. See paragraph 2.7. That is clear risk and might be used and then "serious violation", that is the second of the main concepts. Serious violation has developed a meaning and international humanitarian law and my submission is that in the present context, and particularly when dragged over from this into the policy of the United Kingdom, it indicates the standard that is in play, and it is a very high one. We do submit that as a matter of approach and objective interpretation and meaning, "serious violation" used in this context can be taken to be synonymous with "grave violation" and/or war crime. Alternatively, and it is very much a shaded alternative, in any event, it imports consideration of all the sorts of features that one finds in a grave violation and/or a war crime. It imports particular focus on the intention and the attitude of the state conducting the conflict. May I develop that? That is the basic submission I am going to make.

The concept of serious violation is dealt with in paragraph 2.11 of the User's Guide as you have already noted, page 63. True it is that the language in the first or the main paragraph 2.11 is language which includes the word, "include" in the first of the sentences but you see what follows, what actually is then done in 2.11 is to say well, it includes the list and it includes the other thing and it includes the next thing. So "include" is used in all three sentences as it were

and what is done in that paragraph, we submit, is to produce a selectin of the relevant Articles from the Geneva Conventions and from the Rome Statute and so on, it deals with a selection of those which either are to be taken as comprising the concept of "serious" for this purpose or at the very least, to give the strongest possible flavour of what is being aimed at.

It is plainly not intended and cannot sensibly be interpreted as meaning, "generally serious" in a thoroughly loose sense. In particular, it is an adjective which precedes the words "violations of international humanitarian law" and therefore, can be taken to be adding to those. It might be thought that all violations of international humanitarian law are at least in one sense serious, because it means that you have breached, for example, the principle of proportionality in a particular strike. What this is doing is to add to that. One sees that from the introduction of the additional adjective. One sees that also from the collection of articles which are then referred to. It is elevating the standard deliberately.

What is covered by the examples that are grouped together in that paragraph they are, we respectfully submit, all of a piece and they all support the interpretation which we put upon them. If you simply go through them, and we do not have to flip too far to see the essential nature of them, because they are helpfully collated in annex 5. So, annex 5 starts on page 81 of the document and really, for this purpose, one only has to go through the list to see the sort of things that are being aimed at. I am particularly going to focus on, although the nature of the Act in question or the Act in question that are covered of themselves are strong indications of the height of the standard of seriousness. But you can see immediately that almost all of them, if not all of them, involve focussing on an element of intention or wilfulness or wontedness. If you look at 81 and you look at the grave breaches of the Geneva Conventions that are identified in the left-hand column on page 81,

> "wilful killing, torture or inhuman treatment, including biological terrors, wilfully causing great suffering, extensive destruction and appropriation of property (inaudible 17.31.20) by military necessity and (so it is an additional one if you look at the bottom) and carried out unlawfully and wantonly."

One gets exactly the same flavour and exactly the same focus from Article 85.3 –

LORD JUSTICE BURNETT: Of the additional protocol?

MR EADIE: Of the additional protocol from 1977 which we see summarised at page 83. You may want to go to it in a moment, but just for present purposes taking it convenient from there, that at the left-hand box towards the bottom of the page on page 83,

> "In addition to the grave breach defined in Article 11, the following acts will be regarded as grave breaches of this protocol. When (and that just then introduces accumulative conditions),
> "(a) committed wilfully,

(b) in violation of the relevant provisions of this protocol and
(c) causing death or serious injury to body or health."

Then you see the various matters that are then identified. So you have "wilfully" in there already and if you go over the page to page 84, still on the left-hand column, "making the civilian population the object of the attack", so you are intending to kill civilians and you are making them the object of the attack. You are deliberately breaching the principle of discrimination.

> "Launching an indiscriminative attack (is the second one) affecting a civilian population or civilian objects in the knowledge that such an attack will cause excessive loss of life. Launch an attack against works and installations containing dangerous sources in the knowledge that…"

and then making things the obvious element of intention that that connotes. If you go into bundle, I think it is 2 of the authorities bundle, if you have the additional protocol in its entirety, between tab 51, and it may be marked, I am going to Article 85 which we have already seen summarised in the relevant part of these, just as an example in the User's Guide. Page 287 on the top of the page if you are going by those. Article 8, my learned friend took you to it yesterday and he focussed on 3(b) and the indiscriminate nature of the attacks, particularly focussed on those. But what he did not focus on and that one has already seen from the citation in annex 5 are the words in sub-3 in the second line, "When committed wilfully" and the words in (b), "in the knowledge that such an attack" and "in the knowledge" in (c) and "making objects" in (a). What my learned friend sought to do is to focus on this and say well, there is the principle of indiscriminate attack and then jump straight from there, as it were, without further ado to various provisions and various guidance dealing with the need to take feasible proportions as if, as long as one could establish that objective failure to take feasible proportions, that would be enough to bring you within the concept of "seriousness" identified in the User's Guide. Of course, that analysis ignores the strong mental element which is the absolute heart of the serious violation because it is done, there is a failure which is not just objective, for example, you get the judgment one in relation to proportionality when an attack is due and discriminate. It has to be done to be serious in this context with a mental element if you will. That is what characterises the seriousness.

One can see that, if you will, between the contrast between Article 57 which he then jumped back to and is referred to in 3(c) and Article 85. Because Article 57 does, indeed, deal with proportions in attack which was why my learned friend was interested in them. It sets out "Doing everything feasible to verify the objectives and taking feasible precautions" and all of that. Of course, that is an intrical part of not violating IHL, but the addition and the contrast which is significant is between that, Article 57 which we note is not one of the Articles from the additional protocol identified in the User's Guidance and Article 85 which is one of the articles, the only two articles identified as indicating serious violation. What is the distinction between them? It is the distinction I have precisely identified going to the mental element. So, that is the additional protocol which is of some real interest in relation to that.

We can put that away, that file of the authorities and go back, if you would, to the User's Guide. We see that the final example which is given of a matter which is a serious violation for the purposes of this guidance is the Rome Statute of the International Court and that, again, is summarised in Annex 5, if you want it conveniently, but if you want the full-blown version, it may well be worth just going there. It is in our additional authorities bundle, tab 9 of our additional bundle. That should, I hope, be the Rome Statute of the International Court.

LORD JUSTICE BURNETT: I do not think so. It is the (inaudible 17.38.04) Am I in the right file?

MR CHAMBERLAIN: My Lord, it is in the main authorities bundle, 2, tab 41. 41A.

MR EADIE: Or in 15 tab, the big black one with 15 tabs which my Lord, Mr Justice Haddon-Cove said yesterday "Is that 15 tabs" and my learned friend said no, it only has 13.

J2. It has 15 tabs but only 13.

MR EADIE: In a populated current. Exactly, so you are both right. It is tab 9 of that.

MR JUSTICE HADDON-CAVE: Yes.

LORD JUSTICE BURNETT: Yes.

MR EADIE: I am very grateful to my learned friend. I am going on page numbers, as it were. So you see "war crimes, Article 8"? What this is doing is to define things that are war crimes, so this statute which is 1998 post-dates the Tadich case, which is 1995. The significance of this, which is a specific definition of war crimes for a specific purpose. The interest of this is that this and, in particular, Article 8, so Article 8 and the ones that are referred to in the User Guidance at 2.11 are Articles 8(b), (c) and (e).

LORD JUSTICE BURNETT: Sorry, 8?

MR EADIE: 8(b), (c) and (e) are the ones that are referred to.

LORD JUSTICE BURNETT: So (b) is "Other serious violation laws".

MR EADIE: "Serious violations" that is the echo, and (b) deals with "International arms conflict" which you see from the second line and (c) and (e) and particularly, really, the contrast here is the two to look at are (b) and (e) but both (c) and (e) deal with non-international armed conflicts. That is the structure. The reason I am going there is because if you are in an international armed conflict, a serious violation and the types of serious violation that are identified, are those set out, for example, in (b), namely "Any of the following acts" and then you see a list. The list in question has, as you see, all the various and, unsurprising, any of them are deemed to be serious.

LORD JUSTICE BURNETT: Yes, but it is the mental element again.

MR EADIE: It is the mental element again, yes. There may be some which are so serious that you are in the game anyway, as it were. It is a specific list which focusses, particularly, on "Intentionally" in that mental element.

LORD JUSTICE BURNETT: The need of this is similar, is it identical?

MR EADIE: Pretty similar and again with the mental element.

MR JUSTICE HADDON-CAVE: Does one gain assistance from the wording of (b) using the phrase, "Other serious violations"?

MR EADIE: Yes.

MR JUSTICE HADDON-CAVE: Reference back to "Grave" in (a)?

MR EADIE: Yes, that is an entirely fair point. If one construes it together. I do not want to build too much on that, because that explains the structure of this and it exists for a very specific purpose, which is "Defined war crimes for the purpose of the jurisdiction of the Tribunal". But my Lord is right, they are all of a piece when you come to them. It is particularly the mental element which we respectfully submit is interesting and the selection, so the ones as I say that are selected going back to the User's Guide at page 63 are (b), (c) and (d). What binds all of those things together or binds 85 with Article 8 of the statute, "wilful", "intentional", "want", those are really the key concepts.

The question, I suppose, really then is whether that stronger meaning as it were, so not just a breach or a violation of IHL, but that stronger version introduced by the words "serious", was that the intended meaning when they used the same concept in the policy? We respectfully submit that that plainly was the intention, and we rely upon two categories of things to support that. Firstly, textural indications, if one can group them in that way. The textural indications are that they used the same word, "serious". It does not say in the consolidated criteria if one jumps to that, as it were. It does not say "any violation", so you are not simply looking at, for example, whether the principle of proportionality has been breached.

In relation to other textual matters, you will recall, without my needing to go back to it, that there was introductory wording to Criterion 2(c) both in the common position and in the statement of policy. Perhaps if you have it, just flip back as it were. We can either see a common position to see or you can use the consolidated criteria themselves because the wording is identical. Page 9 in the same little clip of documents in bundle 1 of the authorities that you have Criterion 2. But you see the introductory wording before you get to (c) as it were, "Having assessed the recipient country's attitude towards the relevant principles established by its national human rights instruments the government will…"

There is clear focus there on the country's attitude and, unsurprising, that focus should the there once one understands what the concept of seriousness brings

because it is about their mental element. Are they acting wantonly, are they acting deliberately, are they acting intentionally and that, therefore, does require obvious focus on the country's attitude. The same point can be made, sorry to jump around, but if you go back to the three factors that I drew your attention to or reminded you of earlier which were in paragraph 2.13 of the User Guide on page 66, first sub-paragraph, paragraph 2.13 on page 66. One now goes back to those as it were and looks at them through the prism of what seriousness brings, including its focus on the attitude and the intentions and the deliberate nature of the violation which is alleged, as it were. You see them, as it were, I hope, in a tolerably refreshing light. Because what they focus on will be used in the commission, the second line of 2.13, "The commission of serious violations of international and humanitarian law should include an inquiry into the recipient's past and present record of…" and then it does not say violation, whether or not there are violations of international humanitarian law. I do not exclude an analysis of that but the concept is deliberate. Past and present record of respect for international humanitarian law and that wording of "respect" is echoed in the very beginning of criterion 2 in its title. So, it is respect for international humanitarian law.

