Case No: T3/2017/2079/PTA

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL CIVIL DIVISION

Royal Courts of Justice
The Strand
London WC2A 2LL

Thursday, 12 April 2018

BEFORE:

LORD JUSTICE IRWIN
LORD JUSTICE FLAUX

BETWEEN:

CAMPAIGN AGAINST ARMS TRADE

Claimant

- and -

SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant

MR M CHAMBERLAIN QC, MR C MCCARTHY appeared on behalf of the Claimant
MR J EADIE QC, MR J GLASSON QC, MS K GRANGE, MS J WELLS appeared on behalf of the Defendant

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PROCEEDINGS

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(Official Shorthand Writers to the Court)

(10.30 am)

LORD JUSTICE FLAUX: Yes, Mr Chamberlain?

MR CHAMBERLAIN: My Lords, I appear with Mr Conor McCarthy for Campaign Against the Arms Trade, which is the claimant below and now applies for permission to appeal. Mr James Eadie QC, Mr Jonathan Glasson QC, Ms Kate Grange QC and Ms Jessica Wells represented the defendant below and here, that is the Secretary of State for International Trade. The special advocates are Mr Angus McCullough QC and Ms Rachel Toney who represent and represented the interests of the claimant in both.

My Lords should have the following open documents: one core bundle, which I hope has been update recently, one supplemental bundle, which exceeds 350 pages and we are grateful to my Lords for directing that **(inaudible)** and one authorities bundle. Separately you will no doubt have closed documents.

Subject to the court's view, we in consultation with Mr Eadie have agreed a provisional timetable today. That includes an opening by me, which I would hope to finish by noon, an open response from Mr Eadie, which he would then hope to finish by lunch, 1 o'clock. Immediately after lunch I would then reply for 15 minutes, and then the rest of the day would be reserved for any closed session and any judgment that the court may wish to give.

LORD JUSTICE FLAUX: We were thinking that it would be desirable if we could to conclude the opening before lunch. So, if you can telescope that a little. We think there may need to be a little time in closed.

MR CHAMBERLAIN: I will do that. My Lords, there are two matters before you today. The first application is for permission to appeal from the judgment of the Divisional Court. The second arises if permission to appeal is granted on one or more grounds. That is the application for an order imposing reciprocal caps on the appellants' and respondents' recoverable costs.

The defendant does not agree that permission should be granted, but if it is, the costs capping order is, as I understand it, agreed. I think you have a draft order reflecting that agreement. That means that the only substantive question for decision today is whether to grant permission to appeal and if so on what grounds.

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I propose to make submissions under six heads. First, some introductory points to place this claim in its proper legal context; second, some observations on the structure of the Divisional Court's open judgment; and then the third, fourth, fifth and sixth grounds correspond to our four grounds of appeal, grounds 1 to 5.

My Lords, this application arises in the context of the ongoing conflicts in Yemen between Houthi forces and the forces loyal to the former government of Yemen backed by a coalition led by Saudi Arabia. The conflict began in 2015. It has continued and intensified. It has caused what the United Nations Secretary General last week called "the world's worst humanitarian crisis."

The claim was filed in March 2016, and it sought to challenge two things: first, the ongoing failure to suspend existing export licences for the sale or transfer of arms and military equipment to Saudi Arabia for possible use in the conflict in Yemen; and secondly, a decision communicated on 9 December 2015 to continue to grant new licences for the sale or transfer of such equipment.

Permission to apply for judicial review was granted by the late Gilbert J but the claim was dismissed after open and closed hearings by the Divisional Court consisting of Burnett LJ as he then was and Haddon-Cave J. The starting point for this appeal and for the claim in general is the Secretary of State's own policy announced in Parliament and reflecting an EU Common Position about the circumstances in which he would grant licences for the export of arms.

The policy is made under section 9 of the Export Control Act 2002. You have that in the supplemental bundle at tab 3. I was not proposing to go to it, but it empowers the Secretary of State amongst other things to give guidance about the exercise of his functions relating to the licensing power. The policy itself is in the supplemental bundle, tab 6. I wonder if your Lordships would just turn that up. The policy was set out in a written statement to Parliament --

LORD JUSTICE IRWIN: Mr Chamberlain, we do not have tabs, so you are going to have to --

MR CHAMBERLAIN: The page number is 26.

LORD JUSTICE FLAUX: We do in the bundles that were supplied very late yesterday. I have tabs but only because I brought both sets of bundles. The bundling has not been over-satisfactory, shall I say. The original core bundle was printed double-sided, which is always inconvenient and difficult. The new core bundle

was printed single-sided but did not include all the documents. As my Lord says, the original supplementary bundle did not have any tabs in it, but there we are.

MR CHAMBERLAIN: I apologise, my Lord.

LORD JUSTICE FLAUX: Right, page 26, I think.

MR CHAMBERLAIN: Yes, it starts at page 26. If you turn over to page 29, you will see criterion 2, which is what I am dealing with here. It provides relevantly that the Government will do two things. We need not worry about (a), but if one looks at (b):

> "exercise special caution and vigilance [before] granting licences [for the export of arms]… to countries where serious violations of human rights have been established by competent bodies of the UN [or EU]."

Now, it is common ground that Saudi Arabia is such a country. And (c), that the Government will:

> "not grant a licence [for the export of arms or military equipment] if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law [IHL]."

It is also worth looking at the final words of the policy on page 32, at the top of that page:

> "In the application of the above criteria, account will be taken of reliable evidence, including for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations."

My Lords, it is common ground, as the Divisional Court recorded at paragraph 28 in its judgment that is in the core bundle at tab 5, page 61, that the application for criterion 2 does not involve political considerations. What the court meant by that is that if there is a clear risk that UK supplied arms might be used to commit a serious violation of IHL, the question does not arise whether it would be in the UK's economic or security or other interests to continue to supply arms anyway.

That is important, because obviously in a number of contexts decisions of this kind do involve political considerations of the following kind. Notwithstanding what is said about breaches or possible breaches of IHL, that it would be in the United Kingdom's economic or security interest to continue to supply arms, then

obviously that kind of judgment attracts a very different approach in judicial review proceedings from other kinds of judgment.

LORD JUSTICE FLAUX: Once you have established -- or if there is a clear risk, there is not some residual discretion to override it in some way.

MR CHAMBERLAIN: No. This is obviously a policy, and so it is not a binding piece of law. But there is not in the policy a residual discretion, and nor does the Secretary of State say that any such discretion was exercised. So, it is not the Secretary of State's case that, for other reasons we are going to not suspend these licences anyway. Let me put it that way. It is all about, if I can put it like that, the satisfaction of criterion 2.

The next document which is important, and we can probably take the relevant extract from the judgment of the Divisional Court, is the user's guide which is produced by the Council of the EU to aid in interpreting the Common Position. The Common Position, as I have said, is the document on which the policy is based. So, these criteria come from the Common Position. The Divisional Court set out the relevant parts of the Common Position at paragraph 13 of its judgment. If you look at the core bundle at tab 5, page 57, paragraph 13, you can see a paragraph 2.13 from the user's guide. There are two parts of that paragraph that I invite attention to at the moment.

The first is that an assessment of the clear risk test should include "an enquiry into the recipient's past and present record of respect for IHL." It is accepted by the Secretary of State, indeed, averred by the Secretary of State, that is one of the key matters that fell to be taken into account. At the end of the same paragraph, there is this:

> "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."

That phrase "pattern of violations" is one that you will see is relevant to the argument going forward.

Those passages establish, in our submission, what should we say in any event be obvious, and that is that in assessing whether there is a clear risk that UK-supplied weapons might be used to commit a serious violation of IHL in the future, the Secretary of State must necessarily conduct an assessment of the

question whether a certain pattern of violations can be discerned in the past. It is on any view, we say, a key part of the analysis.

I ought to make clear what I mean when I say that the question whether there is a pattern of violations of IHL is a key part of the analysis. I do not, and I do not need to, submit that in the light of such a pattern the Secretary of State is bound to conclude that the clear risk test is met. So, it does not follow inevitably from the fact of a pattern that the clear risk test is met. It is possible to imagine a case where a pattern of --

LORD JUSTICE IRWIN: Mr Chamberlain, there is quite a distracting noise. Thank you.

LORD JUSTICE FLAUX: You say it is possible to imagine a case --

MR CHAMBERLAIN: It is possible to imagine a case where a pattern of past violations is established but the state in question has faced up to those violations and taken steps sufficient to ensure that there was no clear risk of repetition. But it is sufficient for the purposes of my argument to submit that the question whether the evidence discloses a pattern of violations is a centrally relevant matter, because it affects the significance of the other information that you may have about a state.

For example, if you have evidence that a state is engaged in training its military personnel to ensure that they are complying with IHL but despite that training a pattern of violations continues after the training, the continuing pattern tells you how much significance you can attribute to the training.

If you have evidence of a state conducting a limited number of investigations into some incidents where it is alleged that violations of IHL have occurred, evidence of a pattern of violations continuing after the investigations is relevant to an assessment of their effectiveness in relation to clear risk.

In short, my Lords, if your assessment of the question whether there is a pattern of past violations of IHL is flawed in a public law sense, so will be your assessment whether the clear risk test is met. That is particularly so in a case such as the present where the final judgment as to whether the clear risk test is met is, on the Secretary of State's own admission, a finely balanced one.

So, all I am saying here is that the analysis of the position in the past, whether there is a pattern of violations or not, is a key part of the analysis, and in a case which is finely balanced like this one, where the Secretary of State has accepted --

or rather the Foreign Office advice on which the Secretary of State's decision was based -- accepts that there certainly is a risk and it is finely balanced whether it is a clear risk, then if you have a flaw in that key part of the analysis, it is not possible for the Secretary of State to say the result would have been the same anyway. It might or might not.

That is my first head of submissions. The second head deals with the structure of the Divisional Court's judgment. If your Lordships would take up the judgment at paragraph 64 on page 69 of the core bundle, between paragraphs 64 and 85 you have the Divisional Court's summary of the open evidence of violations of IHL by Saudi Arabia. I am not going to read out those passages because I know your Lordships will have looked at them already. But I would like to highlight some passages, if I may.

At paragraph 67, you can see excerpts from paragraphs 128 and 140 of the UN expert panel's report of January 2016. The expert panel, to put it in context, is a panel that was established by a resolution of the United Nations Security Council. It is a resolution to which the United Kingdom was not only party but indeed an instigator. So, the panel has -- if I can put it like this, its status is somewhat different from, for example, an NGO. It is not the same as a report from Amnesty International Human Rights Watch, although those are also important as the user's guide shows. It is set up by the UN Security Council resolution.

At 128, you can see:

> "The [current] coalition's targeting of civilians through air strikes either by bombing residential neighbourhoods or by treating the entire city of Sa'dah or region or Maran as military targets, is a grave violation of the principles of distinction, proportionality and precaution. In certain cases, the Panel found such violations had been conducted in a widespread and systemic manner."

Then at 140, there is reference to one of the attacks to which reference is made in the judgment and which we highlighted in our submissions. The entire city of Sa'dah and region of Maran were declared military targets by the coalition. This is important, because this was a public statement by the Kingdom of Saudi Arabia that these entire cities were military targets. Sa'dah remains one of the most systematically targeted and devastated cities in Yemen attributable to coalition airstrikes and the targeting of the entire city in direct violation of international

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humanitarian law. Sa'dah also faced systematic and indiscriminate attacks including on hospitals, schools and mosques.

Then there is reference at 151 to the denial of humanitarian assistance being constitutive of a war crime, whether it occurs in an international or a non-international conflict. The significance of that, just pausing there, is that different rules, a different scheme of rules applies under international humanitarian law depending on whether the conflict is properly to be characterised as an international armed conflict or a non-international armed conflict. There is some debate or contention, if I can put it like that, about whether it is to be characterised as one or the other.

The Saudi Arabian government, as I understand it, takes the view that the conflict should be regarded as an international armed conflict because it says the Houthis are backed by Iran. Others have taken the view that the proper characterisation is a non-international armed conflict. But the important point for these purposes is that in either case international humanitarian law has a body of rules. In one case the rules may be treaty rules; in another case they may be customary rules. But the rules are similar in many important respects. In both cases, for example, the importance of not conducting indiscriminate attacks and taking proper precautions apply.

That is the first of the three points I wanted you to look at in particular insofar as the open evidence is concerned of violations of IHL by Saudi Arabia. Then at 74, there is a statement which is by the UN Committee on the Rights of the Child on 25 October 2016. This is a much later statement. As I said before, the conflict started in 2015 and it has continued to date. There have been certain hiatuses in it but it has continued, and we would say, intensified.