Then look at the next of the three. Again, I go here to emphasise, my learned friend took you to these yesterday, he was using this paragraph, in effect, to suggest that the key test is whether or not you can establish in the case of any alleged violation of IHL whether it did occur or what the likelihood of it occurring was. The focus, we respectfully submit, is not there, it is on the country's respect for IHL and we look at the next one, the recipient's intention. Well, if they have breached the principle of proportionality, their intentions are not at the heart of the analysis, it just an objective question. Whereas if it is serious and you are focussing on the mental element, intention is absolutely key. "The recipient's intentions as expressed through former commitments and the recipients' capacity to ensure", so are they able to do it.

This is not an exercise which directs attention to the likelihood of any individual incident actually being a breach of IHL. These criteria, these factors directly chime, we respectfully submit, that is why I introduce it at this stage as another of the text of indicators. They directly chime, if I can put it that way, with our conception of what the word, "seriousness" brings. Those are the texture indications. It might be through that there are purposive indicators which tend in the same direction, etiological, if you will if you are in the common position mode. Purposive if you are in consolidated criteria mode.

Insofar as they are concerned, we are dealing with, in relation to the consolidated criteria, constraints on exports. But those constraints are not, we respectfully submits, if one stands back from one and is approach this as a matter of trying to assess the intention of those who, as it were, binding themselves to these rules. Those constraints are not to be approached on the basis that there are no other rights or interests involved, there plainly are. If you refuse to allow exports, you necessarily interfere with interest, if not rights, of those who wish to export their goods to the country in question. If you ban exports to a particular country, you necessarily create, at least, some risk and it may be more or less significant, that you will have an impact on the diplomatic relations between this country and that.

None of that says that you take those matters into account when approaching the concepts of whether or not there is a serious risk, but they do serve to inform the height of the hurdle that those who agree to bind themselves to this document were agreeing to set themselves when considering that issue. So, that is the first, as it were, of the purposive order, more broad stand that point. The second is that it is very hard to imagine that those who bound themselves to this documentation, to these standards were agreeing, in effect, to set themselves a forensic task that was either going to be virtually impossible or that would impose thoroughly disproportionate burdens in relation to the analysis that they were required to undertake.

It is one thing to say that you must work out whether or not there is a clear risk of a serious violation of IHL ascribing to the concept of seriousness, the meaning that ascribe to it. In other words, you to infer an intention, wantonly, flagrantly, deliberately or intentionally to flat IHL that is one thing. It is quite another to say, and this lies at the heart of my learned friend's analytical approach and case, that whenever an incident of concern is identified by anyone, there is, in effect, a burden thereby imposed upon the state to investigate, to demand answers, to get answers and failing that, to draw adverse inferences.

Governments did not bind themselves, we submit, by signing up to the thoroughly sensible and useful consolidated criteria, they did not intend and it is a wholly improbable intention that is to be ascribed to them, to set themselves up as auditors of the armed conflict pursuit by foreign friendly sovereign governments.

MR JUSTICE HADDON-CAVE: But that will not be somebody else's function. Namely the ICC?

MR EADIE: Exactly so.

MR JUSTICE HADDON-CAVE: On that indication.

MR EADIE: Exactly so. But I deploy that at this stage, because if that truly is the exercise that has to be done, then it is an extraordinarily difficult thing for governments to do, it is almost impossible. The question really is, were they really signing up to that and my respectful submission is that they were not. This is not, we respectfully submit, an examination of whether incidents of concern might be so to have amounted to violations of IHL. "Serious" adds not just an element of degree is perhaps the best way of putting it, but it adds a fundamentally different nature to the analysis, because it focusses on the mental element.

MR JUSTICE HADDON-CAVE: Nevertheless, the depth of one's knowledge as to past incidents, may well inform the future.

MR EADIE: It may. It may. Because if you had, for example, a series of incidents where it was entirely clear on the evidence, as it were, or on the material that you have which may be less than perfect, that they had, over a period of time,

flagrantly and wantonly conducted military operations, no thought to processes, no attempt to discriminate, no attempt to do targeting so as to avoid unnecessarily civilian characters. We can think of examples in the world where conflicts have, indeed, been pursued in that thoroughly unsatisfactory manner. If you were in that territory, so be it, but that is not what my learned friend is suggesting. What my learned friend is suggesting is that there is, in effect, a burden to disprove. The moment reports are produced and if they raise allegations that are of concern. His case, effectively, says you then have to prove the negative or you are in clear risk territory, inevitably, and we respectfully submit that cannot be the right approach. "Serious" adds not just an element of degree but also has the nature of the examination and sets what you need to focus on, including respect for capacity, intentions, those three factors, just to go back to those, that is the flavour of it.

What it leads to essentially, is a focus through the concept of seriousness on the intention and attitude of the foreign state. We respectfully submit that nothing, just by way of responsive point, nothing in the **Tadić** case indicates any different meaning. I am not going to go back to it, if you want it, it is in my learned friend, Mr Chamberlain's supplemental bundle at tab 1, I think it is also elsewhere. It was a 1995 case which pre-dated Article 8 in the statute which we saw, which was 1998, so **Tadić** was 1995 but more importantly, **Tadić** and if one goes back to it, one sees this immediately, **Tadić** is designed to focus on a different issue in its own particular context, which is what are the jurisdictional limits of the International Criminal Court. Those jurisdictional limits were comprised, as they held, by a serious violation with a mental element. That is fine for the purpose of that jurisdictional limit. It tells you nothing about what the concept of seriousness means in the context of this user's guide. The best indication you have of that is those examples, the group of examples that are given, the group of provisions to which attention is specifically directed in paragraph 2.11 of the User's Guide.

That is all I wanted to say about "seriousness", but it is important and it is obvious

The final bit on the criterion and what they import, the bit that perhaps needs to be dealt with in relation to IHL is the investigative side of matters. So, the heading is, "Investigative obligation under IHL." We have dealt with that in our skeleton at paragraph 41 and the key points are these. There is nothing equivalent in IHL to the sort of doctrines that the court have been repeatedly troubled within the context of Iraq and Afghanistan under Article 2 and Article 3 of the ECHR. The duty to investigate under IHL is confined to a requirement that war crimes be investigated. That appears to be accepted, see my learned friend, Mr Chamberlain's grounds, paragraph 39.7. That was the view, I am not going to invite you to turn it up because I suspect we have quoted or if not, we have referred to our relevant bits in our skeleton at paragraph 41. That was the view of the Turtle Commission, "Reasonable suspicion of a credible allegation that a war crime was committed" that was their trigger as it were for an investigative obligation. They examined (see paragraph 44 of our skeleton) they examined the issue in considerable detail. It is also the view of a series of other academics, including Michael Schmidt. If you wanted the Turtle Commission and the Schmidt Article, they are both dealt with in paragraph 47

of the skeleton, they are in our supplemental, the black bundle, the 15-tab bundle, the Turtle Commission is at tab 13 and the Schmidt article is at tab 12. I think you have all you need in the skeleton for that purpose, but if you want them to reference to they are there.

Again, it might be thought that that chimes, so it is not just the point about the nature of any investigative obligation, it chimes with our approach to seriousness, because under IHL the trigger for an IHL required investigation is, again, war crimes. See the definition in Article 8 of the ICC statute. So, we do not jump, as it were, as my learned friend did in his submissions yesterday, from IHL to a position which effectively says, well, there you are, they had hopeless investigations of whether or not there was a violation of IHL. It is substantive, but that is not the test. The question is, under IHL is there a credible allegation, a reasonable suspicion of a credible allegation of a war crime, a wholly different beast.

We respectfully submit that it is both profitless and inappropriate to seek to criticise JIAT. I have breached the rule already, I cannot remember what that stands for, "Joint Independent Assessment Tribunal/Team". Profitless to do so because even if the criticisms are well-founded, that would not establish a breach of IHL, still less a serious breach. The fact that the Saudis are being encouraged to up the standard of their investigative techniques, may be though to be a thoroughly good thing and indicative of a strong UK policy desire to assist in improving their standards. It is not to be inferred from that that this is, in any way, an acknowledgment, implicit or otherwise, that unless there are investigations into every allegation or every concerning incident in objective IHL terms, it is not an indication that they are required to do that. They are required to investigate war crimes and inappropriate for what might be thought to be tolerably obvious reasons to engage in that sort of criticism. I am not going to engage in any form of response to the sort of **ad hominem** criticism that you were taken to yesterday in relation to the legal advisor with absolutely no way of knowing, and neither does the court, whether any of those allegations are good, bad, indifferent, and it would be thoroughly inappropriate to engage in that sort of speculation. Nor, perhaps more significantly, has there been any opportunity for anyone, the Saudis or anyone else, to produce any form of detailed response, should they choose to do so, to the sort of criticism which are made in the Human Rights Watch letter to which you were taken mid-January 2017 yesterday. I am simply not going to engage in that exercise. That is what we say about investigative obligations.

May I turn then to what I am sure is the familiar topic of rationality which I am sure needs no introduction for all the complexities that is within it in recent times. I emphasised at the beginning that the rationality concept underpins both limbs of challenge. Procedural, Thameside and substantive. It needs no introduction from me. Of course, we accept, if that is the point that my learned friend went to Mance L in **Kennedy** for. Of course, the intensity of the view is under common law rationality just as under ECHR or EU proportionality, a context-specific thing. Nonetheless, at the very heart of the concept of rationality is respect or margin or leeway in recognition that the primary decision maker is someone other than the court.

I introduce only a short and small note of caution in relation to Mance L in Kennedy. We return to the theme in another case called Fam(?) and it was pretty much on the same vein, suggesting, no doubt, in deference to Judge (inaudible 17.01.49) from the German Constitutional Court that there might be a cigarette paper between the concept of rationality and the concept of proportionality. That cause a certain freeson as you can imagine amongst government legal circles, whereupon I was instructed to go back before their Lordships and their Ladyship in a case called **Keyu**.

MR JUSTICE HADDON-CAVE: Keyu?

MR EADIE: **Keyu**, K-E-Y-U, in which someone was seeking a public inquiry into incidents which occurred in Malaya in about 1949. I was instructed to argue that actually, good old-fashioned Wednesbury irrationality should not die on my watch, as it were, and reminded Mance L that that issue had not been the subject of any argument before their Lordships and their Ladyship in either **Kennedy** or in Fam and that they would, no doubt, therefore, approach it with a wholly open mind, which they duly did and declined to determine the issue.

LORD JUSTICE BURNETT: Yes.

MR EADIE: The position is that one needs to be tolerably careful before assuming that rationality can in some way shape or form be subsumed in what is, in effect, a proportionality approach. Good old-fashioned Wednesbury is still alive and well.

LORD JUSTICE BURNETT: Is your submission that technically, the observations of Mance L in both **Kennedy** and **Fam** were obiter?

MR EADIE: They were both obiter and (inaudible 17.03.14)

LORD JUSTICE BURNETT: All right, well, let's only go as far as obiter for the moment.

MR EADIE: I do not need it for this purpose, because the onyx submission my learned friend, in fairness to him, made was that rationality in its good old-fashioned form is a context-specific thing, which I accept.

LORD JUSTICE BURNETT: Yes. Yes, well, those observations of course, (inaudible) elsewhere there are many academics who would write constantly on it.

MR EADIE: Yes.

LORD JUSTICE BURNETT: We have not heard the end of it.

MR EADIE: Quite, I am sure we have not. It is what might be described as a ten-yearly issue. It is just a question of who is brave enough to make the first jump and to invite the courts to reconsider it. At the moment, it is undecided. The real question, it might be thought, is what are the matters that bear on the degree of respect or leeway or margin, whichever concept one chooses to use. My learned friend, Mr Chamberlain, says that the court's scrutiny should be intense

and the leeway correspondingly narrower, because the context is a very serious one. No one on this side of the court is doubting that warfare and the consequences of warfare are serious. That, we submit, is to look at the wrong target when you are considering whether or not significant, a greater or lesser degree of leeway or margin is to be afforded.

Even at face value, they would not accept their approach to this issue. There are, in the present context, no protected rights or fundamental freedoms protected under English Law in play. We are dealing with the actions of government simply to give permission or not to give permission for the export of materials. The citizens of Yemen, however much it might be thought in Humanitarian terms, they are deserving of respect and the humanitarian treatment and enjoy no rights under English law. The existence of the policy itself represents the policy and the political judgment, reflecting the seriousness of the context. The fact that the consolidated criteria exists and that the government has agreed to bind itself to them, as it were, in public law terms, is a proper reflection of the seriousness of the context which my learned friend, Mr Chamberlain, relies upon. But it does so, we submit, completely and sufficiently. There is nothing to suggest that the court should add intensity or some narrowing of the usual rationality approach into the decision-making in addition. So, in other words, the consolidated criteria or the appropriate reaction to the species of seriousness that my learned friend identifies

The true target, when considering how that rationality exercise, in other words challenging government decision-making as to the application of the criteria, that is the issue. Once that target is identified, all the points I made in opening in the half-hour or so, 20 minutes or so yesterday, go directly to the question which lies at the base of the correct margin or leeway. That is because margin and its extent asks at base who is the more suitable decision-maker for this sort of decision. Is it the executive or the legislature or the court? Is it the sort of decision which for some or a variety of reasons, her Majesty's government is better placed than the courts to make? The features that I identified yesterday bearing on that issue, I can take pretty shortly.

Our context and in particular 2(c) and the court's approach to that and to the rationality of the judgments that are made, our context involves one, predictions and evaluation of risk. So, future risk, prospective risk in dynamic situations. Frequently changing situations. That is paradigmatically territory in which the courts afford a broad margin or considerable leeway to the primary decision-maker. Because they are better placed, they are better placed institutionally, without any form of disrespect, because of the expertise and experience of government and they are better-placed democratically for all the reasons that were explored in the context of national security by Hoffman L in the **Secretary of State v Rehman** [2003] 1 AC 153. Namely, that this is the sort of decision which could well have serious political ramifications. We saw the political context already, in relation to which it is right that the government should be the primary decision-maker.

I am not going to go back to those cases. You have Carlisle if you want it, bundle 1, tab 16 and the key paragraphs for this purpose are Sumption L at paragraph 32 and Baroness Hale at paragraph 88.

MR JUSTICE HADDON-CAVE: Eighty-eight?

MR EADIE: Eighty-eight. For the relevant passages from **Rehman** and the case which I know will be familiar to my Lord, Lord Justice Burnett, the **Secretary of State for Home Department v A** case about torture-obtained evidence. You have the relevant quotations collated in our skeleton at paragraph 49, **Rehman** is in bundle 2, tab 29 if you want it and **A** is in bundle 1, tab 6. The key passages we have quoted in 49 of our skeleton so I do not go back to that. Predictions, evaluation of risk in a dynamic situation is the first of the points. The second of the points is multi-layered judgments involving a series of areas in which government expertise and experience, it might be thought, is at its height. Where in a context which involved military actions, feasible precautions, IHL proportionality, distinctions, civilian casualties, what are the systems that might protect against that, how do you go about doing that. What would demonstrate flagrancy or wantonness or intentional, deliberate disregard of those sorts of things. You classically would compare and contrast, as it were, with your own, but military actions is part of the context and diplomatic judgments. For all the reasons that I went through yesterday how is the State behaving? How is it reacting to events of concern? Capacity, intention, all the matters referred to, respect for the principles of IHL. That involves making a judgment about how a State is behaving and intends to behave. How is it reacting to, for example, diplomatic exchanges by the United Kingdom which are designed to encourage and secure compliance with IHL. What steps are they taking, if any, to correct or improve? Do they just brush off incidents of concern or do they say yes, we see that, we are going to take some steps to try and improve and so on?

As I said yesterday without over-emphasising it, those diplomatic judgments, in our present context, exist in the context of a system of government which might be thought is much more personalised than one is used to, highlighting and emphasising the importance of making the right sort of judgments about how individuals or a particular carriage of a particular policy areas will behave.

Thirdly, controversial judgments in a controversial political area. I referred yesterday to the parliamentary interest in these issues. There is serious public interest in these issues as one sees from the interest in this case. This is the sort of context in which it might be thought the public would expect proper respect to be given to the primacy of governmental decision-making because they are democratically accountable. These decisions are not without consequence, for obvious reasons.

Just by way of a short three or four responsive points to my learned friend on rationality, he identified a series of things which he submitted yesterday served to shrink or to narrow the margin. He referred to the three factors in the User's Guide which I took you to earlier on, bundle B1, page 66, you will remember those three factors. They properly analysed, do not shrink or narrow the margin on any view. They do not imply or entail an examination of all incidents of concern to analyse whether or not they are more or less likely to be a violation. There is a different exercise focussing on the attitude, the respect, the capacity, the intentions of the State engaged in the conflict. They tell one absolutely

nothing about the margin which the court is to apply. They simply, as it were, focus on a non-exhaustive basis on the sorts of things that you would expect the decision-maker to think about. They do not tell you whether the right decision-maker should be the court or the government. They are just simply neutral issues, so they do not take you anywhere.

Then he focussed on Criterion 2(b) and its reference to there being special caution or vigilance required in circumstances where you are dealing with a State who may have had in the past some issues in relation to human rights matters. That was advanced as a reason, again, for narrowing the margin. My respectful submission in relation to that is entirely unrelated to the margin. 2(b) does not alter the nature of the issues in 2(c) of the consolidated criteria and more importantly and more fundamentally perhaps in principle, nor does 2(b) nor could it conceivably be said that it alters the approach of the court to rationality. What 2(b) does, if anything, is to affect the approach that the government should take to the consolidated criteria. It tells you nothing about the court's approach to rationality, it is about the approach to the Secretary of State to which the usual rules of rationality apply.

Then my learned friend sought to build on the distinction, as he put it, in the **MB** case, which you will recall was a controlled case. That, we respectfully submit, is an inapt analogy. The statute there required a two-stage test to be satisfied by the Secretary of State, if a controlled order or a tenpin was to be imposed, namely, were there reasonable grounds for suspicion that the person had engaged in terrorist activity, I summarise, one and two, was it appropriate in the public interest to impose the restraints that the controlled order would bring. So, there was a very specific statutory context for the JR that followed. It might be though to be entirely unsurprising that a court might feel tolerably comfortable in the context of examining whether there were reasonable grounds of suspicion in subjecting that first stage of the analysis to tolerably intense scrutiny. Because the court is just as capable as anyone else of judging whether that standard has properly and sensibly been met. So, there was a perfectly acceptable and sensible reason for, as it were, approaching that first limb on the basis that it was an area where the margin or leeway could be expected to be tolerably narrow.

But, and it is quite a bit but, the principle basis for respect is not simply, as my learned friend appeared to imply at various points in his submissions yesterday, is not simply that the judgment is one about what is in the best interest of the UK. The principle basis for margin being greater or lesser involves an examination of the institutional and the constitutional reasons for recording primacy to either the courts or the executive as the primary decision-maker. That focusses on experience, on expertise, on the nature of the judgments which actually play into the issue which is actually under consideration which the court is being invited to review on rationality grounds, examines on the democratic side the political accountability for such decisions, who would the public expect to have the whip hand as it were in those sorts of decisions.

I am not going to repeat all the areas of judgment that are in play here under 2(c) but for all and a combination of those reasons, not limited to what is in the UK's interest and indeed, to some extent stripping that out as we saw from the

correct analysis, that 2(c) is a risk business and you come at the other things later, as it were, if at all. But in the context of that risk analysis, my point is that for all of those reasons which are truly the basis on which you decide on a principle basis whether you shrink or expand the margin, for all of those reasons 2(c) is an area of context in which one expects considerable leeway to be given. For the same reason, the submissions made about **MB** and it being a true analogy or not are accepted.

Finally, my learned friend said well, there is a good reason for shrinking the margin because as was repeated, the actual decision-making in this case was said to be finely balanced. That, with the greatest respect to him, does not narrow or affect. It is simply unrelated to the principle basis on which you shrink or expand the margin. It might be thought as a more general point, that emphasis is thoroughly against him because it suggests that we are in an area where there could be two perfectly sensible views on either side of that balanced point, and that is not the stuff of a rationality challenge.

Thameside I am going to take it very, very quickly and I can summarise it perhaps in a single sentence. Which is that Thameside, ultimately, in other words, have we done sufficient information-gathering, is the inquiry we have undertaken prior to answering the substantive duty question an acceptable one that is really the Thameside question. That is a rationality question it is for the Secretary of State rationally to decide what information he wishes to take into account and rationally decide what level of inquiry, what type of inquiry, what manner of inquiry should be followed in order inform the substantive judgment. The only time you tend to get into trouble on Thameside is if you have a series of mandatory things which you have to take into account, otherwise it is as the case law clearly establishes, **Creed v Z** the (inaudible) case, all the matters we have quoted in our skeleton, particularly at paragraphs 52 and 53, otherwise it is a judgment properly to be performed by the Secretary of State.

May I then turn more directly to the specific grounds of challenge, that is the legal context. I am going to deal first with information gathering and assessment in the nature of the inquiry. The initial point in relation to that is perhaps the obvious one that it is not suggested that the Secretary of State, I say the "Secretaries of State", in plural, did not ask themselves the right questions. Is there a clear risk of serious violation of IHL? That is the question and that is the question they asked themselves.

LORD JUSTICE BURNETT: Ye.