On 25 October, you have the UN Committee on the Rights of the Child issuing a report that it was deeply concerned by a credible corroborated and consistent information that the state party, that is Saudi Arabia, through its military operation in Yemen has been committing grave violations of children's rights. You can see what the violations are:

> "Hundreds of children have been killed and maimed as a result of indiscriminate air strikes and shelling by the State party-led coalition on civilian areas and camps for internally displaced persons, of unexploded cluster bombs

sub-munitions and other unexploded ordnance, and of the dozens of attacks carried out on schools and hospitals."

I will not read the rest but you have it there.

Can I ask you to look at one document which is in the supplemental bundle, which is the latest document that was available to the Divisional Court at the hearing in February of last year. That is the second report of the UN expert panel, because we have seen an extract from the first report which dealt with the indiscriminate targeting of the city of Sa'dah and the region of Maran. There is a second report which was produced a year later by the same panel -- I am not sure the panel consisted of exactly the same people but it is still the UN expert panel. You have that in the supplemental bundle at page 462.

LORD JUSTICE IRWIN: Mr Chamberlain, you put this material in your list of essential reading, and I think you both --

MR CHAMBERLAIN: Yes. I just show you a couple of paragraphs and then we will move on. At the time of the hearing before the Divisional Court, this report had not yet been released publicly, although there were news reports indicating what it contained. That was available in open. But the full report was available in closed, and that was confirmed to us, to the Divisional Court. So, the court had a copy of it.

On 462 at the bottom, you can see that the expert panel investigated 10 airstrikes that led to 292 civilian fatalities including at least 100 women and children, and that the strikes destroyed three civilian residential buildings, three civilian residential and factory complexes and a hospital and marketplace. Detailed case studies including assessments of compliance with IHL were carried out.

Without dwelling on the details, you can see if you go forward to 127 on page 466 that in 8 of the 10 investigations the panel found no evidence that the airstrikes had targeted legitimate military objectives, and for all 10 investigations, the panel considered it almost certain that the coalition did not meet IHL requirements of proportionality and precautions in attack, and the panel considers that some of the attacks may amount to war crimes.

Then over the page at 468, paragraph 131, the panel found that violations associated with the conduct of the air campaign were sufficiently widespread to

reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure.

This report, we say, is of particular significance, because it reports the results of a detailed examination of 10 incidents, all of them post-dating at least some of the engagement and training provided by the UK military **(inaudible)** Saudi military. On its face, it is evidence that despite that engagement and training, there is a pattern of violations of IHL continuing, some of them serious.

If your Lordships would go back to the conclusion reached by the Divisional Court about this open source material, it is at paragraph 86 of the judgment. That is in core bundle, tab 5, page 75. You can see what the Divisional Court says about this material.

> "These materials represent a substantial body of evidence suggesting that the coalition has committed serious breaches of IHL in the course of its engagement in the Yemen conflict."

The court then goes on to note that of course the open material is not the only material that the Secretary of State had and indeed the court had before it.

Before I look at the Divisional Court's summary of the other evidence available to the Secretary of State, can I show you what the special advocates said in open about the analysis undertaken by the Secretary of State. It is an important, we would say respectfully, part of the factual background to this challenge. If you take up the core bundle, this document should have been inserted at the end of the core bundle. It should be tab 19 right at the end. This was part of the special advocate's detailed grounds. The special advocate's detailed grounds were obviously partly enclosed, but part of their detailed grounds were made open pursuant to direction of the court.

LORD JUSTICE FLAUX: You have given us a bit more than we needed, I think.

MR CHAMBERLAIN: I am sorry.

LORD JUSTICE FLAUX: The special advocate's detailed grounds are at 350. The rest of what we already have. So, these are the detailed grounds.

MR CHAMBERLAIN: What they said is that -- if one looks at page 354, paragraph 11(1), this is about the MOD's tracker, which is its database of incidents of concern in relation to IHL. In particular they said:

> "The tracker does not generally provide any assessment of whether the actions of the responsible party are compatible with IHL or not. In its initial format, the tracker included a question for each incident 'IHL breach ?' But in no case was an assessment of this question addressed in the box provided. That question was removed from subsequent versions of the tracker."

Then they said this at 2:

> "No other material disclosed in open or closed suggests that the process adopted by the defendant through the FCO or MOD or otherwise includes any routine attempt to reach an assessment in any individual case, 'To identify whether the responsible party's actions are compatible with IHL or not.'"

The reason for the deletion of the "IHL breach" column in the tracker is in fact recorded in the judgment at paragraph 185 on page 98 of the core bundle, and that is that when the tracker was originally created, the MOD thought they would be able to determine definitively whether there had been individual allegations of breaches of IHL in relation to each of the incidents logged. However, when it was realised in July 2016 that this was not possible, the column heading was changed. That is the explanation, but what matters for our purposes is the fact that there is no such assessment.

This last quoted phrase, "no routine attempt to reach an assessment in any individual case, 'To identify whether a responsible party's actions are compatible with IHL or not'" was important because the Secretary of State, as your Lordships will have seen from the judgment, had stated both in pre-action correspondence and to Parliament that such an assessment was done. We now know from a correction that the Secretary of State made in Parliament, that it is not. The Divisional Court said that the correction was not material.

LORD JUSTICE FLAUX: Where is that in the Divisional Court judgment?

MALE VOICE: This is the Ellwood statement.

MR CHAMBERLAIN: Yes, exactly. We say that there is a critical distinction between on the one hand saying that the MOD has assessed that the Saudis are complying with IHL, which is what was said originally, and saying that the MOD has not assessed that there have been violations, which is what is said in the corrected version. We say the Divisional Court did consider that, for instance, says they did not think it was material. We say it is, with respect, critical. Why? Because the

former suggests a positive assessment capable in principle of displacing the conclusions drawn on the open evidence by the UN expert panel and others. The latter suggests that there is no positive assessment capable of displacing the open assessments you have seen.

The structure of the judgment is then to look at the six strands of evidence available to the Secretary of State. The first strand, as I have sought to presage, is the MOD's tracker, which is a database of incidents of potential concern including those identified by the NGOs and the UN expert panel. The evidence about the tracker is set out in the judgment at paragraphs 104 to 120. We make a number of points about this in our skeleton argument at paragraph 24. Can I ask your Lordships to look at that. I am not going to read it out obviously because you will have seen it, but I just draw attention to three in particular.

If one looks at point 5 on A1.13:

> "The MOD on its own case do not have access to Saudi operational intelligence and so are not in a position to interpret whether a target was legitimate or not.

Point 7, "The MOD does not consider the alleged consequences of a strike, including the reported civilian casualties."

I pause there to say of course we accept -- I think the judgment makes this point and we accept that the mere fact that there are civilian casualties does not on its own justify a finding that there has been a breach of IHL, but it is certainly a highly material fact.

Then point 8, "The MOD also does not consider whether the strike was against a target such as a hospital that attracts special protection under IHL." We say there are special IHL rules applicable to hospitals.

> "That may be thought relevant when in one reporting period at least, January 2016, immediately before the operative decisions were taken, two-thirds of the allegations that were being considered concerned attacks on hospitals."

That figure can be seen from Mr Crompton's witness statement, paragraph 65A in the supplemental bundle at page 191.

LORD JUSTICE IRWIN: Give the reference again, please.

MR CHAMBERLAIN: Crompton 1, paragraph 65A, supplemental bundle 191. The key point we make can be seen from paragraph 25 of our skeleton over the page on page 14, and it is reflected in paragraph 110 of the judgment. It is this:

> "In the majority of cases, [the majority], despite their access to Saudi military liaison, the MOD has been unable to identify any legitimate military target. In the later reporting periods, the MOD was unable to identify a legitimate military target in three-quarters of the cases examined."

As I have said, we accept that the inability to identify a military target does not in and of itself mean that there was not one, but it does mean that in the majority of cases, and in latter periods the great majority of cases, the MOD tracker provides no means of gainsaying the substantial body of open evidence that there has been a pattern of violations of IHL, some of them serious.

My Lords, the second and third strands of the information available to the Secretary of State are dealt with at 121 to 127 of the judgment under the headings, "UK Knowledge of Saudi Arabian Military Process and Procedures" and "UK Engagement with Saudi Arabia." As to those strands, we make two points. First, whatever the extent of the liaison between the United Kingdom and Saudi Arabia, it does not deliver operational intelligence about coalition targeting. Despite the liaison relationship, it does not enable the MOD to identify a legitimate military target in the majority of cases of concern.

Second, if, as the open report suggests, there has been a continuing pattern of IHL violations after the point when UK engagement and training began, that pattern of violations is highly relevant to the weight that can properly be attached to engagement and knowledge.

The fourth strand of information available to the Secretary of State is the Saudi investigations into incidents and the establishment of the JIAT, Joint Incident Assessment Team. That is dealt with at 128 to 133 in the judgment. As to that, again we make two points. The first is that if the analysis of the evidence of previously alleged violations was flawed, pointing to the fact of a few investigations carried out by Saudi Arabia or the JIAT cannot save the decision. When I say it cannot save the decision, I do not mean that it is irrelevant to the decision; what I mean is that if you are starting from a flawed starting point in relation to the past, then the decision will fall and fall to be retaken again. No

doubt if it did fall toe be retaken again, a whole lot of new material might have to be considered which was not available to the Divisional Court in February 2017.

The second point I make in relation to the investigations and the JIAT is a point that arises from the judgment, paragraph 132, where the court records what we would respectfully say does not deal adequately with the criticisms that we made of the investigations and the JIAT process. You can see that there are three criticisms that we made. We made these criticisms not off our own backs, if you like, but by reference to things that had been said by Government ministers and others. The three criticisms are: (a) that the Saudi investigative procedures have been too slow (that is something that was said by Tobias Ellwood, the Parliamentary Under-Secretary of the State at the Foreign and Commonwealth Office in January 2017); (b) that they have been too few in number (14 JIAT reports amounting to 5 per cent of the total number of incidents reported; (c) that the JIAT reports and methodology and exiguous published summaries have been the subject of criticism, and we would say respectfully justified criticism, in particular by Human Rights Watch in a letter to the JIAT dated 13 January 2017 which is before the court.

The fifth strand of information available to the Saudi officials is dealt with at 134 to 149. That is public statements by Saudi Arabian officials and post-incident dialogue. Again, we do not dispute that public statements are in principle relevant, but what we say about them we have set out again at paragraph 20 of our skeleton argument. Essentially what we say is this: if you are going to rely on public statements by the Saudi Regime evidencing commitment to compliance with IHL, you have to take the good with the bad. There are at least a couple of statements which far from suggesting compliance with IHL in fact suggest precisely the opposite.

In particular, there are two statements to which we drew attention, one from May 2015, which we set out in 20(1), and the second on 1 February 2016. That is important because it is the same date as the statements that the Secretary of State relies on. If you look at the February 2016 one, it comes from the official spokesman for the coalition, Brigadier General Assiri, who spoke to **(inaudible)** about coalition military operations along the border and informed Reuters, "Now our rules of engagement are: you are close to the border, you are killed."

We have obviously made a number of points about that. The Divisional Court said that had been, "designed to encourage civilians to leave the vicinity of the border." May be, but it was still on its face a clear threat, we would say, to act in flagrant violation of IHL, for the very obvious reason that if you declare an entire area a target of military attack, you are violating the principle of distinction and you are also conducting an indiscriminate attack.

Obviously the same point can be made with even greater force in relation to the May 2015 statement where, as I have said before when I showed you the first UN expert panel report, entire cities where thousands of civilians lived were declared as such military targets. "These are our targets" and that is again a flagrant violation, we would say, of the principles of distinction and indeed a flagrant violation of the rule against indiscriminate attacks.

As there were six strands, these are the FCO updates, the FCO information which is sent regularly to the Secretary of State for International Trade. Those are dealt with at paragraphs 150 to 175 of the judgment. As to those, it is right to say that they record, this is the Secretary of State's case, I think, in answer to the appeal, that the NGO and other assessments have been "taken into account." Each one records that the FCO has not assessed that there has been an IHL breach by Saudi Arabia. None explains what standard of proof was applied, and none engages directly with the specific findings of the UN expert panel for NGOs.

The Divisional Court made at paragraph 285 a number of general points about the information available for the authors of the UN expert panel reports, but in relation to that, we say there is no evidence that the Secretary of State had better information than was available to the UN expert panel, in relation, for example, to any of the 10 cases which were the subject of in-depth studies by the UN expert panel in January 2017 and where the panel concluded that it was almost certain that IHL had been breached.

It does not help, we would respectfully submit, to say in general that the MOD can look at, for example, satellite imagery that is not available to other people if in three-quarters of cases even with that satellite imagery and all the other sources of information supposedly available to them they still cannot identify a legitimate military target.

So, those are our observations on the six sources of material that were available to the Secretary of State. Can I move to ground 1 of our appeal. I hope I can do this relatively briefly in light of the instruction we have had about timing and also because we have set out our argument on the various pretty fully in the skeleton argument.

Our arguments under ground 1 is to be found at paragraphs 30 to 41 of our skeleton argument at pages 15 to 18 of tab A1. Can I try and reduce this ground to five propositions, try and simplify it. First, we say the open sources provide as the Divisional Court said at paragraph 86, "a substantial body of evidence suggesting that the coalition has committed serious breaches of IHL." Second, the Secretary of State did not of course have to accept the conclusions drawn by these open sources, but if he was going to reject them, he had to have reasons for doing so.

Third, it was not the claimant's case that the Secretary of State had to reach a concluded view about each and every one of the instances where the UN expert panel or NGOs said there had been violation of IHL. What he had to do was produce an independent analysis of enough of them to displace the *prima facie* evidence of a pattern of violations, some of them serious. Probably the best place to show your Lordships the case that we were advancing before the Divisional Court is the reply submission which we put in writing at the invitation of the court. That is in the core bundle at tab 7, page 155(a).

We were a bit squeezed for time on oral replies and the court said put your quotes on two sides of A4, which I did not quite manage to achieve but nearly. You will see the first of the two points that we raise is a pattern of IHL violations? If you look at 1D, you can see -- I will invite you to read it all in due course but at 1D we see,

> "This submission does not entail that the Secretary of State not form a concluded view about each and every incident where an IHL violation is alleged, but he does have to have evidence that is rationally capable of displacing the prima facie open evidence of a pattern. That could be either evidence that the authors or methodology of the open source reports that are unreliable, or an independent analysis for enough of the individual incidents to displace the finding of a pattern of violations. On the open material, it appears that the Secretary of State had neither…"

Then further points were made.

That was our case. The fourth proposition is that the open evidence, if I make that point good, about the process undertaken by the Secretary of State shows two things. It shows that the process he undertook was not designed routinely to analyse whether IHL had been breached or whether there was a serious violation in any particular case. And in the majority of cases, the great majority in later reporting periods, the MOD was unable to identify any legitimate military target. The fifth proposition really encompasses or encapsulates our conclusion which was that there was, therefore, no proper or rational basis for rejecting the apparently cogent conclusions drawn in the open reports.

I have said at the start and I repeat, an analysis of what has happened in the past was not the be all and end all of the question the Secretary of State had to look at, but if there was a flaw, public law flaw in that part of the analysis, then it flaws the decision as a whole, we say. Must do, because when you have a finely balanced decision and you have a factor that is so obviously key to that decision, even if other factors are also important, then a flaw in relation to the analysis of that factor flaws the decision as a whole. So, that is ground 1.

Ground 2, our argument is set out in the skeleton argument at 42 to 47. That is at pages 18 to 22 and also in 7 to 9 of our reply submissions. I hope your Lordships have seen the written reply submissions which we put in which you should have at C1.

LORD JUSTICE FLAUX: This is really, if you like, a subset of ground 1, is it not?

MR CHAMBERLAIN: It is related. It is certainly related, my Lords. It arises, if I can put it in context, from our complaint, which was actually ground 1 of the claim below that the Secretary of State had failed to ask or answer a series of questions set out in the user's guide. These included:

> "(1) whether Saudi Arabia has legislation in place prohibiting violations of IHL;
> (2) whether there are mechanisms in place to secure the accountability of members of the armed forces for breaches of IHL; and
> (3) whether there is an independent and functioning judiciary capable of punishing members of the armed forces who violate IHL."

The complaint was twofold. First, that the Secretary of State had failed to ask or answer those questions, and secondly, that he had given no reasons for failing to

do that. The state of the evidence as to the Secretary of State's knowledge of these matters is set out at paragraph 44 of our skeleton. You can see, the claimant had asked in pre-action correspondence -- had identified these questions, which as your Lordships know, are set out in the user's guide, and said, what is the answer to those? The answer was, the Government was not in a position to advise on the domestic legislation of the KSA.

By the time the decision was under challenge, we said, there was no open evidence to show that he had taken any steps at all to equate himself with the state of KSA law on this topic, whether by making his own enquiries perhaps through the UK post in Riyadh or by asking the Saudi Arabian government. Yet, we say, "It is difficult to think of a more basic or necessary starting point when examining the recipient's past and present record of respect for IHL," which is one of the topics the Secretary of State accepts he had to consider. And we set out various provisions of international law.

So, the position that we have -- similarly we have set out at 44(2) the Secretary of State's response to our pre-action correspondence makes -- just does not know whether Saudi Arabia has ever prosecuted or punished a member of its armed forces for a breach of IHL. He does not know whether it has ever instigated any form of disciplinary investigation into any of its armed forces in respect of an allegation of breach of IHL. The question just has not been asked despite the purportedly close liaison relationship, which of course the Secretary of State relies upon, positively relies upon, as a independent source of information not available to the open bodies whose conclusions we have cited.

Similarly, no evidence of any consideration of the question whether the Kingdom of Saudi Arabia has an independent and functioning judiciary capable of prosecuting serious violations of IHL. We point out it is not an idle question, because various reports have concluded it does not. We set out one of the US State Department reports. Your Lordships I am sure will be familiar -- both of you, I should imagine, having sat in SIAC, very familiar with those kinds of reports.

We summarise the Divisional Court's answer to this point at paragraph 45 of that skeleton. It was essentially the scope of the enquiry to be undertaken, because this is, if I can put it this way, a *Tameside* argument, so it is a failure-to-enquire

argument. The answer was essentially that the scope of the enquiry to be undertaken is a matter for the Secretary of State subject to *Wednesbury* reasonableness. That is an established principle the Divisional Court relied on.

Our principal response, and the principal basis for our ground 2, is that in the context of an enquiry under criterion 2, in a case where under paragraph (b) of that criterion, "special caution and vigilance is required" the three matters which we have identified were so centrally relevant to the satisfaction of criterion 2 that a decision-maker could not rationally decide not to enquire into them. But we do not actually have to go that far. It is enough for us to say that the decision-maker could not rationally decide not to enquire into those matters without giving reasons for not doing so.

We do not know -- we are told nothing about the Secretary of State's reasoning process. Was it said, for example, this would have been a very sensitive matter to raise? If so, was there really no other way of discovering what the legislation said, whether there was ever any known case of a mechanism for securing accountability? We put the point in this way at 47(4). You can test the point on rationality in this way. Suppose there was no or no adequate legislation in place prohibiting violations of IHL, no or no adequate mechanisms in place to secure accountability for violations of IHL, and no independent functioning judiciary capable of punishing violations of IHL by the armed forces. If that were the case, if those were the facts, and they might be for all we know, could a decision-maker rationally say that those facts were irrelevant? We say, with respect, no. They would be centrally relevant to one of the issues which the Secretary of State accepts he must address, which is, does the recipient state have capacity -- and capacity here includes legal capacity -- to ensure that weapons will be used in accordance with IHL and international human rights law?

That, my Lords, in a nutshell is ground 2. Ground 3 we deal with in our skeleton argument at paragraph 48 to 52 and in the reply at paragraphs 10 to 11. I am not going to say a great deal about this ground. It is a challenge to the conclusion that the Divisional Court drew in relation to intensity of review. The challenge takes issue with one of the points made by the Divisional Court, which was the analogy that it drew between Rayman(?), which I am sure both of your Lordships are very familiar with, which says essentially, where you are

taking a decision on national security grounds, then a great deal of -- different words in different cases -- but a great deal of deference is due to the Secretary of State. The same is true when one is taking a decision about what is in the United Kingdom's foreign policy interests, for example, so those kinds of consideration which both your Lordships will be familiar with having sat in SIAC.

We say that the analogy, in short, is a bad one, because this was not a decision that turned on political considerations, as the Divisional Court itself accepted. It is a decision that turned on an analysis of risk which is precisely the kind of analysis which courts are accustomed to perform in, for example, analysing safety on return issues. We draw attention in the reply -- I am not going to go to it but I will show you where we have made this point --

LORD JUSTICE IRWIN: It is a bit of a different kind of risk.

MR CHAMBERLAIN: Well, it is a different kind of risk in one sense, but we say that there is an analogy to be drawn between the type of analysis or assessment that is involved. In an asylum case, what you are considering is, is there a real risk, for example, that someone is going to be subject to persecution or subject to proscribed ill-treatment under, say, Article 3. That involves an analysis often of a whole range of sources including open sources and sometimes it involves -- if one is looking at an asylum case it might involve some closed sources as well that are not available to the open. But the court does not in general in considering that type of risk apply a Rayman type of deference as it would to the question --

LORD JUSTICE IRWIN: No, because the risk does or does not attach to a process with which the court is centrally familiar, albeit in a foreign jurisdiction. Look at the **(inaudible)** judgment. But here, what you are dealing with is the risk of the future conduct of military operations.

MR CHAMBERLAIN: It is, but part of that conduct, and this is really the point we make in our reply submission -- there are two parts of the analysis. I am not going to dwell on this point for long because as your Lordships will have seen our main grounds we have dealt with already, and ground 4 is obviously important too, but on this point, we do say in relation to ground 3 that there is a difference in the two parts of the analysis that are involved.

Two parts are involved. One, a backward-looking analysis of what has happened in the past, and that is whether there has been a pattern of violations or

not. Then two is a forward-looking analysis of whether in the light of what has happened in the past and all the other things we know about the attitude of the relevant government, there is a clear risk. We do say that at least when one is looking at the first part of the analysis, it is a kind of analysis which the court is accustomed to performing, and it is more analogous to the kind of factual analysis identified in, for example, the MB case which we refer to in paragraph 11 of our reply.

You will both know that the MB case says, there are two parts of analysis here. When we are asking the question, is there a reasonable suspicion this person has been involved in terrorism -- I know that is obviously a different question; it is a factual question -- it is a backward-looking question. We do not defer. But when we then go on to the next part of the analysis which is, in the light of that, is it conducive to the public **(inaudible)** whatever it is or in the national security interests of the United Kingdom to impose this or that obligation, then we do apply a Rayman type analysis. So, they disaggregate the analysis in that way, and we say by analogy the analysis here can be disaggregated in that way, and at least when one is looking at the fist part of the analysis, which is the backward-looking part, there is no warrant for the type of deference which the court applied in, for example, Rayman.

Can I deal then with ground 4. This is also a legal ground. The best summary, as I have said, of the claimant's case on this before the Divisional Court can be seen again from the reply submissions which you saw before at core bundle tab 7, pages 155(b) to 155(c). You have seen before that we split the reply submissions into two parts. One was the pattern of violations question. The second was a question of serious violations. If you look at 2(a), we said:

> "It is not accepted that serious violation of IHL is synonymous with grave breaches of the Geneva Convention or additional protocols. The wording of Articles 89 and 90 to C1(?), Additional Protocol 1, makes claim that serious violations is a wider category. The latter provision makes reference to a grave breach or other serious violation, indicating the two are separate."

The tribunal in *Tadić* made the same point, setting a much more general threshold criterion. It is important to bear in mind, we say, that what one is

looking for under criterion 2 is the recipient state's respect for IHL; it is not overtly concerned with questions of individual criminal responsibility.

We have sketched out in our skeleton at 53 and following why the proper interpretation of serious violation matters and what we say the proper interpretation is. On the question of why it matters, can I show your Lordships the Secretary of State's case before the Divisional Court, what they were saying was the true position. At page 167 of the core bundle, tab 8, at paragraph 38 we can see they said this: "As is accepted by the claimant…" that is what they said based on their understanding of what we say in our skeleton, "…the term 'serious violation' has a particular meaning as a matter of IHL and is synonymous with 'war crimes and grave breaches as defined in particular in the four additional **(inaudible)** Additional Protocol 1 and Article 8 of the **(inaudible)** statute." They set out the user's guide, which of course uses the word "include" rather than "synonymously".

Then if one goes forward to 40, they said this, after setting out the relevant provisions of the **(inaudible)** statute, "As is evident from these provisions and as indicated by international case law, war crimes generally require intentional or reckless conduct (see *Delalić*)." Certain other things are cited there. Whilst the precise mental element may vary depending on the crime concerned, some mental element will be necessary. Then a reference was made to a journal article. That was the Secretary of State's case.

They said, as you have seen from the skeleton argument, they understood to be in agreement on that point, at the point where they put in their skeleton argument. But we made clear, in oral argument and as you have seen in the reply, that we were not in agreement on that point. We said that serious violations had a different meaning and a much wider meaning.

Before I show your Lordships why we say that, let me show you some other documents that indicate why this matters, because I think one of the points the Secretary of State makes is, it does not really matter and said if the Divisional Court in answer to our application for permission to appeal said, "It does not matter because we have said in our judgment serious violation includes…" and they underline the word "includes".