MR EADIE: In addressing that question, they did consider the User's Guide and they did consider the three factors which we have seen repeatedly now in paragraph 2.13 on page 66 of bundle 1. The approach and the sources are set out in detail in the evidence, and there is, perhaps unsurprisingly, a mix of open and, in particular, sensitive information in judgments that are in play and so, there is a limit to what I can stray into and open, as it were, I need to be tolerably cautious about that, particularly given that I have now seen both aspects as it were. So, I have to make jolly sure I do not slip.

One needs to be clear at the very outset that the focus, if it is going to be said that the information-gathering assessment process was inadequate to the point of irrationality. The focus has to be on whether that is truly asserted to have been the position in relation to the correct question. The correct question involves looking at that information gathering process, that assessment in the context of a series, as I have defined it, violation of IHL.

We make the following points in relation to the information gathering and assessment. Firstly, the process was one of intense and almost continuous review, with all the expert input that one would expect from the foreign office and the MOD. It is described, at least in some respects perhaps most conveniently in Crompton 2, may I use that shorthand without disrespect to him; Crompton 2, paragraph 20. A summary of the FCO input, including the preparation of detailed IHL dates and the involvement of the Foreign Secretary personally at various stages is in our skeleton summarised in some detail between paragraphs 83 and 89.

Secondly, the MOD, with all its various departmental elements, the operations directorate and permanent joint headquarters, PJHQ, and, indeed, the legal service within the MOD as well, as you have seen from the statements, the MOD, this is the second point, track and analyse allegations or matters of concern relating to IHL. We got a flavour from the statements in open and indeed in our skeleton is that they predominantly do so, unsurprisingly, in the context of air strikes in Yemen. That process is summarised in our skeleton between paragraphs 60 and 67 and is described in more detail, if you want it pulled together in Watkins 1, 39 to 61, Watkins 2, 20 to 31 and more briefly in Crompton, the Foreign Office witness, Crompton 1, 38 to 41. What that indicates in summary is that the MOD track and analyse allegations from all sources, including all public sources, such as the UN and NGOs. It is simply incorrect to say that incidents concerning alleged attacks on, for example, hospitals is a sensitive and obvious target of concern all right note analysed. They are. Matters of that kind, what was the nature of the strike, what did it hit, are obviously of importance including, obviously, if the target that has been hit appears to be something as sensitive as a hospital or a funeral hall, whatever else it may be, it is obviously a matter of concern and so, for good measure, a number of alleged civilian casualties. It is perfectly obvious that those are matters of concern and they were taken into account by the MOD and the FCO as the evidence indicates.

There were various criticism made of this process and of the tracker as it was called, that the MOD used, and I should just make a series of points in relation to that. We do submit and on the open end I make this submission, that the MOD tracker is, indeed a useful tool, it is a framework for MOD's analysis but as the MOD evidence makes entirely and properly clear, it has its own methodology and it is designed to assist in answering, not to answer the duty in question. My learned friend Mr Chamberlain focussed quite heavily on the concept of legitimate military target and what the tracker, in open at least, said about legitimate military target. That is a subject properly for the court, no doubt, to explore and we will explore it in close, I am sure. The claimant suggested there were two explanations for why the MOD had not been able to identify a legitimate military target. Either it said, we asked the question and

the Saudis did not answer, or we did not ask for fear of embarrassing. All I say in relation to that is that the process of investigation is not, perhaps, as simple as that and we will need to look at the detail of all of that in closed. But in open, I can say that no inference can properly be drawn from the fact that the tracker said we cannot identify a legitimate military target, (I summarise). No inference can be drawn that there was not one. No inference can be drawn that matters in relation to that category of incident were not further explored with the Saudis.

It is perhaps worth also emphasising in open in this respect, that it is for obvious reasons not always clear-cut what a military target might or might not be. That issue is unlikely, at least always, to be answered by simply focussing on the fixed physical building. I have made the point already, that even if you focus simply on the fixed physical building, there is a serious question about what the building is being used for at the time of an alleged strike. It is possible that a building previously used as a hospital or as a school has since become a weapons depo. That is the point that Mr Watkins makes specifically in his second statement at paragraph 27. As he puts it there, I do not invite you to turn it up now, but as he says there, facilities, structures and buildings there could be dual use, for example, bridges or communications towers and therefore, legitimate targets. I am not going to call it "military objects", the MOD's inability to identify military objects should not therefore be interpreted as the absence of a legitimate target at the time of the strike. That is about the sum of it.

That is legitimate military target. The point has also been made by Mr Chamberlain that Watkins 2, paragraph 26, indicates that the tracker analysis as it was put, does not include the consequences of the strike. I think the implication if not the overt suggestion, was that that demonstrated that the MOD in its analysis ignored civilian casualties. In fact, all that is said by Mr Watkins is that no view is expressed, because the language that was used in 226, about the consequences of the strike. The language therefore used does not say or infer that the MOD or government treats those consequences actual or reported as irrelevant. Indeed, it is evident, it might be thought, from the reaction to, for example, the Great Hall incident on which my learned friend focussed, but that is simply not the position. That it is obviously important, if you have an incident where 140 people have been killed in the strike if they are civilians. That comment also needs to be seen in its proper context, as Mr Watkins also said in his first witness statement at paragraph 52, so Watkins 1, paragraph 52 provides context for Watkins 2, paragraph 26. As he said in that first statement, it is important to note that while MODs does try to determine if the incident was caused by an airstrike and the tracker does record the reported number of casualties, we are generally unable to verify the number of civilian casualties or perform in-depth BDA. So, that explains, as it were, what is actually going on and it is not an ignoring of civilian casualties or a treating of them as in some way shape or form irrelevant to the consideration of a particular incident. That would be absurd.

So, that is the point about the MOD and its exercise. The third point about information gathering and assessment are that MOD and the Foreign Office diplomatic personnel do have a considerable understanding, perhaps an unusual

understanding and knowledge in the context of world affairs as it were, of the details and processes followed by the Saudi military. That is dealt with in our skeleton between 68 and 76 and especially in Mr Watkins' first statement at paragraphs 18 and following.

MR JUSTICE HADDON-CAVE: Could you give that reference again?

MR EADIE: I am so sorry, my Lord; skeleton 68 to 76 and Watkins 1, paragraph 18 and following.

MR JUSTICE HADDON-CAVE: Yes.

MR EADIE: That understanding is the result of engagement in this process as a result of connections of both the MOD and Saudi personnel and, indeed, connections through the Foreign Press personnel and Saudis, including at ambassadorial level. There is sometimes intense recent engagement, there has been intense recent engagement at the highest levels. You have seen references to that sort of liaison by the defence attaché, see paragraph 70 of our skeleton. He is of firs rank seniority reflecting the importance of that position. He has regular meetings with senior Saudi military personnel and privileged access as it is put, I think, in the evidence, as good as any other evidence in terms of our relationship there. UK liaison officers below that level of defence attaché also have access to information and therefore to some extent, have access to jet operations, data as Mr Watkins notes at paragraph 53 of his first statement.

There is specific liaison between the chief of air staff liaison officer, CASLOW if you want the acronym, and his Saudi counterparts as well. See our skeleton, paragraph 72. I am giving you the references to the skeleton, because there are various footnotes which take you back into the evidence. It includes, that is, at it were, the main personal levels of engagement. It includes in terms of subject matter, engagement in relation to particular incidents and posts questioning analysis. For a description on the various references into the evidence, see our skeleton 77. The level and seriousness of that engagement is evident from the examples listed of contact in our skeleton, paragraph 78

We have provided, and this also enhances their understanding but is important in its own light, training and support to the Saudi military over a period of time, both logistical and technical. Skeleton paragraph 74. The important features of that are that the training is in fact provided, it is, in fact, willingly received and that tells one plenty, it might be thought, about the attitude, capacity and willingness to improve a lack of wantonness, if you will, in relation to that.

MR JUSTICE HADDON-CAVE: Mr Chamberlain makes the point that the outcome of some of the training are not always known.

MR EADIE: Of the specific?

MR JUSTICE HADDON-CAVE: Of the training. He says that the result of the training is not known. That is the phrase he used.

MR EADIE: My Lord, yes, I am sure that is the general proposition and that might be thought to be tolerably self-evident. But the training is in place, is received and the natural inference is that although it does not and cannot be relied upon as a complete answer to any of this, the inference is that the training is provided for a purpose. It is designed to improve standards, it is designed to imbed good practice. It is designed to seek to ensure that there is greater compliance with the principles of IHL in practical terms. That is its purpose. I do not suggest that is a complete answer but it is of some significance. It is particularly of some significance that they, as it were, take it and use it. That is about as good an indication as one could have of both attitude and capacity.

We also know from the evidence that in assessing some of these incidents, the MOD sourced imagery, as it is put in Watkins 1, paragraph 57, and UK defence intelligence reports also. So, the UK and the Secretary of State are in a position in which assessments are informed and understanding a knowledge and information and analysis that is simply not available to third parties, reliant only on public information. One consequence of that is that expertise and experience is therefore at a real premium, given the very nature of the analysis that is involved. Of course, all things are relative and I do not over-state it and neither does the evidence. Even when we are conducting military operations, it can be jolly difficult to get a full and complete picture of what went on in an incident in the heat of battle and in an airstrike. Incidents of "Blue on Blue" as they are called in the context and have been called in the context of Iraq and Afghan conflicts are not unknown.

All the more so, it might be thought, when one is trying to monitor or to assess the actions of a foreign sovereign state. There are some understandable and inevitable limits on access on information. If one, as it were, imagine the Saudi's in Whitehall when we were conducting a set of military operations and they were on our shoulder, there would, no doubt, be things which we would be tolerably reluctant to share. That is not, in truth, the game that we are in. Their intelligence is their intelligence and there no doubt have to be judgments made by those who are engaged in managing and dealing with that relationship as to the precise manner in which they do choose to deal with their Saudi counterparts. Again, it is quite helpful at least to imagine it the other way around. I mean, you would make a series of judgments about how counterproductive or productive it might be to question every single incident down to the end, or do you focus on the major incidents of concerns and zoom in on those, use the tools that you have to try and get there. Just as a matter of general approach, that those sorts of diplomatic and relationship-management judgments are, perhaps, inevitable in this sort of context.

I do emphasise again, this is not about an exercise which, as it were, poses the impossible or the disproportionate challenge which says you have to drill down every incident, reach a view on how likely it is or how likely it is not that there were was or was not a violation of IHL. The emphasis of this consolidated criterion is different for all the reasons I have gone through.

My learned friend says, well, all jolly interesting but there are limits to what you know, and we accept that. The only point, perhaps, worth specifically dealing with by way of response in open is the assertion by reference to some of

the statements in some of the earlier (inaudible) that we have little insight, I think is how it was put on one occasion on dynamic strikes. It will be us to all, considering close, the extent of our understanding in relation to those, but one does need to be a little careful, perhaps, with the chronology because these sorts of things or one's knowledge and understanding of these sorts of things can develop over time. Again, I make that as a general proposition, so one needs to be a little bit careful with taking the point in the chronology and then asserting or running with that as a general point over the entire period.

There is, of course, some definitional questioning and my learned friend indicated he did not understand, necessarily, what was meant by dynamic targeting. We will have the basic parameters of that pre-planned versus dynamic is the broad. The best description we have been able to find in the evidence of that is in Mr Watkins' second statement at paragraph 18. I think that is the best indication of the sorts of distinctions involved in pre-planned versus dynamic versus combat engagement. I think there are various phrases that are indicated.

So, that is the third of the areas, diplomatic, personnel and MOD have considerable understanding and knowledge. Fourthly, in terms of our assessment, we make, understandably as the evidence indicates, as the specific incidents are dealt with in Crompton 1, paragraphs 53 to 55 but they now have the joint incident assessment team, JIAT, confirmed in a letter to the United Nationals Security Council on 1 February 2016 and it is, perhaps, relevant in terms of that respect in terms of their work to have a look at; I will not take you to it now given the time, but to have a look at Crompton 1, paragraph 85(a)(i) which deals with that announcement.

In particular, the statement which was made by the Saudis, it may just be worth turning that up just to show you where it is. In bundle 2, I think you have two, I mean we can perhaps invite you just to read 2 at some point, they are quite long, but two public statements as it were by the Saudis. The fact that they are making public statements at all in this area is an indication of their attitude. They are concerned about the world opinion, they are concerned about the issue of IHL, they are concerned to investigate and to tell the world they are investigating. The two statements that are exhibited to that Crompton statement are to be found in B419, it is quite a long statement by the Saudi's. That is a statement, I think, in May 2016, you may get that from the evidence rather than the document itself. Then we see a statement –

LORD JUSTICE BURNETT: Forgive me whose statement is this?

MR EADIE: The Saudi government.

LORD JUSTICE BURNETT: The Saudi government generally?

MR EADIE: I think so, I am not quite sure where it is featured. I will have to go back to the evidence to check that, but that is, I think, a statement of May 2016. Then you have similar symptoms, if I can put it that way, in February, 1 February 2016. If you go onto B3 436, this is the statement made to the United Nations Security Council as you see from B437, their permanent

representative is sending it to the President of the Security Council. This is the one that set up JIAT. So, you see what is said in the five numbered paragraphs in a formal considered document sent to the United Nations security. The statement that is there referred to, I think, is the one at page 439 in the translation. The themes coming out of that, which are the same themes one finds a few months later in the statement beginning at 419, if you go back to that. You will see, for example, that the statement at 419, towards the bottom of that page, just about three or four lines below that second hole punch:

> "The coalition forces in Yemen have complied with all rules of international and humanitarian law and are committed to the duty of protecting strict constraints…according to the rules and regulations of international humanitarian law. One of the most important mechanisms can be seen from the following…"

Then setting out some mechanisms and procedures of targeting in the five or six points that then follow. Then describing the after target assessment processes that are there. Over the page on page 422, conducting investigation and so on. So, you have, as it were, a statement at that stage saying we are respecting IHL, we have some processes for targeting, that is all processes including our own improvement and development but there they are, setting out these things publicly and setting out the facts that they assess and that they conduct investigations where things appear to go wrong. You see that that is all part of a piece with the earlier statements that were made at 439 appended to the letter sent to the United Nations Security Council.

MR JUSTICE HADDON-CAVE: In the third paragraph at the bottom of 439, first "is seeking the assistance of international experts to assist it in the discharge of its function". Is that helpful?

MR EADIE: My Lord, I respectfully submit it is. I do not know whether the evidence deals with what specific steps had been taken in that regard, but I respectfully submit that that also is all at a piece with this. This is not a state of issue, unless you take these as being in bad faith, this is not a State which is, as it were, flagrantly and wantonly disregarding the rules of IHL, it is positively asserting to the world, including to the United Nations Security council, that that is its aim and object.

MR JUSTICE HADDON-CAVE: Your point being that it is not an inward-looking statement, it is looking for assistance.

MR EADIE: It is looking for assistance and it is seeking to improve. It sets out the basics of its procedures for targeting, it sets out the processes that if follows after at target has been hit. It sets out the processes for investigating when things have gone wrong. It knows that the eyes of the world are upon it.

LORD JUSTICE BURNETT: Well, this is where one runs into difficulties of evaluation. There are those, no doubt, who will read this sort of statement and treat it with extreme caution.

MR EADIE: Who will say, we will forget about it and just come.

LORD JUSTICE BURNETT: The meet and drink of the foreign officers in particular –

MR EADIE: In making those sort of evaluations.

LORD JUSTICE BURNETT: - is to sort the wheat from the chaff and make an evaluation of where the reality lies, whatever the words used.

MR EADIE: It may be that in relation to anything of this description from any state in the world there may be a bit of both. There may be an element of –

MR JUSTICE HADDON-CAVE: Scepticism.

MR EADIE: Quite. Healthy scepticism but there is a base question and the base question is assisted by focussing on the concept of seriousness and all the matters that that directs attention to.

LORD JUSTICE BURNETT: Yes.

MR EADIE: All of those four areas therefore, those four sources, I tried to summarise the main ones, those are the sources, as it were, which feed into the analysis. But what about then the correct –

MR JUSTICE HADDON-CAVE: Can you just summarise the four sources in a word each, so that we just have those?

MR EADIE: Yes. They are; well, I say the four sources, the four points on that process. Process of intense and almost continuous review was the first. Second was focussing on what the MOD do and in particular on the tracker and the analysis that they undertake. Thirdly was MOD and diplomatic personnel and all they liaison strands and fourthly was the assessment of statements by the KSA, both public and private.

MR JUSTICE HADDON-CAVE: Thank you.

MR EADIE: Then the correct approach, again, I have flagged most of these already, the correct approach consistently with the tests in the User's Guide, and I approach this in summary and in generality because we have come to the closings in due course. It might be thought that in general terms the approach and the perfectly acceptable approach would be as follows. You seek to identify incidents of particular concern, if you are doing this function of trying to make a judgment, it is perfectly legitimate as a general approach to have processes designed to assist in identifying the incidents of most concern and then focussing, particularly, on those. More particularly, that is a sensible and rational approach to the inquiry when you are dealing with a friendly sovereign government that is itself pursuing military operations, with all the stresses and strains that that brings. With all the diplomatic relationship that require you to make judgments about which lines you do and do not chase down. If you, by and large, direct your attention to the overall system and then to the specific incidents of most concern that, I respectfully submit is a perfectly acceptable

approach in principle. You see therefore what is known about some of those most serious incidents and then you make judgments about them.

None of that requires the state properly applying Criterion 2(c) to act as auditor, as I put it. Moreover, for reasons of principle, which I have already developed, the selection of the approach, the nature of the inquiry is a matter in principle for the government, because it engages just as many layers and strands of judgment informed by expertise and experience of what is likely to be the most productive approach.

MR JUSTICE HADDON-CAVE: If there were several states supplying weapons to State A, presumably, on this hypothesis all the other states, X, Y, Z, will all have to engage in some sort of investigation. Is that not the logic of it?

MR EADIE: They would, on my learned friend's case, because the criteria would be likely to apply in all sorts of EU states. But whether States outside that region would do the same thing is a matter of judgment for them. I will come to it in due course but we know that the Americans have taken a slightly different approach in relation to at least one species of military equipment and it is, on the open evidence, only one species of military equipment. One would have to make assessments as to why they had gone there and done that. There might be totally obvious answers to that sort of diplomatic question. In relation to EU states, my Lord is right, that would be the logic of it.

Of course, you would then be in a pretty strange position and, of course, each state has to make its own judgment, but you would be in a pretty strange position if the process truly was as onerous as my learned friend was suggesting. None of that arises if the judgment on seriousness is of the kind that I have identified. Or it is at least a great deal less (inaudible) because you will be looking for a set of clear indications that really do demonstrate a flagrant or wonting disregard for the rules of IHL rather than the process which my learned friend identified. His process does involve and require, I think, a determination at the very least of the likelihood of each such incident and adding to a violation of IHL, pure and simple, objective or not. Insofar as that is concerned, certainly, in relation to the exercise that the UK has conducted, as it appears from the open evidence, the idea that one is not seeking as it were to examine it, it may well be a selection, but seeking to examine those incidents through the prism of IHL is nonsense. It is self-evident nonsense. That is the basic premise on which you are doing it. You are looking at an incident like the Great Hall incident because and precisely because it is an incident of self-evident and serious concern. It involves a large number of civilian casualties in an apparently civilian used building and that, therefore, prompts a series of questions. But the basis on which all of this analysis is done is to try to see what, why that occurred, whether there was a good reason for it occurring. It is back to the basic questions I asked at the beginning. Who did it, why did they do it and if things went wrong, what lessons have been learnt. You do not have to conduct some intricate legal analysis to get you to those base questions. That is the purpose and the basic premise on which these incidents are being examined.

But, and it is quite a big but, that examination needs to ask the right question, it needs to be focussed in the right place, hence all my development of the approach in principle. It is, inevitably, subject to constraints, limited information and the need to be thoroughly cautious as a result of having limited information for perfectly legitimate reasons but non-available information or even diplomatic judgments about which lines to chase down. One needs to be jolly careful and it is appropriate in a friendly, foreign relationship to be jolly careful before reaching conclusions on the basis of less than full information, even about the likelihood of a particular instance objectively violating IHL. That does not mean that that examination is not a real value for what it tells you about and informing the prospective judgment about serious violation under 2(c)

MR JUSTICE HADDON-CAVE: Those questions you are articulating; who did it, what happened, why, are all within the curtilage, it is essentially a risk assessment.

MR EADIE: Exactly.

MR JUSTICE HADDON-CAVE: That is what they are for.

MR EADIE: That is what they are for.

MR JUSTICE HADDON-CAVE: That are not an end in themselves, they are just a part of what essentially this is about which is a risk assessment.

MR EADIE: Yes that is why, I think, my learned friend in fairness to him says well, you have to look at the likelihood, you have to reach a conclusion about the likelihood of it being a violation. You do not have to determine, because determine would be ridiculous. I mean, you could not possibly do that unless you report it as a function. It is, as you rightly say, a risk analysis. My respectful submission is that you look at the series of incidents you do for the purpose, precisely, of informing exactly the sort of exercise my Lord has just described.

Perhaps that leads on to the third point which is that the likelihood of a breach of IHL in relation to a particular incident is not the question anyway. There are at least two reasons for that. One my Lord has just identified and I made in submissions, a prospective exercise of risk analysis under 2(c) and so, the fact that there may have been a violation in the past may inform but cannot determine what they will do in the future and the fact that there has not been, likewise. So, either way, it does not make any difference. That does not mean you do not look at the who, why and lessons learnt, but you do so for the broad and fundamental purpose, particularly when one grasps the seriousness of that matter. That is the second of the at least two reasons because serious violations we know asks, at the very least, the differently focussed question.