We say, with respect, it does matter for this reason. If you look at the documents disclosed that were before the Secretary of State, it appears that the Secretary of State's understanding, which is that serious violations are synonymous with grave breaches and war crimes and require a mental element -- it appears that was crucial to the Secretary of State's understanding. You can see that, for example, from supplemental bundle tab 14, page 322.

This is a Foreign Office advice which informed the decision. This advice was given in January 2016. Paragraph 11, they said this:

> "Past performance is often a helpful though not necessarily determinative indicator included in a risk assessment. In a conflict that has been ongoing at that time for 11 months and which over a certain number of the strikes had not given rise to IHL concern, it is arguable that whilst there is risk here, that risk is not clear. Particularly when assessing for a qualified risk, as required by the TC test…"

Then there is reference to the point about UK licensed items, "and whether those incidents of potential concern involve not just a violation but a serious violation of IHL."

So, what they are saying is, it is a finely balanced decision. There is a risk but one has to ask whether it is a clear risk. And in assessing that question, it is important to ask whether incidents of potential concern involve not just a violation but a serious violation. So, the question of what constitutes a serious violation is important.

If one then looks at Mr Crompton's witness statement, which is at 189 in the same tab, he says at paragraph 58, "The update notes that intent is a key element in assessing IHL compliance and acknowledges that there is often insufficient information to determine intent." Your Lordships will have seen that a consistent theme of the Foreign Office updates, which are excerpted in the judgment going through them, are that we have not been able to establish that there have been breaches, not we have established that there have not been.

You can see that is mentioned at 58. He then goes on to say:

> "It is also clear from the update that those making the assessment were well aware that a consistent pattern of non-deliberate incidents with the same cause and without remedial actions being taken to address that cause could amount to a breach."

But this is all part of a war crimes analysis. You can see that from the last sentence. "We have taken into account recent NGO reports in our assessment, and we are ensuring that we are meeting our responsibility to avoid any risk of wilful blindness." Wilful blindness is a term that is used in connection with grave breaches and war crimes. So, they are looking at a war crimes paradigm, if I can put it like that.

LORD JUSTICE FLAUX: But they are also recognising, are they not, that consistent patterns of non-deliberate incidents could nonetheless amount to sufficiently serious violation.

MR CHAMBERLAIN: That is all part of, with respect, a war crimes or grave breaches paradigm, because that too could amount to a war crime. Why? Because if you have a consistent pattern of non-deliberate breaches and you are not doing anything about it, then that gives you the intent necessary for potentially war crime. Why? Because war crimes can be committed recklessly as well as intentionally in the strict sense.

You have to read that consistently as well with the Secretary of State's submission to the court, which was, as I have shown you in the skeleton argument, that serious violation of international law was synonymous with grave breaches and war crimes, including those which can be committed recklessly by wilful blindness or whatever.

We said and we say that the true position is that actually serious violations of international law comprehends a wider category of international wrong than grave breaches and war crimes. We make that point by reference to a couple of different sources. The first source that we have referred to are the words of the Additional Protocol 1 themselves, which talk about grave breaches "or other" serious violations of international law." The second major source that we have looked at -- I will just show your Lordships this, if I may, which is the ICRC commentary on Article 89. That is authorities bundle, tab 17, page 1033.

> "At 3588, you can see the meaning of the words in situations (inaudible) serious violation of the Convention or of this Protocol [those are the words that you find in Articles 89 or 90 or Additional Protocol 1] was not (inaudible) conference. The expression 'serious violations' is only used in one other place in the Protocol. The system of Convention in the Protocol requires that the contracting parties suppress (inaudible) contrary to the provisions of these instruments.

> Furthermore, they must impose penal sanctions on conduct (inaudible) instruments as grave breaches. The terms 'violation' and 'breach' may be considered to be synonymous and both cover any conduct both (inaudible) contrary to the Protocol. Does this mean the expressions 'grave breaches' and 'serious violations' are also synonymous? The principal elements of the answer can be found in Article 90 at which the above-mentioned paragraph distinguishes grave breaches as defined in the Convention and the Protocol and other serious violations of the Convention or of the Protocol. The latter, therefore, refers to conduct contrary to these instruments which is of a serious nature but which is not concluded as such in a list of grave breaches."

Then there are examples given of what might qualify.

LORD JUSTICE FLAUX: Including the second example, which is the pattern of non-deliberate breaches, is it not? Non-deliberate violations of **(inaudible).**

MR CHAMBERLAIN: Of course, that is an example, but we then go on to look at tab --

LORD JUSTICE FLAUX: It is a cumulative point, I suppose, even if it is not deliberate. If it carries on occurring, so it is a cumulative thing. You can say this is a serious violation or a series of serious violations.

MR CHAMBERLAIN: We do say that, but we also say that when one looks at the analysis that the Secretary of State undertook, although there is reference to non-deliberate, it does appear to be in the context of establishing recklessness or wilful blindness for the purposes of a grave breach analysis. That appears to be consistent with what the Secretary of State was submitting to the court, which is that serious violations were synonymous with grave breaches. That was the submission made. We joined issue on that submission. We said that is wrong.

I show you *Tadić*. Before I show you *Tadić*, can I show you the latest ICRC document which is about arms transfer decisions. It is in the supplemental bundle at tab 22, page 478. This is a document which is actually a very recent document, I think.

LORD JUSTICE FLAUX: August 2016.

MR CHAMBERLAIN: That is right. It is a recent document. It deals particularly with this context. It deals with the question in the context of the arms trade treaty which is one of the international instruments that is the precursor to the Common Position, which itself is the precursor to the policy. If you look at that

document at 489 at the top, 3.3, which acts are considered serious violations of IHL.

> "Violations of IHL are serious if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian objects or infrastructure) or if they breach important universal values. The most serious violations of IHL involve causing death or injury or the destruction or unlawful taking of property. War crimes are serious violations of IHL that entail individual criminal responsibility and that states have the obligation to prosecute and punish pursuant to treaty or customary law."

What it is saying there is, there is a separate test, and you can see from footnote 15 that the reference is to the decision of the Tribunal for the Former Yugoslavia in the *Tadić* case, which I will come to in a minute. What you can see here is that -- I am conscious of the time; I have given the references -- they are saying serious violations of IHL are simply those which endanger protected persons or objects or breach important universal values. That is obviously a much broader category than simply war crimes or grave breaches, and we say that is important.

I have given you the references, but perhaps I will just give you for your note the references to the tribunal for the Tribunal for the Former Yugoslavia decision. *Tadić*, authorities bundle 10, pages 37 to 38 at paragraph 94, makes the point that the requirement for something to constitute a serious violation is separate from the requirement that it entails individual criminal responsibility.

Same point can be seen from the subsequent decisions in *Galić*, authorities bundle tab 12, paragraphs 106 to 108, and *Delalić*. I will give you the reference to that in due course. Essentially, the point on ground 4 is, if we are right and the Secretary of State is wrong about the meaning of serious violation, it follows that the argument being made at the hearing before the Divisional Court by the Secretary of State and the basis on which the Secretary of State took the decision were both wrong.

If that is so, when you are dealing, as we are here, with a finely balanced decision, that could have affected the result. Therefore, we say it is a ground that is material. If it is an error of law, the court finds on a substantive appeal that we are right and the Secretary of State is wrong, it is something that could have -- not saying necessarily would, because it would depend on how the decision was retaken -- but it could have affected the result.

My learned friend asks me to draw attention to the ILC commentary at paragraph 10 to show that intent is not generally relevant to the question of state as opposed to individual responsibility for serious violations of IHL. The ILC commentary is tab 15 of the authorities' bundle. Unless I can assist further, those are my opening submissions.

LORD JUSTICE IRWIN: Thank you.

MR EADIE: My Lords, if I start with the nature of the judgment of the Divisional Court, a couple of brief points in relation to that, because it may be as well, particularly in a context which is filled with evidence and material **(inaudible)** keep coming back to the judgment itself. But it is evidence from that judgment we respectfully submit, the judgment of Burnett LJ as he then was and Haddon-Cave J, that they conducted the most detailed and careful review of the facts: 214 paragraphs, over 50 pages, after a review of the very extensive material provided to the court.

There were four or five lever arch files on behalf of the claimant. There were roughly equivalent files on behalf of the defendant with witness statements 1, 2 and 3 from various of the defendants on behalf of the defendants, over 100 pages of evidence. That is just the statements, leaving aside the exhibits and closed material as well.

The way they approached that evidence one sees, if you have the judgment -- maybe it is worth keeping that judgment out because I am going to refer to it quite a lot. You will how they approach that evidence in paragraph 60. Just to remind you of that paragraph. You see what they were trying to do from paragraph 60. There is no earthly reason for supposing that they did not achieve the aims that they set themselves on that voluminous evidence that was before them.

Their key conclusions, it might be thought, in this long judgment are the detailed conclusions between paragraphs 104 and 175 on the six strands of material that they there analysed. Those were important obviously to deal with the basic challenge which is made, which is that the open source reporting created -- call it a presumption if you will; call it a burden if you will -- an evidential picture which needed to be responded to in detail by the Secretary of State. Those paragraphs are of obvious importance in relation to that.

But if you wanted some paragraphs by way of summary conclusion, perhaps if I could respectfully suggest paragraph 120 as summarising their conclusion on process, i.e. the process, the *Tameside* point, the process which was being followed by government -- and I particularly call it government because as you are well aware, different departments were involved in the feeding in [of] intelligence information and materials. 120 is perhaps the critical concluding paragraph on process.

181, signally absent from my learned friend's submissions this morning, but setting out their summary reasons for positively disagreeing with the central submission and one of the central submissions which is now made, which is that the nature of the detailed engagement by the Secretary of State with the open source reporting needed to be of a particular kind, on other words, reaching quasi-judicial findings about some or all of the allegations or contentions or areas of concern that had been raised; or, even if they did not need to do the full quasi-judicial thing, some assessment of likelihood that there was a violation. That was the nature of the argument that was being made, and they simply did not accept that, for the reasons that they summarise in 181. So, that is perhaps a key paragraph on that point.

208, which I will come back to, which is perhaps a key paragraph on why the open source reporting, however august the bodies that are doing it, is not the answer and does not lead to real presumptions of weight. That goes in effect to the imbalance of information available to them as compared to Government. But that 208 paragraph is important on that.

Then 210 and 211, on the basic and fundamental conclusion on the rationality challenge. A substantive rather than tensile rationality challenge, namely, was the Secretary of State entitled, as a matter of public law by reference to rationality standard, to reach the conclusion that there was not a breach of 2C.

Can I turn to the first of the grounds. This is in essence an error in approach to the open source material, is the argument, and the necessity for there to be findings of part-breaches of IHL by KSA or engagement in that way with the open source material. My first submission in answer to that is there is nothing to support the proposition that the court, that is the Divisional Court, needed to approach its

rationality function on the basis that there was some form of presumption created by the open source reporting and materials.

My Lords will need no reminding that the headline test in 2C is whether there is a clear risk that items might be used, so a prospective test, in the commission of serious violation of international humanitarian law. That was of course a test for the Secretary of State in the first instance, and it as a test does not involve any system of presumptions. The question rather is an overall one, not channelled by English law concepts of legal presumptions or evidential presumptions or matters of that kind. It is obviously a test which is derived from a continental system ultimately. It has to work in just the same way in France and in Germany as it does in the United Kingdom with their different systems of law.

That system, as one would expect, envisages that, "account will be taken of all reliable evidence." See, for that purpose, the judgment at paragraph 10, citing form the Consolidated Criteria.

LORD JUSTICE IRWIN: Mr Eadie, I did not listen to -- listening to Mr Chamberlain or reading the submissions, I did not think he was going as far as to say there was a legal presumption that open source material took you anywhere; merely that on the facts here, the facts were such that they had to be addressed. I think that is as far as --

MR EADIE: My Lord, I do not hang my argument on legal presumption versus evidential presumption versus something rather looser as my Lord has described.

LORD JUSTICE IRWIN: Yeah.

MR EADIE: I think it goes a little bit further than the way my Lord has put it, because he accepts, he would have to, on the basis of the findings of fact in this judgment, that there was detailed and positive engagement with all of the allegations of concern. The evidence in relation to the tracker was they took the incidents of concern from a whole variety of sources including NGO and UN panel of experts reporting. So, there was engagement with. The point he really makes, and I am going to come to it, is that engagement needed to take place in a particular manner. In other words, there needed to be positive findings either that there were or there were not violations of international humanitarian law, or there was or was not a pattern of violations -- it comes to pretty much the same thing; or even if one could not reach final conclusions in relation to that, there needed to be an assessment of

the degree of likelihood in relation to some or all of the individual incidents that are identified. So, the debate ultimately may be between the manner in which that engagement happened.

But he definitely does say, here we have a set of open reports, and however you describe it, they trigger the need to engage. The point we would make by way of answer is, those reports undoubtedly are one of the matters that needs to be taken into account in assessing the overall question that 2C poses. We accept that. That is evident from the description in the consolidated criteria that all reliable evidence needs to be taken into account, and gives a series of examples.

The examples you see in the judgment at paragraph 10 are revealing to some extent, because they are not just relevant reports by international bodies, intelligence and information from open source reporting and NGOs; they also include, tellingly by way of example, diplomatic post reporting, which is **(inaudible)** likely in some instances to be sensible. But they are recognising that variety of sources.

The question for the court, we submit, was whether or not the Secretary of State was lawfully entitled on all the material to conclude, having taken into account the open source and all the other sources of information available to him, that there was not a clear risk of the kind set out in 2C.

You see the summary of argument which does indeed refer, perhaps by way of shorthand -- maybe so but nevertheless that was the thrust correctly understood by the Divisional Court that the argument was in fact run before them -- with the various references to "presumption" in the judgment at paragraphs 54, 86 and 205 using that word.

The second submission that we make is that the approach in fact taken by the Divisional Court was, we respectfully submit, unimpeachable, because the evidence demonstrates why it would be wholly inappropriate in this context for there to be, as it were, any weight, by which I mean presumptive weight, placed on the open source reporting. The Divisional Court reviewed the totality of the material before them with the greatest care and in intimate detail. They did so in open, but they also did so on the basis of the sensitive material which they received. They concluded that the open source reports had to be, as they put it in

the judgment at paragraph 207, "properly considered in the overall evaluation." That is another way of saying, relevant and take them into account.

But there is no error there by the Divisional Court. There is no legal error. They have taken them into account. They recognise that the Secretary of State needs to take them into account. But they do not create any -- they do not alter the legal shape. They are simply a factor, a set of views to be taken into account alongside the totality of the material.

In short, the simple proposition is the correct approach for the Divisional Court to take, just like the Secretary of State, was to have regard to all of the evidence, all of the materials, including that open source reporting. It is entirely clear, we submit, that the Divisional Court did so, just like the Secretary of State, having recognised as the starting point, if I can put it in neutral terms, the gravamen of that open reporting.

LORD JUSTICE IRWIN: Where do you say they did that, recognise the "gravamen" of the open reporting?

MR EADIE: In the judgment, they set out all of the key passages upon which my learned friend relied from all of those reports.

LORD JUSTICE FLAUX: It is paragraph 86, really, is it not?

MR EADIE: Yes.

LORD JUSTICE FLAUX: The conclusion that a substantial body of evidence suggesting the coalition has committed a series of international **(inaudible)** IHL.

MR EADIE: Exactly so. That is the observation that sits at the end of their summary of the key passages in those reports.

LORD JUSTICE FLAUX: But then they make the point which is essentially the submission just addressed to us that the open source material is only part of the picture.

MR EADIE: Exactly so. The point that my Lord, Flaux LJ has just put to me is important, because without going through all the points we make in our skeleton at paragraph 15 again, and without descending too far into the detail of the careful analysis of the Divisional Court, it is perhaps worth picking out two or three points as to why it is that they were the starting point only, if I can put it that way.

The first of these points is, the Divisional Court was particularly and properly alive to the fact that there was a wider range of information available to the

United Kingdom than to those who produced the open source reporting. Within "wider range" I include a range of information which is both, it might be thought, quantitively and qualitatively better than the material and information available to those producing the open source reports. So, they had and were analysing -- that is the Government had and were analysing the MOD tracker.

As the court **(inaudible)** if one traces through the way the judgment then works after the starting point that my Lord identified at 86, they had the MOD tracker which is dealt with in particular at 104 and following. They note between 108 and 115 the fact that the MOD tracker was dealing with and was analysing and did then analyse all of the allegations that the open source reporting drew attention to -- I use the word "allegations" deliberately and advisedly -- but also more. It was quantitively greater; they were analysing the numbers that you see there set out, whatever the numbers were but considerably more than the open source reporting. They were taking them but analysing additional incidents of concern. That is the point that is made. That is the punchline, if you will, about the perception at 115 of the judgment.

But you see in my qualitative analysis, they then go on to the qualitative analysis at 116 to 117. They have all of that information which is not available to those who are doing the open source reporting. Specifically and very importantly, skipping over the conclusion on process at 120 that I drew attention to earlier, they then go on to consider the fact that we had insight, for all the reasons analysed at some length in 121 and following -- we had considerable insight not available to open source reporting into the processes, actions and attitudes -- attitudes being of considerable importance under 2C for obvious reasons -- of the Saudis.

That was not just insight into their military processes and procedures, which is dealt with under the bold and italicised title 2 on page 81 just above paragraph 121. They were able to gauge, if I can put it this way, top-line political reaction within the Saudi government and those who were responsible for conducting the military campaign, which is obviously a matter of considerable importance when the centrepiece and focus of the 2C test is on assessing the respect for IHL of the state concerned -- you will remember that word in 2C -- and when you are trying to gauge likely future attitudes to the conduct of military operations in a test which is prospective rather than retrospective at its heart. And

they had the detail of the post-incident investigations and reaction from Saudi Arabia when concerns arose, when there were incidents of concern, which in any military operation there will be.

So, that is the first reason for being cautious about placing more than a starting point reliance upon the open source reporting. The second, and it is a point to which the court below was also obviously alive on the limitations on open source reporting. To some extent, that is the flipside of the point I have just made, but there are additional points.

That is relevant as to the extent to which they truly did provide even *ex facie* support for their conclusion that there were in fact or there had in fact been past violations of IHL as compared to incidents of concern where civilians are injured or killed in military strikes.

LORD JUSTICE FLAUX: I follow your points. Nonetheless, the conclusions drawn by the UN expert panel in the second report from January 2017, which was really hard up against the Divisional Court hearing, were in pretty categorical terms, were they not?

MR EADIE: They were, but you will have noted --

LORD JUSTICE FLAUX: In relation to I think 8 of the 10 incidents they were investigating, one of which was the funeral hall.

MR EADIE: Exactly, so. We will come back to that no doubt in greater detail at some point, but you will have noted that (a) it was 2017, so the process of engagement, reaction and so on, had already been occurring in relation to the Great Hall strike, which was the principal one we were concerned about. There had not been that process of reaction to that report -- had not yet occurred. But you will also have seen that for good or ill, the Saudis did not cooperate. That was one of the complaints that was made by the UN panel of experts. They had not provided information the UN panel had sought, so they did not have access, for example, to targeting information, that insight. You can criticise the Saudis no doubt for that, but those conclusions are inferences that are drawn still in the absence of what might be thought to be critical information if what you are trying to do is to form some sort of assessment about matters such as distinction and proportionality and how targeting processes are working.

MR FLAUX: So, it will be obvious that, although it cannot be described in open in full, the Secretary of State and the Government have access to much more information. That is what the court found. A degree of it cannot be spelled out, or particularities cannot be spelled out.

MR EADIE: There is quite a lot of detail in the open judgment, is why I took you to those paragraphs, but my Lord, yes. This second point is a slightly different point, which is the court was also alive to the concerns about the way in which that open source reporting had founded the assertions or views about violation that they did.

Let me take you to the judgment itself, 182. It is an important point. The first sentence of 182 is of course that we had better access point. That is a repetition of my point 1. But into point 2, the claimant's case depends largely on inferring violations of IHL on the base of reports or civilian casualties and damage. IHL was(?) more sophisticated and so on than that. Then 201, sub 2, in particular on the second half of sub 2, "By contrast the reports of the NGOs…" and so on.

MR FLAUX: Hard to know what that means without some more specifics. I do not know whether you want to illustrate it.

MR EADIE: I think the point that is there being made is that when one goes to some of the NGO reports, you see that in large part they are based on, and the conclusions that they reach are based on, those sorts of considerations. So, they are going on particular photographic evidence. They are reliant on second-hand information. They interview witnesses on the ground but they are witnesses on the ground after the strike has happened, and the relevant question from an international humanitarian law perspective is, what happens before the strike occurred? So, they suffer from those weaknesses, as it were. It does not denude them of any value; it just puts a proper note of caution before taking too readily even a broad statement of conclusion and view about violation. One does need to bear in mind those sorts of limitations, at least in relation to some of them.

The final note of caution perhaps is the one which is struck in 208(4) of the judgment. It is that although there are some clear expressions of view about violations Burnett LJ drew attention to, often (see the final sentence of 208(4) as the Divisional Court correctly recorded), the reports are "directed at broader considerations."

LORD JUSTICE FLAUX: I appreciate at the time of the Divisional Court judgment the second report was really not available in the open, so it is not dealt with in the open judgment, is it? It seems to me at least, that is the most compelling example of a report which is not by an NGO; it is actually by a United Nations expert panel, set up pursuant to a United Nations resolution, which specifically finds that there were serious violations which they considered may amount to war crimes. So, they draw a distinction between serious violations on the one hand and war crimes on the other, and in relation which they also find in terms that the Saudi government failed to cooperate, which was a breach of a UN resolution, which they, it seems to me, correctly considered to be an extremely serious matter.

MR EADIE: Yes. It cuts both ways, the failure to cooperate.

LORD JUSTICE FLAUX: Of course it does.

MR EADIE: Of course it is serious, but it means that the earlier finding of violation --

LORD JUSTICE FLAUX: One just does not know precisely, because it is not spelled out at least in this part of the report -- I will not pretend to have read it all -- upon what evidence they base their conclusion. For example, what was the evidence they had or the lack of evidence, if you like -- no evidence that the airstrikes had targeted legitimate military objectives.

MR EADIE: Quite. The answer to that is they had no evidence, because the only source of that evidence could have been Saudi targeting, reports of that kind and so on. I do not seek to diminish the non-cooperation seriousness, but there is a --

LORD JUSTICE FLAUX: For better or worse you can say they were or they were not because they had not had that cooperation.

MR EADIE: They were where they were. Also bear in mind the motion of the timing of all of this. My Lord already has the point that it was hard up against the hearing.

LORD JUSTICE FLAUX: Yeah, sure. But your point is that in contrast, whatever the rights and wrongs of the Saudi approach, the UK Government did have the cooperation of the Saudi authorities.

MR EADIE: Yes, exactly so. It was better placed for that reason. So, one needs to introduce a note of caution. If the answer is that UN panel of expert reports create a pretty serious starting point, and the more serious the language the more firmly **(inaudible)** the more serious that starting point is, then that occurs, as it

were -- that consideration, that taking it into account, occurs when that view has been expressed. This is ultimately a challenge to something that had happened before that. Having said that, the core, real core incident of concern was the Great Hall strike. That was considered in some detail by the Divisional Court for obvious reasons, because it was a very serious incident.

But in relation to the earlier UN panel of experts' report, as my Lords will be well aware at least in the open judgment, that is dealt with in terms putting together some of those strands that I just identified in 208(5). The third reason for a little caution, and I have to some extent made the point already so I can make it shortly, is that the IHL considerations and the IHL flavour of the issues that were being considered, rendered both the privilege information position of the UK and the concerns about open source reporting and their limitations all the more significant, because as you saw from the Divisional Court judgment between 21 and 24, whatever adjective one puts in front of violation of IHL, the principles of IHL which are of concern in military conflict, the central principles of concern in a military conflict are likely to be those that the Divisional Court set out carefully and accurately between 21 and 24 of the judgment, including in particular the principle of distinction and the principle of proportionality.

As my learned friend has rightly recognised, neither of those precludes, no military operation ever could, the possibility of collateral damage, the possibility of civilians being embroiled in the armed conflict, injured and killed. What it requires is that the decision-making is, as it were, as good as it can be and that proper and reasonable steps are taken to try to minimise that state of affairs, which is precisely why the Great Hall strike was of such seriousness and is treated as such by all concerned.

But it is those principles that need to be determined. So, if you are trying to work out whether targeting was done properly, unless you are simply going to infer back from the fact of civilian casualties -- which does not actually take one very far; it demonstrates that there was a serious issue of concern to be considered -- but if you are trying to work out whether that occurred as a result of a breach of IHL you have to go back to the prior stage, to the prior targeting stage and the decision-making that was taken in relation to the military operation in question.

MR FLAUX: I wonder if it comes to much more than this, that the frequency, the degree, the intensity, the continuation beyond the point of engagement between the UK and the Saudis was such that in order to take it into account properly both Government and the Divisional Court needed to do more than say, we have taken it into account the volume of the evidence or the nature of the extent, and it was such that it could required some kind of answer, specific answer. This is why we set aside this pattern. Not as a matter of legal presumption, not as a matter of a formal evidential presumption, but on the facts of this case.

LORD JUSTICE FLAUX: That is Mr Chamberlain's argument, because he says in terms quite sensibly and fairly that it would be unrealistic to expect every single incident to be, as it were, picked off in turn, but what you would expect is a sufficient weight of response that addresses and neutralises the impact of the open source reporting in relation to which the Divisional Court concluded, as it did in paragraph 86, having so concluded as it were, if one looks in terms of, which is a question for us, the Divisional Court's judgment and whether an appeal is arguable at this stage, the question I think my Lord has posed is precisely that question.