I should make it entirely clear in relation to the submissions I have made throughout on seriousness, certainly when one goes through the or see our submissions in open, if one looks at all of those, those who were advising the ministers are not, as it were, drawing sharp distinctions on the basis of that legal

analysis. What they are doing, however, is properly to focus on matters such as intention, attitude, wantonness and those are, we respectfully submit, properly directed.

We have a bit to get through, I am afraid. Irrationality, if I can turn then directly to substantive irrationality. I have been so far dealing with Thameside as it were, irrationality, now I am going to deal with irrationality (substance). The first aspect, just to clear away, although the two are obviously related, the failure to apply the suspension mechanism, which is a submission of degree by my learned friend, but I deal with it at the outset.

LORD JUSTICE BURNETT: Yes.

MR EADIE: Dealt with in our skeleton at paragraph 118 and following. The short point is that there is a judgment to be made around whether or not you have sufficient information to enable you to make a proper assessment under 2(c). I made my submissions in opening about the nature of that suspension policy and took you back to the terms and particulars laid out, I think, in the written statement to Parliament, but it is a judgment to be made. No doubt, almost inevitably in this sort of area there are going to be gaps in knowledge and information, but we are dealing with a serious violation, that is the judgment, and we do have a continuing and, it might be thought, unique in terms of relationship with the Saudis, flow of information to enable us to make those judgments.

MR JUSTICE HADDON-CAVE: Just summarise generally the submissions, what he appears to be saying is given the known unknowns and the gaps, it should not be precautionary principle trigger the suspension mechanism?

MR EADIE: I think he does say that and my answer to it is the same, which is as a matter of judgment for the Secretary of State, whether he feels he has enough information, sensibly and properly to answer the 2(c) question at any point in time. The idea that one could castigate that judgment as irrational in circumstances where we have better access to all the Saudi processes and so on than any other nation in the world would, it might be thought, be a surprising basis on which to mount a rationality challenge. As I say, to some extent, I emphasised the serious violations but for this reason also, if the suggestion is that the known unknows, as it were, are really significant, they become more so, no doubt, if in truth the nature of the exercise which has to be performed is a, kind of, court-like judgment about each individual incident and the question is whether it breached IHL. It is a great deal easier to say that that judgment has been properly exercised if, in truth, you are asking the correct question as I have identified it. But my Lord is right to summarise the way he puts the case, and that is my answer.

I think it is in this context, particularly, that he seeks to build on the US position, as it were, and I said I would come to that. May I just give you the references given the time in relation to that.

LORD JUSTICE BURNETT: Yes.

MR EADIE: There is no inferences to be drawn that the US have decided to suspend ergo, we should do, ergo the known unknown for the US were good enough why are they not good enough for us. That seems to be the basis on which this point is deployed against me. That is not a proper inference. The open evidence in relation to it is set out in these places, Crompton 2, paragraph 32, and Bell2 I think, paragraphs 14 to 16. May I just show you one set of documents in the exhibits.

Bundle 3, if you would, you can put away the bundle of material if you have not already, bundle 3, page 1223 that is the one which identified what the evidence in open showed. This, I think, is the December 2016 letter from the Foreign Secretary, 1223, the letter from the Foreign Secretary to the Secretary of State for International Trade. You will get the date from 1224 and the author. The relevant passage for our purpose is the paragraph directly on the page, there are some bits blanked out but right in the middle of the page, "In reaching this conclusion, I am aware of a reported US decision", do you see that paragraph? So, that is the letter from the Secretary of State. If you go on, you will see the submission that is then put to the business secretary, the international trade secretary by Mr Bell I think it is, and the relevant parts in that document is at 1229. Just a few pages further on and the relevant paragraphs are 14 to 16.

LORD JUSTICE BURNETT: Can you remember what PGM stands for?

MR JUSTICE HADDON-CAVE: "Precision guided munitions".

LORD JUSTICE BURNETT: Oh sorry, yes. It is there.

MR JUSTICE HADDON-CAVE: (Inaudible) my Lord.

MR EADIE: You might say so I could not possibly comment. So, that is failure to apply the suspension mechanism. The conclusion on 2(c) then and whether that is additional, they are both placed, particularly on the third parties' reports and so, we do not challenge the conclusions they say or advance reasons for saying in open that they are wrong. The points we make in relation to that are these. They are just positive points, as it were, and I will come back to it.

MR JUSTICE HADDON-CAVE: I am sorry, can you just give that context again?

MR EADIE: I am dealing with the third parties reports so UN reports, amnesty, all the reports in bundle 9, all the public reports in bundle D, tab D I think, bundle 4. We respectfully submit positively, if I can deal with that first, one, no necessary inference from those reports. There is not a burden, we submit, of explanation for disagreement with those reports. They are not more determinative than they would be if they were all the other way and said everything was tickety boo. It is evident that there is a necessary constraint on public explanation, public engagement in relation to those because much of the assessment is necessarily sensitive. The correct approach is to consider all the information available to the Secretary of State and reach and overall judgment. He is well-placed to do that for all the reason I have given.

Secondly, the Secretary of State has considered, with care, the reports in question but has done so as part of a range of information and assessment informing the 2(c) overall judgment. It is wholly wrong to say that those reports have been ignored or have not been properly considered. If you want some references into the evidence to make at least some of that good, see Watkins 1, paragraph 42, Watkins 1, paragraphs 68 to 74 and Watkins 2, paragraph 31.

Thirdly the judgment that the Secretary of State has in fact reached under 2(c) is informed by the range of information which I have already dealt with. They include all the processes designed to improve the Saudi systems, to reduce the risk of civilian or inappropriate strikes and the overall assessment in open, one sees from Crompton 1, 84A(c) is that the coalition broadly has IHL-compliant processes in place. There are targeting processes in place in the Saudi military. They are explained, especially in Watkins 2, paragraphs 18 and following. There are no strike lists, they are processes which are described in the November 2015 update. See Crompton 1, paragraph 16, as being broadly consistent with NATO standards. Dynamic targeting is, for obvious reasons, more difficult, as it were, to exercise that same degree of control as compared to pre-planned targeting, but the evidence demonstrates (see again Crompton 1, paragraph 85A) is that the Saudis have continued to and we have continued to engage with the Saudis to understand those processes with a view to improvement and improvement has in fact taken place.

So, whether or not they are fail safe, which I am sure even the NATO processes would not be, whether or not they are failsafe the key points are one, they are processes and two, they are positively designed to conform to IHL principles. There has been, on a slightly separate point, engagement with UK personnel, constructive engagement with UK personnel on standards and improvement, including the training. Again, the evidence goes into some detail on that; 207 personnel operating in that assistance role, half of them in place in Saudi. There are supporting systems, there is training and liaising with the specific aims of improving the processes, including specifically training on targeting. (See our skeleton paragraphs 74 to 75) Training on targeting is provided. Again, see by way of example only, Crompton 1, paragraph 60 and Crompton 1, paragraph 84A(e). That process continues, the process designed to secure improvement. Watkins 2, paragraph 11 and following. There is nothing whatever to suggest deliberate incidents of wanton disregard of the principles in IHL. There are plainly some areas of concern and real concern, but appropriate reaction, willingness to engage and a recognition of the standards at which they are bound.

Repeated statements, we have looked at them already, by the KSA themselves of respect and intention to conform, judgments no doubt around that but we have discussed them. They are in place and they specifically acknowledge that they are bound by their principles, they have set out the targeting processes and they have set out their willingness to review and improve and investigate when things go wrong. There has been a willingness to engage specifically with the UK on issues of concern and we have all the evidence in relation to that. It might be said that the key overall conclusions in relation to that are to be found

in Watkins 1 and his overall conclusion on the attitude of the Saudis, summarised in Watkins 1, paragraph 75I and Watkins 2 at paragraph 39.

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That is not just a question of relying on that willingness and that engagement without more, the evidence also demonstrates (see Watkins 1, paragraph 75H) that all of that and all of those processes have led to a sustained decrease in the allegations of concern. That is the wording used by Mr Watkins in that paragraph. The assessment in that same paragraph is that "the Saudis have been willing to improve its processes and have been successful in doing so". That

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conclusion, that summary is simply and directly inconsistent with a clear risk of grave violation or serious violation. So, although there are difficult expert judgments and a number of strands feeding in, there is nothing to suggest that deliberate wanton disregard for IHL, there is everything to suggest that they take their system seriously, they seek to improve them, they investigate when things have gone wrong and that they have been successful in improving them.

C

Just to come back very briefly to the reports that have been produced, we do respectfully urge very considerable caution on the court when considering their conclusions, however carefully or in some limited cases not, those conclusions are expressed. Those reports are not and those conclusions are not in the main addressed to serious violations as we have identified that concept. They consider, at most, whether there may have been violations of IHL and where

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they do in some rare instances descend into or may descend into knowledge, intention, matters of that kind, they do so in the most careful and guarded terms for understandable reasons. Even in relation to their subject matter and their conclusions, we urge caution. They are not in an equivalent position. They do not have equivalent access, however important the organisation may be. Whether it is the UN experts or whether the European Parliament or Amnesty

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or anyone else, they do not have equivalent access. That is a fact which is emphasised and reinforced by the fact that at least some of that reporting not merely does not have that privileged information, but is based on sources which are themselves liable, and I make no criticism of it, but liable to be inherently unreliable. Second, third-hand information, witnesses on the ground. Assumptions based, very largely on **expo facto** analysis focussing on fixed, physical sites. Media reporting which can itself, as we all know, be partisan.

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They have no access at all to the Saudi systems, to the Saudi operations, to the Saudi (inaudible). So, it is pure inference on a much, much narrower base. But that involves no criticism of the sort of conclusions that they put out there. Often, that is part of the function to trigger debate, to ensure that matters of concern are drawn to everyone's attention and are properly considered. It is a perfectly legitimate function.

G

We respectfully reject Mr Chamberlain's principled approach sought to be fair and honest which would require us, in effect, to conduct investigations into the likelihood that any or all incidents were in violation of IHL. For all the reasons, I have gone through, we also reject what might be thought to be the simplistic attempt to box in the government's permissible responses to those serious

H

reports. As he sought to put it, a three-possibility response only. The body is inherently unreliable, the report is not up to scratch or the report is fine but we have future assurances. We do not accept that as a grid for a sensible analysis

of these serious issues. It is legitimate and rational to adopt a broader approach. You take into account those reports as potentially raising concerns, potentially raising serious concerns but you then use them to consider in more detail, select as appropriate the most effective way of focussing on the incidents of the most serious concern and enabling you should form the broader judgment which criterion 2(c) actually requires to be asked and answered. It is evident just from looking at those three boxed responses as it were, that the premise for the boxing is, in effect, a need to answer all the allegations and, in effect, disprove them. That is the forensic gain. There is an incident of serious concern, look at the amnesty report, now the burden is on you to disprove that. That is completely impossible. Not appropriate and not required.

LORD JUSTICE BURNETT: Now, Mr Eadie, how are you doing? I know your time was chewed into a little bit yesterday.

MR EADIE: My Lord, I am going to be done by 12.45 pm.

LORD JUSTICE BURNETT: All right, and we can sit a few minutes beyond 1.00 pm. Mr chamberlain will have his opportunity to reply. We have had a request anyway to start at 2.15 pm on the closed session –

MR EADIE: If it goes to 1.15 pm now.

LORD JUSTICE BURNETT: It will have to be 1.10 pm because our closed papers are being collected from us at 1.15 pm and we have to be there when that happens.

MR EADIE: I will try to finish as quickly as possible, if I may.

LORD JUSTICE BURNETT: THANK YOU.

MR EADIE: I have made the general points in relation to the proper and appropriate reaction to those reports. You will have seen that some of those reports, some of the issues that they raise has been the subject of specific consideration in the evidence. Maybe just to give you the references in relation to that. The UN Panel of experts, which is obviously a matter of real interest and concern dealt within Crompton 1, 60 through to 65, Watkins 1, 63 to 64. The points that are there made in summary are these. The allegation that IHL violation are tolerably general, but the key answer is that they do not and self-evidently do not have the same sources, the same access and so on as ours. The UN panel of experts that is relied upon is based on interviews with Refugees, Humanitarian organisations, journalists and local activists. Again, without disparaging any of those, one sees that at least some of those may not be entirely objective and unreliable. It is also based on commercial satellite imagery and again, that might provide its own conclusions.

It may also be thought that that report does not actually, in truth, focus on what is the relevant 2(c) question, namely that of serious violation. In any event, that report was taken seriously as the evidence demonstrates. We requested, it may be noted and it is of some interest perhaps, we requested further information from the UN Panel which was not and has not been forthcoming. See our skeleton paragraph 125F(i).

The Great Hall incident is the only incident I am going to focus on, it may be that we have to pick up on it in close and I made the point already generally that we do not accept that we do not consider with particular and conspicuous (inaudible) the open evidence plainly demonstrates attacks particularly on buildings such as hospitals. The open evidence is clear that we take those extremely seriously for unsurprising reasons. The Great Hall incident was focussed on for obvious reasons and as far as that is concerned, there plainly was appalling loss of life. Be careful, however, not to blur that adjective with a descriptive ascribed to the United Kingdom Government and the United Kingdom ambassador of Saudi conduct. Even in the Reuters report it was not. What was described as "appalling" was the loss of life as you see in that report. Bundle 3, page 1288, letter E. But it evidently was an incident of the most serious concern, given the loss of life and it was treated as such. It was acknowledged by Saudis to have been an error, as we have seen. That was the subject, therefore, of considerable focus and attention immediately following the incident, and we see that from all the evidence and from all the documentation and the ministerial submissions which are directly focussed on that incident alone, so it breaches no divide to say that was self-evidently one of the most serious incidents of concerns that has been focussed on.

I have no intention of rising to Mr Chamberlain's forensic challenge to me to assert in open court what the government's view was or was not in relation to the IHL compatibility on that incident.

May I turn very briefly to the Interveners' submissions. I am not going to deal with the Oxfam submissions, we have covered those in our skeleton in relation to the Interveners at paragraphs 32 and following, but in relation to the first interveners and Mr Swaroop's submissions, I start, as it were, perhaps at the back end given the interest, no doubt, and the issues international law and principle that are raised in those submissions. I start at the back end which is what is the domestic legal significance of those submission and the attempted nuance, so that whenever a question is put, as it were, the answer came back, "Well, I am only establishing a **prima facie** case".

That smacks, it might be thought, of an argument which is prepared to wound but afraid to strike. He says as a **prima facie** case only and then he says there is no need for a court to rule on the actions of the Kingdom of Saudi Arabia as internationally wrongful, even though that is the necessary precursor of Article 16 engagement. Nor, he says, is it necessary for the court to rule on the nature and quality of any aid or assistance if truly that is what had been done.

My answer to that is as follows. Firstly, there is no **prima facie** case, whatever standards Article 16 imposes and whether or not Article 16 tagged into the consolidated criteria in the way indicated. Secondly, there is no public law principle which requires one to analyse any and all possible arguable legal basis for a challenge. There is no authority cited for any such broad proposition. **A fortiori** it might be thought when the legal basis in question probably forms no part of public law anyway. The third and dispositive point, it might be thought, is how would any such examination materially differ from or add to the exercise which has already been undertaken under criterion 2C? The core

focus is already on whether or not there is a clear risk of violation of IHL by the Kingdom of Saudi Arabia. If there is a clear risk if on applying the rationality standard that was the only acceptable answer, then Article 16 drops away as unnecessary. If, on the other hand, there is no clear risk, and that was a rational judgment, it is impossible to see how any case on Article 16 could advance. That is because the approach under Article 16, whoever is right about its engagement, if one assumes engagement, whoever is right about the standard imposed is stricter. It must be stricter than a clear risk.

My learned friend retreated, as it were, from even positively asserting the **prima facie** case on the basis of constructive knowledge. So, he appeared to rely in the end on wilful blindness, but one can (inaudible) clear risk and wilful blindness. If you cannot surmount a clear risk test, you are going to get nowhere near wilful blindness. We respectfully submit that that is the complete answer that we have set out in our written submissions and I do not develop them orally, why we say that Article 16 is not a part of the consolidated criteria. Perhaps the only real point in relation to that is that Article 16 may, indeed, be customary international law but as both parties' submissions aptly demonstrate, the meaning, interpretation, effect and application of Article 16 is anything but clear and uncontroversial. There are serious issues in relation to a series of those matters. You know that the government's position is that where it says, "Knowledge" it requires knowledge, and knowledge is it. You know that the government's position is that Article 16 means intention. But if you are in that territory, it is against that context of controversy, as it were, that you then go to Criterion 1 and ask the question whether it truly was the intention, as it were, to bind the government to conform to those standards in this context, and that becomes a great deal more difficult as an issue than simply focussing on **inter alia** or including it as a textual matter. But we know, in any event, that there is serious controversy around the nature of the standard that would be imposed anyway. However, you put it, we respectfully submit that no one has sought to suggest on the claimant's side that that sort of standard of wilful blindness will be met. Indeed, it might be thought to be quite revealing that my learned friend Mr Chamberlain was very careful to point out on a number of occasions why it was that United Kingdom personnel who might be in Saudi Arabia were not, as it were, imbedded in the sense of actively providing target and assistance when the targeting was going on, because it might be thought at that stage, you might end up in the territory of aid and assistance and having to argue about knowledge and all those matters, and that is directly inconsistent with the case which Mr Swaroop advances on the substance of it. The big answer is, no need to go there, not part of the claimant's case (a) and (b) no need to go there because if you cannot get over clear risk, that is the end of it.

My Lord, those are my submissions.

LORD JUSTICE BURNETT: Thank you, Mr Eadie.

MR CHAMBERLAIN: My Lords, may I respond to what I understand to be the main thrust of my learned friend's reply to our submissions, which is to focus on what he understands to be the proper target of analysis in this case. He does that by reference, in particular, to paragraph 2.13 of the User's Guide, and I just ask your Lordships to look back at that. Bundle 1, the key documents, page 66.

Your Lordships will recall that Mr Eadie focussed his attention, particularly, on the words that you see in the text at 2.13, an inquiry into the recipient's past and present record of respect for international humanitarian law. You will recall that he focussed on that word, "respect" so as to make good the submission as he put it. What was required was a general view as to the attitude of the country concerned, rather than an auditing, as he put it, of specific incidents that may have occurred. We do ask your Lordships just to look at the bottom of that page as well:

> "Isolated incidents of international humanitarian law violations are not necessarily indicative to the recipient countries' attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying 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 should give cause for serious concern."

As we understand it, the submission is that when one looks at the recipient's past and present record of respect for international humanitarian law, the Secretary of State is not requiring do Mr Eadie's submission to form any view about whether on past occasions international humanitarian law has been breached or not. There is no requirement, he says, to form that view. We say that as a matter of rationality and as a matter of construction of this policy, one cannot form a view about a recipient country's past and present record of respect for international humanitarian law without at least forming an internal view as to the likelihood as to whether there have been breaches of international humanitarian law and whether there has been a pattern of such breaches. It is a simple matter of rationality and one can test it in this way.

LORD JUSTICE BURNETT: But does that mean that you are saying that having set up the tracker mechanism and accepted, last week it was up to 211 or something of that sort, 200-odd.

MR CHAMBERLAIN: 244 in the latest report.

LORD JUSTICE BURNETT: Thank you, incidents of concern, there is a legal duty for the Secretary of State to come to a view independently on each one?

MR CHAMBERLAIN: My Lord, what we say is when you have the evidence from apparently authoritative bodies –

LORD JUSTICE BURNETT: No, forgive me, I would quite like you to answer my question, Mr Chamberlain. We have 244 or whatever it is, the numbers have varied over the years. Is it or is it not your submission that the government, as a matter of domestic law, has to form a concluded view on the likelihood on each one of those cases?

MR CHAMBERLAIN: Yes, if there is an apparently credible report that international humanitarian law has been breached. At least the government has to do enough to form a view to enable it to reach a conclusion on the question of whether

there is a pattern of IHL breaches. If what you see, which is what we do see on the government's evidence, the system that has been set up does not routinely form a view in any case as to whether IHL has been breached, then you have a system which is inherently incapable of negating the conclusions that are drawn by the other apparently reliable sources. I say "apparently" because of course I accept that any of these sources might be shown to be unreliable in a particular case or in a particular series of cases.

LORD JUSTICE BURNETT: So, again, it is part of your case that there is a positive legal duty to negative the conclusions?

MR CHAMBERLAIN: Well, may I start with stage one.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: Stage 1, one can see from 2.13 that incidents of international humanitarian law violations in the past are relevant. In principle, relevant to the question of the recipient country's past and present record of respect. That seems obvious, and one can test it in this way. Let's just suppose that it were established, to the Secretary of State's satisfaction that there had been in say, May 2015, a serious violation of international humanitarian law when the city of Sa'dah was targeted as a whole. A series violation of international humanitarian law. Let's suppose, let's just assume for present purposes that between march and October 2016 there were ten individual breaches of international humanitarian law some of them and some of them may amount to war crimes, let's suppose the Secretary of State concluded that. The reason, of course I give those examples is because those are the findings of the UN expert panel as we understand them. In the second case, of course, it comes from a Reuters report as you know. So, just assume that fact and ask yourself the question whether a rational decision-maker could form a view about the recipient country's past and present record of respect for international humanitarian law without taking those facts into account. I am not saying they would be determinative necessarily, they might not be. You might say, well, there had been ten breaches of IHL, some of them may amount to war crimes, but we are satisfied on the basis of the information that we have that they will not be repeated. You would have to have some pretty compelling evidence of that if you were satisfied, to start with, that there had been ten breaches of international humanitarian law. So, that is my first stage in the analysis.