MR EADIE: Is there a burden -- I am not using that in a legal sense -- as a result of the open source reporting in paragraph 86 to produce at least in relation to some of them -- because if you say there is a pattern of violation you assume there are violations in the individual cases, but is there a burden to explain why, as it were, you disagree.

LORD JUSTICE IRWIN: Burden is difficult, because it entangles us within whether we mean a legal burden of any kind, which I do not **(inaudible)**. But whether on the facts of this case, the intensity, the length, the continuation past the point of engagement with the UK in training terms and cooperation -- but it is such that here, taking it into account cannot be merely lip service. There has to be some actual reasoning that says despite that we can pass the threshold.

MR EADIE: My respectful submission in answer directly to that is that the extent of enquiry has to be -- it merges, as it were, the two elements of the rationality, substantive rationality and reaching a conclusion that there is no violation of 2C, which is a prospective -- and a *Tameside* burden of enquiry and/or explanation, as it were, in relation to those past incidents. My respectful submission is the way in which this scheme works is that the headline test is the prospective one; the past is

relevant obviously to the future, because it provides a guide and there are, therefore, rational judgments to be made about how you engage with the past. Those are judgments that have been made by the Secretary of State rationally. The rationality question is undoubtedly affected by the production of reports to be taken into account, as the guidance indicates, by respected bodies such as the UN panel of experts and other NGOs.

What that does not, however, require, in my respectful submission, is that the Secretary of State or the Government, or indeed France or Germany or any state that does not have access of the privileged kind that we might to do Saudi Arabia, are under a burden, and I deal with that phrase here, are under a duty or a burden to produce detailed answers whether on likelihood of violation having occurred or on whether or not in their view violation occurred in relation to any particular incident or indeed in relation to any pattern that might flow from those incidents.

What they are required to do is to take into account those serious incidents of concern however raised, conduct such analysis of them as they can on the information available to them, and if they have access to privileged information they of course will have to bring that to bear. But they are entitled within that approach, I respectfully submit, to make judgments about those incidents which they consider to be particularly serious knowing what they do about the way in which the recipient government has been conducting and is conducting the military operation.

For example, it would be of considerably greater concern, I respectfully submit, if there was an inappropriate and extraordinarily limited reaction to an incident of the seriousness of, for example, the Great Hall strike. They are entitled, I respectfully submit, to make judgments about how best to go about using the past to inform the key judgment they have to make, which is the prospective one. And there is nothing in the scheme of this international legal framework to suggest that it is any part of or any necessary part of forming that 2C judgment, whatever the UN panel of experts or NGOs might have said by way of view, that requires England, France, Germany or anyone else that is party to this Common Position to produce, as it were, a detailed rebuttal before they can continue to -- before they can say 2C has been met.

LORD JUSTICE IRWIN: Are you meaning to produce it even for the minister or ministerial group who takes the decision?

MR EADIE: To produce it internally or to produce it in public. The past is the guide to the future, certainly. But ultimately, the judgment that has to be made is a prospective one, and what that requires is an appropriate reaction to incidents of concern and expressions of views that there may or may not have been violations by international bodies. That is one of the relevant sources.

LORD JUSTICE FLAUX: This is not in a sense specific to the case really, but I am slightly struggling with the submission in one sense that because alive, or as you say, the past is a guide to the future, it seems to me it necessarily involves some sort of judgment as to the seriousness of what has happened in the past. I do not see how you can engage in that judgment or exercise that judgment without actually -- where you have evidence that there were -- bodies like the UN expert panel said there were serious violations -- unless you have engaged in some sort of analysis, not case by case but on an overall basis, of whether there is a pattern or not.

MR EADIE: My Lord, I do not disagree with that. The engagement is fine.

LORD JUSTICE FLAUX: Your point is the engagement, picking up on that word, does not have to take any particular form.

MR EADIE: Exactly so. That is the critical bit, because the real --

LORD JUSTICE FLAUX: There are no tramlines you have to **(overspeaking)**.

MR EADIE: The real complaint that is made against us is that we have not reached either what the Divisional Court described as the quasi-judicial review is there or is there not a violation of IHL, nor have we gone into a thing that says our assessment of the likelihood of there being an violation of IHL in relation to any particular incident is 30 per cent, 40 per cent, 70 per cent. But what is clear is that we have, and we did and we do engage with all incidents of concern. So, if there is reporting by the UN panel or NGOs, for example, there have been military strikes involving a hospital -- take that as a hypothetical example -- the fact that a hospital has been hit does not establish *ipso facto* a violation of IHL.

LORD JUSTICE IRWIN: I fully understand that.

MR EADIE: Nor does the fact that civilians have been killed. But I fully accept and assert that we would be required to be engaged with any incident of serious

concern that raised questions about the compliance by Saudi Arabia and the coalition forces -- raise concerns about whether or not they had violated or had breached IHL. So, I am not taking my stand on the basis of non-engagement.

(Overspeaking)

LORD JUSTICE IRWIN: I wrote down something you said earlier about -- it is probably my fault but I am going to check it with you. I wrote down that you said, "It is not necessarily part of the rational judgment that is required to produce internally or in public a detailed analysis of the past."

MR EADIE: I am trying to answer the case which is being put against me. A detailed analysis of the past means, on my learned friend's submission, a conclusion, more or less final, or arriving at a conclusion as to degree of likelihood of violation of IHL in relation either to most or in relation to some allegations of concern. I do not accept, and the Divisional Court did not accept, that was how the thing worked. What I do accept is that if someone raises, whether it is the UN panel of experts or NGOs, or it comes to our attention from our own sources that incidents of concern have occurred, e.g. the striking of a hospital or e.g. a strike which involves considerable civilian casualties such as the Great Hall strike, there are issues of concern; we have to engage. I accept that. That is what is required, proper engagement, not in a particular manner, not with any finding quasi-judicial or otherwise of likelihood of violation of IHL, but proper engagement of that incident of concern.

How would that occur if you are the UK or you are France or you are Germany? The answer to that is, you look at the incident, you note it, you take it seriously, you try to gather such information open and closed as you have in relation to that incident. And if you think that as a result of that initial, as it were, information analysis there are still concerns that are live and ongoing, you seek to engage, if you can. It may be that you cannot if you are France or Germany, whoever it may be. If you are the UK you can. You seek to engage with the recipient country to try to obtain further information, to see if it was a -- to make a judgment about whether or not it was a reckless or a deliberate thing. Even if it was not, to see why the serious incident occurred, to see to the extent that you can how their targeting systems work and worked in this particular instance, why things went wrong.

LORD JUSTICE IRWIN: Whatever the detail, what you are describing is a process of saying there is an obligation to engage and look carefully to see whether what appears to be a pattern of violation will continue.

MR EADIE: Or a single individual incident. I am not restricting **(overspeaking)**.

LORD JUSTICE IRWIN: It is the future. It is whether having seen what has happened and assessed it, and then assessed the reasons and so far as you can you move to the future. What you are really doing is setting aside what ostensibly looks like a pattern of violation on the facts of this case, because that is what the UN special body said. You are having to set aside a pattern because that is what they laid down. Is that not right?

LORD JUSTICE FLAUX: Even if it is only to the extent of saying because of what we, the UK Government, know above and beyond what the UN experts knew, we can discount their conclusion that there was a pattern of violations.

MR EADIE: They would not do that in relation to the report that my Lord has in mind, because it had only just come out, as it were. So, any reaction, any evidential reaction to that might be -- would be likely to be future **(inaudible)**.

LORD JUSTICE IRWIN: I would put it slightly differently. It is not a question -- you set it aside as an indicator of what is going to happen. You are looking forward. Whatever information you have at the time of the decision, if it establishes a pattern of violations, then do you not have to say, we can be reasonably confident or confident to the correct level that is not going to go on.

MR EADIE: But that is precisely why I started with the three points I gave you as to why open source reporting needs to be taken with a bit of caution.

LORD JUSTICE IRWIN: Of course. So, they give reasons for saying why it will not go on --

MR EADIE: And so you cannot proceed from the assumption what we are in effect doing is to set aside a finding of a pattern of violations. All one is doing is to say, there it is, that is the view that has been offered; we need to engage with that seriously. We do not need to reach a point of saying, there is a 60 per cent likelihood that they were right on any individual incident or all of them. We do need to take that seriously to examine the basis on which that view was expressed, to see what information we have about the incidents of particular concern, all of them or some of the most serious, and then to use that total picture including any

reaction and any engagement we might then have in relation to selected incidents of particular concern, e.g. the Great Hall, including any further information that we agree(?).

As I say, this is not a process which as it were starts -- and it is almost in the language of presumption the way my Lord put the point to me. I know you are not putting it that way, but it says, here is a pattern of violence --

LORD JUSTICE IRWIN: I am not going to accept it even from you, Mr Eadie.

MR EADIE: Here is a pattern of violations that has been found by the UN panel of experts. Why are you not putting that aside? Is there not -- I was about to say burden but that would provoke the court even further -- something that sounds a bit like a burden -- to put that on one side and discount it. My respectful submission is, actually what you are doing when the UN panel of experts produces a report or an NGO says we have gone into Salwa City and they hit a hospital or whatever it may be -- what you actually need to do is to conduct the process I have described, which is to say: what was the basis for that view? What do we know about it? Are we going to discount this entirely or are we going to take it seriously? If we are going to take it seriously, what information do we know about it?

If we think it is of concern, if there are 10 of them that happen, if there are 8 from the UN panel of experts, is there a particular one we think is a particular concern which, as it were, would be illustrative of the attitude or a potential problem? From that analysis, I do not exclude pattern, because if, as it were, the same thing keeps occurring --

LORD JUSTICE IRWIN: Then obviously you will think about it.

MR EADIE: Then you are saying -- you said last time it was a bit of an accident; how does it keep occurring unless your systems -- so, tell us about the systems. What can we do to assist in relation to that? What can you tell us in relation to that? So, really, the plea as it were for submission on this side of the court is that evaluation should not, however tempting it may be for the lawyers to pigeonhole it in this way, start from the UN panel of experts and then say, there it is; now you have to produce something by way of answer. That evaluation is a broader one, and it requires you to look at the basis for the views that are expressed, take them seriously, to put your own information in including sensitive access, to recognise if

it is appropriate to do so that in part that view may have been expressed on the basis of no access to Saudi information, or it may have been partly based on interviews with civilians after the event, or it may have been based on all of those things.

You bring all your information to bear, and it is that evaluation, a broader evaluation, that feeds in to the prospective judgment you have to make, which is about their respect for IHL. What are they going to do tomorrow?

LORD JUSTICE FLAUX: I am sorry to take you out of your turn, but just so I do not misunderstand something -- looking in the judgment is probably the best place to look at it, paragraph 202 on page 103 where the Divisional Court quotes Foreign Office advice, which I think you have at page 171 -- where under the fourth point it says, "Saudi Arabia is seeking to comply with [International Humanitarian Law]…" and then, "In addition, 'Given the very small percentage of incidents'… They conclude that while 'there is a risk, that risk is not clear'" That quotation, the "they" there is the Foreign Office officials, is it? If you go back to the top of it --

MR EADIE: Yes, it is.

LORD JUSTICE FLAUX: "…the submission and [its] annexes by the FCO officials…" their arguments are as follows. So, it was the Foreign Office officials advising the Foreign Secretary, who said that the very small percentage of incidents of potential concern, therefore, no pattern of violations, clear.

MR EADIE: Yeah.

LORD JUSTICE FLAUX: Okay.

MR EADIE: But it is on the basis, as you know from the open evidence, that various departments are feeding in.

LORD JUSTICE FLAUX: Yeah, I understand.

MR EADIE: **(Overspeaking)** the MOD.

LORD JUSTICE FLAUX: There is obviously a timing issue, because this is February 2016.

MR EADIE: But there is MOD input into that, as it were. MOD have carriage of the tracker and all the things that feed into the tracker and all of that. So, this is based on -- these IHL updates which as you referred to are relied upon very heavily by

the Divisional Court for obvious reasons, are, as it were, the pinnacle of a full-blown governmental process of the kind I indicated.

LORD JUSTICE FLAUX: Thank you.

MR EADIE: So, as I say, I do not want this debate to be going off on a false premise. You have the way in which we put it, which is essentially the way the Divisional Court dealt with it. And it is about manner; it is not about non-engagement with incidents of concern; it is not about non-engagement with expressions of view in the open source reporting. The more august the body, and UN panel of experts are at the top of that tree, the more seriously that is taken.