Now, we know, of course, the Secretary of State has not reached the view that he is satisfied that there have been ten breaches of international humanitarian law. The Secretary of State on all the evidence we have seen has not reached a view that there have been any violations of international humanitarian law, at least, had not in February 2016. The position as to the Secretary of State's view since then is not clear on the open material. But where you have apparently reliable sources indicating that there have been violations, then rationality requires that you should look at those sources and then form a view as to the likelihood of the conclusions there set out being correct.

It does not have to be a publicly expressed view, of course I accept what Mr Eadie says that there may be political considerations which means that it is not

necessary for the Secretary of State to set that view out publicly, but there has to be a view. Rationality requires that when those findings are made, the Secretary of State either accepts them or rejects them. If you cannot accept or reject them, then you do to have a basis for forming a view as to past and present record of respect for international humanitarian law.

Of course, I accept what Mr Eadie says; there are all sorts of other things that go into the melting pot in telling you whether a country respects international humanitarian law, and of course, you can look at the commitments made by that country and the public statements made by that country. I will come to that in a moment, of course, you have to look at them all in the round. The fundamental starting point for any assessment of past and present record of respect of international humanitarian law has to be what has actually been happening on the ground.

As to statements, I am going to go backwards, if I may, to the four matters which Mr Eadie relied on. The fourth one was statements made by the Saudi government. Your Lordships were taken a statement made on 1 February to the UN Security Council. Sorry, I think the 1 February one was in fact made and is on page B439. My Lord, Mr Justice Haddon-Cave made the point that reference is there made to seeking the assistance of national, regional and international experts and specialists of its own choosing. Your Lordships obviously know one of the experts for the Saudi Arabian government went to, that is Colonel el Mansour. Of course, your Lordships cannot draw any conclusions as to him, but nor can the Secretary of State and nor does the Secretary of State seek to. All that one has is the fact that they have said they will go to experts and the knowledge of one of the experts that they went to.

What one also has is the –

LORD JUSTICE BURNETT: What is the Secretary of State to do with that? Where all this seems to be going, Mr Chamberlain, is that your submission is that the Secretary of State has to hunt down, as it were, every statement made by, in this instance, the Saudi government and then double check it against what is written in the independent and in the various reports. Which is entirely unrealistic.

MR CHAMBERLAIN: No, my Lord, of course, I do not say that. What I say is that rationality is a flexible concept and when you have a vast body of evidence suggesting that there have been violations of international humanitarian law and your own system is not such as to enable you to assess whether those allegations are true or not, that is the case here, the Secretary of State's own system is self-confessedly not able to assess whether those allegations are well made out or not.

Then, you have to rely on the other factors which my learned friend does rely on to negative the conclusion that you would otherwise draw. If you have a country which has committed a pattern of violations of international humanitarian law, some of them serious, just assume that you have a country of that kind, I accept that in principle, you could reach the view that notwithstanding that pattern, there is still no clear risk. But you would need pretty good material to reach that view. So, what does the Secretary of State

rely on? Well, number 4, going backwards, he relies on statements made by the Saudi authorities. The first question you would have to ask is well, what do those statements actually tell you and do those statements rationally enable you to negative the view that the facts on the ground –

LORD JUSTICE BURNETT: But that all goes into the melting pot of the diplomatic assessment.

MR CHAMBERLAIN: I agree, but when one looks at the statements, one has to look at all of the statements. On 1 February, you have seen this statement but you have also seen from our skeleton argument another statement made on the same day, 1 February 2016, by Brigadier Asid as he then was.

LORD JUSTICE BURNETT: Yes, which is why I think we agreed that evaluating all the statements become unofficially in the various ways we have. That is an exemplar of specialist diplomatic skill in sorting out what it really means.

MR CHAMBERLAIN: I agree. When my learned friend says, well, that kind of thing is the kind of exercise where, ordinarily, you defer to the foreign office unless there is some very clear irrationality shown, that is fine, if you started from the right starting point. But, my Lord, the problem here is that they have not started from the right starting point, because they have undertaken no assessment whether there is, in fact, at the beginning a pattern of violations of IHL. They simply have not addressed that question. They have not addressed themselves –

LORD JUSTICE BURNETT: So it may have started, that it is neutral?

MR CHAMBERLAIN: Well, we do not know. All that we can see from the open material, and your Lordships may be able to see more from the closed material, but all we can see from the open material is that they have started from the proposition that they have not established any violation of IHL, serious or otherwise, that is their starting point.

LORD JUSTICE BURNETT: Yes, all right.

MR CHAMBERLAIN: Then against that, they put into that, one, two, three, four, contextual matters, all of which have to be considered by the Secretary of State using his expertise.

LORD JUSTICE BURNETT: Your submission is they should have started, to borrow one of Mr Swaroop's phrases, they should have started from the position that **prima facie** because of the material you have shown us, there have been such violations.

MR CHAMBERLAIN: Yes, indeed.

LORD JUSTICE BURNETT: That it is irrational to start anywhere else.

MR CHAMBERLAIN: Exactly.

LORD JUSTICE BURNETT: Well, if I may say so, it has been rather obvious from the beginning, even before we came into the court that these two arguments are like ships passing in the night, because you start in one place and saying one who takes a different view is irrational. The government says we start in our place and this is how we have come to our decisions and so, it is a critical question.

MR CHAMBERLAIN: Yes. It is a critical question and we do say it is simply not open to my friend to say well, we do not even have to address the question how likely it is that there is a pattern of IHL violations in the past. We do not have to go there. We are looking forward and therefore, we do not need to reach a view, one way or the other, whether there is a pattern of violations, some of them serious. We say that when you have authoritative reports, like the UN report, my learned friend tried to or made a number of comments about the reliability of the UN report, but we do say, we do invite you to look at the UN report and look at the care with which it was produced, using satellite imagery, using eyewitness accounts, using media reports and then ask yourself the question, in any material respect, does the Secretary of State actually have anything that goes beyond that in relation to, for example, the bombing of Sa'dah? The answer, on the open material, is no. You asked the same question in relation to the ten incidents reported.

LORD JUSTICE BURNETT: Sorry, I did not hear that?

MR CHAMBERLAIN: You asked the same question in relation to the ten incidents that are reported in 2016. In any material respect, does the Secretary of State actually have a basis for saying, "I know more than you"? When one looks at the open material, what it shows is that actually, the Secretary of State does not have that basis because the Secretary of State, even after all the access that has been given by the Saudi authorities still has 90 incidents in which he cannot identify any military target.

My Lords, may I just make this point about the question of serious breaches. You have been shown, obviously, at some length sections from the additional protocol 1. I would just ask you to look at additional protocol 1 again, it is in volume 2.

LORD JUSTICE BURNETT: Yes.

MR CHAMBERLAIN: Tab 41A.

LORD JUSTICE BURNETT: Tab 41 is the Rome Statue.

MR CHAMBERLAIN: Oh, I am sorry.

LORD JUSTICE BURNETT: It is 41 I think.

MR CHAMBERLAIN: Forty-one, yes. Sorry. The first point, if you look at 85.1 which is on page 287, there is reference there to "Grave breaches" of this protocol. Yes? Does my Lords see that? If one then goes on to 89, one can see reference to a different concept, "Serious violations of the conventions for this

protocol". Then in Article 90 there is also reference to serious violations of the protocol.

J2: What does that last reference?

MR CHAMBERLAIN: I am sorry?

J2: What is that last reference?

MR CHAMBERLAIN: The last reference is, yes, if one looks over the page at 292C, commission, there was a commission which had been set up:

> "Should be competent to inquire into any facts alleged to be a grave breach as confined in the conventions in this protocol or other serious violation of the convention for this protocol."

The two concepts are not synonymous, that is the first point. The second point is that even if one is looking for grave breaches, turning back to Article 85, launching an indiscriminate attack affecting the civilian population for civilian objects in the knowledge that such an attack will cause excessive loss of life and injury to civilians or damage to civilian objects is a grave breach if done wilfully.

May I just ask you to look on this point about wilfully since my learned friend made specific reference to it. I am conscious of the time but I do ask you just to look at this point. At the small additional clip which we handed up yesterday.

LORD JUSTICE BURNETT: Is this the one that mentions definitions of war crime on the front?

MR CHAMBERLAIN: Yes, it has definitions of war crimes on the front. If you go to the second tab which is the ICRC commentary on Article 85 and turn over the page to the bottom of the page where it says 3474 in very small writing I am afraid, you can see what it says about "wilfully" there. It says, "Wilfully the accused…"

J2: Where are you reading from?

MR CHAMBERLAIN: I am sorry, at the bottom of the page, just before 3474, just after 3474, "wilfully":

> "The accused must have acted consciously and with intent, i.e. with its mind on the act and its consequences and willing the criminal intent (criminal intent or malice or forethought), this encompasses the concepts of wrongful intent or recklessness is the attitude of an agent to without being certain of a particular result accepts the possibility of it happening."

If one just applies that to something like the bombing of Sa'dah where you have an entire city, 55,000 people, declared to be a military target, leaflets dropped a couple of hours beforehand, radio warnings given in circumstances where it

must have been known to those targeting that city that many, many civilians would be unable to get out, even on my learned friend's construction of serious violations, one can quite see why the UN expert panel felt able to conclude in relation to that case that there had been a serious violation and one can quite see why they went on to say in the footnote that the violations in relation to the bombing in that city were systematic in widespread. Two words which you know are used in the Rome Statute, there actually in relation to crimes against humanity rather than war crimes.

My learned friend cannot get out of this by saying ah, well, none of these violations are serious. There is a finding there and there is a further finding in the second UN expert panel report as we understand it, that some of the ten violations established to a standard of almost certainty in that report may amount to war crimes. We do not say that that fact alone determines the answer to this case, but if you do not start from that fact, then your system for analysing one of the key questions, namely past and present record of respect for IHL is a fundamentally flawed system which does not entitle you to reach the view that the clear risk standard is not met.

My Lords, there were a number of other points I might have made but I see the time.

LORD JUSTICE BURNETT: Mr Chamberlain, if you think they are points which would assist us, by all means, reduce them to one or two sheets of paper, but not more, and we will be very pleased to receive them.

MR CHAMBERLAIN: My Lords, whenever I am told to keep something that short, it is always quite a relief. At least in terms of my own …

LORD JUSTICE BURNETT: It is also a truism that good points can usually be made very shortly. All right. Well, now that completes the open part of this hearing. As everyone understands, we will be spending the rest of today and Friday in closed. At the end of the proceedings, we will be reserving our judgments and will take time to consider those judgments.

As everyone will appreciate, we have been provided with a pretty colossal amount of material and it will, alas, take us a little bit of time to produce our judgments. It will be circulated in the ordinary way, that is to say the open judgments for hand down. There will be no need for any attendance of counsel or others unless we consider that we need help on something and, again, in the usual way we would hope that the parties would be able to agree an order to reflect whatever you find in our judgments. Thank you all very much indeed.

(Open session concludes)