It is not about non-engagement or not addressing those; it is about the manner in which that is done. Does there have to be the, as it were, quasi-judicial process that the Divisional Court described? We respectfully submit that they were right when they come to it at 181 to disagree that manner is required under either the continental scheme or under our domestic principles of rationality.

There is nothing in the guidance to say or remotely suggest that one has, as it were, to set out the basis of this agreement. Indeed, it might be jolly invidious for France, Germany or the United Kingdom to start setting out the basis for disagreement. They may not be able to, because they may have sensitive material access.

LORD JUSTICE IRWIN: Yeah. They are bound to.

MR EADIE: Quite. There is nothing in the continental system which says you have to engage, now you have to disagree. There is nothing in the continental system that says that in taking into account the past, the only correct and proper way of doing that under this system is to reach a conclusion as to whether there were or there were not, to a greater or lesser degree of likelihood, findings of serious violation in the past. That is just not part of the system. And it is entirely understandable that should be so when one takes into account the difficulty of the IHL questions that are posed and the information that you would need in order properly to answer that.

LORD JUSTICE FLAUX: It is the point the Divisional Court makes, is it not, is the impracticality --

MR EADIE: Impracticality but also one can take the impracticality back so that it becomes a purer point of interpretation, if you will, of the continental system. Let

us suppose for the sake of argument that you are France or Germany. Let us suppose for the sake of argument, I know not, that they do not have anything like the degree of sensitive or privileged access that we have to the state which is jointly conducting these military operations. How on earth could they do that? How could they properly do that? Indeed, on one view, how could we properly do that even if we do have sensitive access? Because there are bound to be limitations. Whether there is a breach of IHL is difficult enough to establish or to assess with any degree of confidence, even if you are the state conducting the military operations yourself.

So, you have unlimited access to all the information. **(Inaudible)** in a context such as the present. So, the pure point of interpretation is that the impracticality renders it highly unlikely that this sort of manner of engagement with experts as opposed to a broader take into account in the sense that I have used it -- engage but you do it sensibly within the limits of the information and intel that you have. That could be part of it.

That is looking at it from the perspective of the continental system itself, the guidance and the user's guide and all of that. But if one brings that forward into the task the Divisional Court were seeking to do, they were assessing judgments already made, and they were not doing so themselves as primary judgment makers; they were conducting the public law function.

So, the principal basis on which they were to approach their task was to assess whether a rational process had been adopted. There is nothing in public law to suggest that a rational process for engaging with the past for the purpose of ultimately answering a prospective question requires you to descend into the quasi-judicial process which is at the heart of my learned friend's submissions on the manner of engagement with these sorts of issues. I have taken a little bit of time on that question, but I think that is the big point.

LORD JUSTICE IRWIN: Well, we interrupted you.

MR EADIE: Grateful as ever. Can I move briefly on to ground 2, to see if we can make a little progress in the five minutes that remain, if that is not too much of a burden. Ground 2 is failure to ask some of the questions in the user's guide. That is it in a nutshell. The case by the claimant is that there was a failure made by the

Secretary of State, and implicitly no doubt by the court, to ask all of the questions set out in the user's guide.

That is dealt with in the judgment at paragraphs 11 to 15, which set out the factual position in relation to the user's guide. You will see on that factual description, which is not queried to any material extent by my learned friend nor could it be; it is simply reciting facts. You will see, for example, from paragraph 11, the nature and status of the user's guide serve as guidance for its implementation. Five lines into paragraph 11:

> "…does not replace the Common Position 'but summarises agreed guidance for the interpretation of its criteria and implementation of its articles. It is intended for use primarily by export licensing officials.'"

So, it is, as it were, not detracting from the overall question that is usually asked; it is just making some helpful suggestions as to how you might go about doing it. Best practices, licensing practices, all emphasised by the Divisional Court. Then you see in particular the emphasised -- it is their emphasis bit -- in the quotation in paragraph 11, "fully entitled to apply their own interpretations." Simply best practice, as it were.

Then if one fairly reads the user's guide, as the Divisional Court did, what you in effect end up with, as one sees from paragraph 13, is a required or a suggested focus on the three key areas that you see identified in 2(13) in the quotation in paragraph 13 of the judgment. You will, I am sure, have picked up in the fourth and fifth line of 2(13), "an inquiry into the recipient's past and present record of respect…" It is "of respect" for humanitarian law. That is the point I was making. It is about attitude, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment and technology is used in a manner consistent with IHL and so on.

Those are three key focuses, but no one on this side of the court, and the court below did not suggest that those, although they are core areas of focus, were even in themselves exclusive or exhaustive. The overall question still has to be asked, which is the question which 2C itself poses in terms, is there a clear of serious violations?

Sorry, I should draw attention to the fact --

LORD JUSTICE FLAUX: On this point it is the same -- I said to Mr Chamberlain **(overspeaking)** -- this is all about manner as well, is it not?

MR EADIE: It is. The answer is going to be --

LORD JUSTICE IRWIN: I believe we know where you are on ground 2.

MR EADIE: Can I check over lunch whether there are two sentences I might wish to give you in addition on that, but I will move on otherwise. I should think I will be 15 or 20 minutes after lunch.

LORD JUSTICE IRWIN: We will come back at 1.55 pm.

(Adjournment for lunch)

MR EADIE: I am not going to go in any further detail into asking questions in the user's guide. Can I give you three paragraphs in the judgment where that is dealt with directly, 177 to 179, where this point is addressed in terms. Just by way of reference before moving to the final two grounds, back to the first ground, as it were my learned friend Mr Chamberlain's interweaving some of his four allegations and highlighting from the report or the reports that were produced, can I invite you to note when considering those in open -- and I have made all my points about the concerns that one has potentially over simply accepting the view that there might be or might have been violations -- but in relation to Saada City, the whole city is targeted and so on, I refer you to the judgment at paragraph 64, which is a Human Rights Watch report for essentially the same period.

That quotation in that paragraph of the judgment indicates there were indeed a number of coalition strikes on Saada City. The Human Rights Watch review, based as you see on the various investigations that they undertook, was that they appeared, underline appeared, to violate IHL, as you will see that even they accept that some of those coalition strikes were directed at military targets in that city.

Of course, you can readily see how much further information one might need before jumping from the particular attacks or airstrikes that they identify as appearing to violate IHL, that one could actually reach that conclusion, in other words, reach a conclusion there was a lack of distinction or a lack of proportionality **(inaudible)** by way of example.

That is in relation to Saada. In relation to Assiri and the statements by Mr Assiri, that is dealt with -- and you need to have in mind the entirety of the passage dealing with this. I think my learned friend took you to 139, "Now our

rules of engagement are: you are close to the border, you are killed." But my Lords I am sure will already have appreciated that the court then goes on to deal with that example in the paragraphs that follow, including in particular in relation to that very statement in 142 and 143. So, a little careful about simply accepting at face value selective highlights.

Ground 3 asked about incorrect approach to the standard of review, and we made two essential submissions. Firstly, that the Divisional Court was entirely correct in principle in the approach that they adopted, and secondly, that it cannot sensibly be said in the light of the closed and the open judgments on the facts of this case the approach they adopted was inappropriately deferential by anything other than the rigorous standard that they set themselves.

That second one needs no development. You just have to read the judgments. But the first one entirely correct in principle. They deal with the correct approach in principle, as you will recall , in their judgment in a section that runs from paragraphs 25 to 35. With the greatest respect to Mr Chamberlain, that is an unsurprising and obviously correct approach. In a nutshell, they accept at paragraph 27, as you see, that because of the context involving as it does the risk to life, the court is required to conduct what they describe as a rigorous and intensive standard of review. They then apply that standard, as is entirely clear from the detail, with which they consider the material before them.

But within that, they properly respected very well established limitations, especially on the expertise of the court and the distinctive position of the Secretary of State who is able to call upon those who are expert and experienced. Neither of my Lords will need an introduction to those principles, but they accepted the six points that are then set out at 29 to 34. All of them are sound, we respectfully submit, paragraph 31 especially relevant and obviously important in the present context. That is no doubt why they return to it as they did in paragraph 209, final sentence.

The test under criterion 2C and indeed the three key areas to which the user's guide directs attention, self-evidently involve the series of complex questions that IHL raises, the series of predictive questions that 2C raises, including questions about the attitude of the recipient country, Saudi, to IHL compliance. That indeed is a matter to which attention is particularly directed in the criterion itself. If you

go back to paragraph 8 of the judgment, you will see that criterion 2 is set out and 2C is highlighted, underlined. But look at the lead-in to 2A, B and C: "Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will…"

So, all of the evaluation which the court accorded respect in relation to, they, we respectfully submit, properly did so. The evaluation runs through the assessment by a non-party to a conflict of the clear risk question. In that respect, we respectfully agree with and invite the court to conclude this was entirely correct.

At paragraph 28, final sentence, the process is imbued with assessments of how a friendly foreign government will act, which is informed by diplomatic and security expertise the court does not possess. That is the point in a nutshell. So, my learned friend seeks to focus on Rayman, and Rayman was indeed a national security case. But it will not have escaped the court's attention that when summarising the approach in principle in those paragraphs 25 to 35, the court highlighted the various different nuances of respect that is accorded and the things that affect respect. Pretty much whenever Rayman is cited, so is *Lord Carlile*. *Lord Carlisle* is the one about whether or not Mrs Rajavi, an Iranian lady about whom the Home Secretary had concerns in relation to her mission, could come to Parliament at the invitation of Parliament to address a committee and so on.

But that was pure foreign relations; that was pure reaction of a foreign government. There it might be thought in a tolerably unattractive context because the reaction that was predicted was a reaction by the Iranian government which would not have conformed to any great notion of the rule of law. But nevertheless, that judgment as to whether or not they were going to react, how they were going to react, the attitude of the foreign government, is and was at the very heart of the *Carlile* case. We respectfully submit there is a true and proper analogy with the Rayman authority because it recognises on classic grounds of both democratic accountability and institutional competence, to use those phrases, the court traditionally does afford appropriate respect in certain areas.

That point is not met by focusing in on the acceptance by the court of the -- as it were our acceptance that in relation to 2C there is not a freestanding discretion at the end of it that allows policy considerations to come in. That was common

ground, as my learned friend rightly acknowledged this morning. But that does not touch this point. This point goes to the nature of the evaluations that are necessarily built into the 2C question. That is what we say about that.

Serious violation of IHL. As to that, the Divisional Court approach and conclusions indicate that they essentially accepted the claimant's position emergent in this, see judgment at paragraphs 15 to 24, including in particular the word "includes" that they emphasise in paragraph 16 by reference to paragraph 2.11 of the user's guide. So, they essentially accept the approach that the claimant advanced in relation to that test.

However, it is evident -- perhaps it is evident that the Divisional Court's approach and the approach that they in fact adopted to the examination **(inaudible)** for the Secretary of State was very much on that basis. In other words, they approached the matter on the basis that it was relevant for them to consider, that is for the court to consider, violations which might be serious in that sense. So, they were not restricting themselves to war crimes; they were not restricting themselves to a narrower view of seriousness. So, my learned friend seeks to alter the attack, as it were, so that it becomes an attack not on the Divisional Court's approach but the attack is now on the approach that the Secretary of State is said to have adopted. That is in large part founded on submissions as to the correct approach to seriousness that we did indeed make in the court below. We no longer seek to resurrect them in this court and accept the Divisional Court's conclusions in relation to that.

But perhaps the critical point in relation to this attack which is focused on the Secretary of State's approach is that whatever breadth the concept of seriousness entails, it is still obviously relevant for anyone considering whether or not a breach is serious to have regard to questions such as intention, deliberateness, recklessness. Because if it is demonstrated that there is a deliberate breach of IHL or there is a reckless disregard of IHL, then that will be a matter of considerable seriousness and will plainly be relevant to the satisfaction of the test that 2C poses.

Non-sequitur that the Secretary of State can be demonstrated or can be shown on the evidence to have taken an approach which restricted the examination to the grave war crime approach, if that makes sense.

LORD JUSTICE FLAUX: In a sense, that point is made good by the fact that in some of the updates, specific reference is made to the fact that a pattern of non-deliberate violations would nonetheless be serious violations for the purposes of the analysis.

MR EADIE: Exactly so. That is the short point that we make. In fairness, there is no use castigating the Secretary of State for the lack of skill of her counsel.

LORD JUSTICE FLAUX: Logically, of course, if they were intentional or deliberate, then they are all the more serious.

MR EADIE: Exactly so.

LORD JUSTICE FLAUX: It does not mean they are not serious.

MR EADIE: But the critical thing, if you are going to mount an attack on the Secretary of State's approach, you have to demonstrate on the evidence that she took a view, or he took a particular view of the law -- it was he -- and as a result unduly narrowed the focus of the factual investigation. That perfectly obviously is not so, because not merely did the IHR dates(?) indicate that there were patterns being looked at without any regard to the intention, recklessness or otherwise, but they also demonstrate an entirely appropriate and proper focus on individual incidents of concern as incidents; take the Great Hall as an example.

So, the passages relied upon by my learned friend in Crompton do not go nearly far enough to establish the case that he seeks to make. They simply indicate that there was a proper focus, not an exclusive focus but a proper focus as part of the analysis conducted on the mental element, if that at some level would work. Those are my submissions.

LORD JUSTICE IRWIN: Thank you very much, Mr Eadie. I think it worth saying at this stage, perhaps particularly for those who are not lawyers, it is important for us all to bear in mind this is not an appeal; this is merely an application for permission. Though the submissions have been fairly full, in the end, the decision we have to take is whether there is an arguable appeal, not whether it succeeds. I do not know whether you want to alter or add or say anything directly to that, but that is the context in which all these arguments have to proceed.

MR EADIE: My Lord, we entirely accept that, and it is right for the court to have made that clarification. You will appreciate that I think my learned friend and I

sub silentio are addressing the arguments on the basis that he says it is perfectly obvious they are arguable and we say, no they are not.

LORD JUSTICE IRWIN: Not an unfamiliar **(overspeaking)** even at an actual appeal hearing.

MALE SPEAKER: **(Inaudible)** an actual appeal, as my Lords know, if I am allowed to end on a forensic point, you have had your nose rubbed into nine volumes of material before we got to this point.

LORD JUSTICE IRWIN: Thank you very much. Mr Chamberlain?

MR CHAMBERLAIN: Yes, by both sides. The points I seek to make are very simply few because I think your Lordship's questions both to me and to my learned friend indicate that you have understood how the arguments are put. So, I will be as brief as I can. Obviously I am conscious of the need for you to hear from Mr McCullough and Mr Eadie in relation to the closed.

The way that we put our case fundamentally in relation to the first ground was accurately summarised by my Lord Justice Irwin in argument when Mr Eadie was on his feet. But can I just show you how we put it. It is very similar to the way that -- my Lord probably put it better than I could. But just show you our reply skeleton paragraph 6. It is in the core bundle, C1, page 3. It is very similar to the formulation that my Lord put in summarising what we were saying.

LORD JUSTICE IRWIN: Could you give me a page?

MR CHAMBERLAIN: I am sorry. It is C1, page 3.

LORD JUSTICE IRWIN: I only have the page numbers.

MR CHAMBERLAIN: At the beginning of the core bundle there should be A1, B1 and C1. At paragraph 6 of that, we say that the Secretary of State criticises the claimant for overlooking the statement that account will be taken. We say the demands of public law rationality are not satisfied merely by asserting that evidence has been taken into account. The decision-maker has to show what he made of it, in particular whether he accepted it and why not. This the Secretary of State has not done.

It is a very similar formulation to the one my Lord put to my learned friend. Just to be clear, we are not making, and have indeed been clear with the court that we are not making the submission that there is any legal or evidential presumption. This all flows from the demands of rationality. This is a perfectly orthodox public

law challenge. It is a challenge that looks at the way in which the decision was taken by the decision-maker, and it asks the question whether the process undertaken by the decision-maker and the reasoning which the decision-maker offers to the court was adequate. We say in summary it was not.

At points, my learned friend veered into making the submission that we were somehow saying that the Divisional Court should itself have reached a judgment about whether IHL was breached or whether there was a serious violation in any individual case. We have never made that submission. We did not invite the Divisional Court to say in this case, in this case, in this case there were serious violations of international humanitarian law.

Our submission was focused, as you would expect it to be in an orthodox judicial review challenge, on whether the Secretary of State had adequately addressed that question in relation to what the Divisional Court summarised as the substantial body of open source material showing that there were indeed serious violations of IHL. So, the question at all stages, whether before the Divisional Court or indeed in this appeal, has been focused on the Secretary of State's decision-making process.

The Secretary of State's answer to why it was all right to say simply, as your Lordships will have seen from the IHL updates, the FCO updates which are summarised in the judgment -- all of them say, we have taken account of the open material. If it were enough in a public law challenge of this kind to simply assert that we have taken account of the open material, then obviously we are not going to succeed. But we say it is not enough.

The demands of rationality are obviously fact-sensitive. What is required by way of an answer to particular open material depends on the cogency of the open material *prima facie*. We say in this case the open material presents an overwhelming picture when taken on its own. We do not pretend that the Secretary of State had to look at that material and nothing else, but we do say that the material had to be addressed. "Do you accept that this material shows a pattern of serious violations of international humanitarian law or not? If not, why not?"

The Secretary of State's answer to that question as I understand it is to make a number of general points. In general, he says, the Secretary of State had available to him sources of information that were not available to the authors of the open

source report. Of course, in general, that is right. But we say that it was not sufficient to answer that "in general" the Secretary of State had available sources not available to the open source report. One had to go further than that and actually look at whether in particular there was available material which enabled the conclusions drawn in those reports to be displaced.

I will give you one example of that. It is the example that my learned friend majored on. He said, take the second UN expert panel report, and as my Lord said, that is the report which perhaps contains the fullest and most rigorous analysis of 10 incidents. There was a point at which my Lord Justice Flaux said I think in argument that they had found that there was -- it was almost certain that there was a serious violation of international humanitarian law in 8 out of the 10 cases. In fact, they found it was almost certain in all 10 cases.

LORD JUSTICE FLAUX: Yeah, I am sorry. I had a different -- when I re-read it I realised it. There were 2 of the 10 where they had identified a military target of some description.

MR CHAMBERLAIN: But they still found, even in relation to those cases, that there had been non-compliance with the principle of distinction or --

LORD JUSTICE FLAUX: Because one of those was actually the Great Hall, where they did find some military --

MR CHAMBERLAIN: Indeed. So, there can be a case where there is a military target like the Great Hall incident, where there are still very serious concerns as the UN expert panel --

LORD JUSTICE IRWIN: Proportionality.

MR CHAMBERLAIN: Yeah, about proportionality, because there can be a military target but you still do not attack a hall with 500 mourners in it. Yet, of course, that is something that happened, as we know, at a late stage after engagement by the Secretary of State in October 2015.

You have the UN expert panel report. My learned friend says, as an example of the disparity in the information that is available on the one hand to the Secretary of State and on the other hand to the open source reports, for good or ill, the Saudi government did not engage with the UN expert panel in relation to its second report. We absolutely adopt the point made by my Lord Justice Flaux that itself was a breach of the Saudi government's obligations under international law.

But it goes further, because if one could come along and say, in 8 of those 10 cases, the conclusions of the UN expert panel were conditioned by the fact that the Saudis had not told them what the military target was -- and we of course have this great liaison relationship and, therefore, we are able to say that we can discount the conclusions that the UN expert panel report reaches -- then I would be in difficulty. I would be in difficulty whether the Secretary of State said that openly or whether the Secretary of State said it in closed.

But the information that we have -- obviously we do not know what is in closed but we can only go on what is in the open -- about the processes that were undertaken in closed, as far as we are aware, the Secretary of State has not done that. When the Secretary of State tells us what his process involved -- it involved in particular the tracker as you will recall, which was the database of all incidents of concern -- in the later reporting period, the proportion of incidents where the MOD itself with all its access to Saudi liaison was unable to identify a legitimate military target with three-quarters. So, it is almost exactly the same proportion as in the UN report.

So, when one drills down, it is not for that reason, we say, satisfactory to simply say in general the Secretary of State has available sources of information not available to the open report. In general, that may well be true, but does that provide an answer to the specific reports both of the UN expert panel and of the NGOs? We say, no.

Just briefly, my learned friend made a number of points about the way in which the reports -- and indeed the Divisional Court mentions this as well -- of the NGOs and of the UN expert panel were compiled. A couple of points of detail. The UN expert panel had itself access to satellite data. It may not have been exactly the same satellite data but it did have access to satellite data. It also has access to interviews of those who were involved. It engaged in a pretty rigorous analysis which it set out in an annex to its report. So, it is not simply an institution that was looking at this from afar.

Importantly, one has to ask the question whether in relation to the specific incidents the Secretary of State had better information. We say on the open evidence there is nothing to indicate he did.

As to the NGOs, it was said the NGOs' information was also limited. In part, yes, but some of the NGO reports as you will see from the excerpts that we referred to in our skeleton did indeed include interviews with people on the ground. That is something that the Secretary of State has not done. So, in some respects, the NGOs had available to them sources of information which the MOD did not have access to, because the NGOs were themselves on the ground; the Secretary of State was not.

Of course, the Secretary of State had available a channel of information from Saudi liaison, that is to say, from military officers in Riyadh, but we have drawn attention to the limitations of that. They did not have access to operational intelligence which grounded the strikes. Therefore, we say in a critical sense, the Secretary of State's information was not better, or not materially better, than that available to the open source and court.

That is ground 1. I do not propose, unless your Lordships have any further questions, to say anything further about it. Your Lordship's questions to my learned friend have indicated that you have correctly apprehended the way we put the ground. It is not a legal presumption; it is simply an application of the principles of rationality to the facts of this case.

Can I make this one further point. It was said at one stage by my learned friend that we were somehow saying that the Secretary of State was under an obligation to say publicly what his reaction was to the open source report, but my Lord put to my learned friend, actually, the case does not have to go that far. We certainly do not say that the Secretary of State was under an obligation to do the analysis that we said needed to be done in public.

LORD JUSTICE IRWIN: It could not be done in public.

MR CHAMBERLAIN: It could not be. We do not even say there was an obligation for that analysis to be considered in public in these court proceedings, because as we know under the Justice and Security Act there is a procedure for these matters to be considered in closed. So, if there were an all singing all dancing analysis of these matters in closed, I would be in some difficulty. Obviously I do not know what is in closed; I can only go on what the Divisional Court has said and what the special advocates have said in their open submissions. But we say all the

indications are that there is no such analysis either in open or in closed. That is, we say, the problem.

On ground 2, as my Lords have correctly indicated, it is an aspect if you like of ground 1, because it is an aspect -- it is related to ground 1 in that it alleges a failure to undertake the enquiry that is needed when one looks at the open source material. We do say that when one looks at the three questions and asks, if the answer to the three questions were no, all of them, could one rationally say that those answers were categorically irrelevant? We say the answer to that is no, and with respect, there is no answer to that from my learned friend.

In relation to ground 3, we simply make the point there is a two-part analysis. One, what happened in the past; and two, in the light of one, is there a clear risk for the future? We do say that in relation to part 1 of that analysis, the Divisional Court applied too deferential a standard of review. It is a separate point and it is a freestanding ground which does not depend on grounds 1 and 2, as you know.

On ground 4, just to answer the point that my Lord put to my learned friend, which was, do not the IHL updates, the FCO updates indicate that they understood that a pattern of non-deliberate breaches could itself amount to a serious violation? Therefore, does the distinction matter? Just on that, if one looks at the *Tadić* formulation, which we say is the correct formulation as picked up by the ICRC, that is a very different formulation even to the one being given in the FCO updates.

I will give you an example. A single instance of non-deliberate conduct could on the *Tadić* formulation constitute a serious violation of IHL. So, If one takes, for example, the indiscriminate bombardment of the City of Saada and the region of Maran which took place in May 2015, UN expert panel looks at that and says, we find that was an example of serious violation of IHL, and it gives reasons for that.

On the Secretary of State's analysis -- and this, by the way, is the analysis which my learned friend is not now, as he confirmed in his submissions, pursuing anymore -- serious violation is synonymous with grave violations of the Convention and Additional Protocol and war crimes. Even on the FCO's analysis, you only look at non-deliberate incidents where there is a pattern of them and the

pattern indicates wilful blindness. That is, as I have said, a grave violation/war crime analysis. If that analysis is wrong, then the Secretary of State's conclusion at stage 1 of the analysis was also wrong. Given that the decision was finely balanced, we do say that it would have made a difference, and that is all we need to show. My Lords, unless I can assist further, those are my submissions in reply.

LORD JUSTICE IRWIN: Thank you very much. I think we need to rise now while the court is cleared.

MR CHAMBERLAIN: Can I ask whether we are wanted back at any point this afternoon?

LORD JUSTICE IRWIN: I do not think so.

LORD JUSTICE FLAUX: No, I would not have thought so.

LORD JUSTICE IRWIN: I think it is unlikely in the highest degree we will give a decision today. We certainly will not give reasons today, so, no.

MR CHAMBERLAIN: If your Lordships were minded to give even a decision without reasons today, I wonder if a message could be somehow --

LORD JUSTICE IRWIN: You want to be here for that.

MR CHAMBERLAIN: We would like to either be here for it or at least be informed of the decision as soon as it is made.

LORD JUSTICE FLAUX: You are presumably at the end of a telephone, Mr Chamberlain. You are not far away.

MR CHAMBERLAIN: Yes.

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