Case No: T3/2017/2079

IN THE COURT OF APPEAL
CIVIL DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 9 April 2019

BEFORE:

THE MASTER OF THE ROLLS SIR TERENCE ETHERTON MR
LORD JUSTICE IRWIN
and
LORD JUSTICE SINGH

BETWEEN:

THE QUEEN
on the application of
CAMPAIGN AGAINST ARMS TRADE

Claimant/Appellant

- and -

THE SECRETARY OF STATE FOR INTERNATIONAL TRADE

Defendant/Respondent

- and -

(1) AMNESTY INTERNATIONAL
(2) HUMAN RIGHTS WATCH
(3) RIGHTS WATCH (UK)
(4) OXFAM

Interveners

MR M CHAMBERLAIN QC MR C MCCARTHY appeared on behalf of the Claimant/Appellant

SIR J EADIE QC, MR J GLASSON QC & MS J WELLS appeared on behalf of the Defendant/Respondent

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PROCEEDINGS

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(Official Shorthand Writers to the Court)

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(10.30 am)

MR CHAMBERLAIN: My Lord, I appear with Mr Conor McCarthy for the appellant, Campaign Against Arms Trade. Mr James Eadie QC, Mr Jonathan Glasson QC and Ms Jessica Wells represent the respondent Secretary of State for International Trade. The special advocates are Mr Angus McCullough QC and Ms Rachel Toney. There are in addition two sets of written submissions, the first from Ms Jemima Stratford QC, Mr Nikolaus Grubeck and Mr Anthony Jones on behalf of Amnesty International, Human Rights Watch and Rights Watch UK, and the second from Mr Gerry Fecenna QC and Ms Julianne Morrison on behalf of Oxfam.

Before I go any further, I have been asked if your Lordships would give permission for this hearing to be "tweeted". I understand there are people in court who wish to do that.

A MEMBER OF THE BENCH: (**Pause**). Yes, that is fine.

MR CHAMBERLAIN: I am obliged. Your Lordships should have the following open documents: one core bundle, four supplemental bundles and two volumes of authorities. Separately, you will no doubt have the closed documents.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: Subject to the court's view, we agreed a timetable which I understand has been communicated to you.

A MEMBER OF THE BENCH: Yes, that was very helpful.

MR CHAMBERLAIN: We also stand ready, if so directed, to return on Thursday after the closed hearing if the court considers that would assist.

OPENING SUBMISSIONS BY MR CHAMBERLAIN

My Lords, this is an appeal from a judgment of the Divisional Court of Burnett LJ and Haddon-Cave J (as they then were) in July 2017. The Divisional Court dismissed the appellant's challenge to the Secretary of State's decisions not to suspend licences and to continue to grant new licences for the export of arms and military equipment to Saudi Arabia. There are three grounds of appeal for which permission was granted by Irwin and Flaux LJJ after a hearing in April 2018.

I propose, subject to the court, to make submissions under seven heads: first, some introductory remarks to put the claim in context and to outline our arguments on the appeal; second, the legal framework governing arms exports and the key rules of international humanitarian law; third, the evidence from NGO reports and from international bodies as to Saudi Arabia's past and present record of respect for international humanitarian law; fourth, what is known in open about the Secretary of State's decision-making process and the six additional stands of evidence he relied upon; fifth, our ground 1; sixth, our ground 2; and seventh, our ground 4. Your Lordships know that permission was not granted in respect of ground 3.

My Lords, the context of this appeal is the ongoing conflict 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, as you know, in 2015. It has continued and intensified. Various attempts have been made to broker ceasefires but these have not held. The UN Secretary General last year described the situation in Yemen accurately as the world's worst humanitarian crisis. More recently, he has indicated that some 24 million people are in need of humanitarian aid and protection.

The conduct of the war has been the subject of reports from a large number of reputable, non-governmental organisations, many with staff on the ground in Yemen, and from international bodies, including the European Parliament and various UN bodies, including in particular a UN panel of experts established with UK support, pursuant to a Security Council resolution.

The Divisional Court, in paragraph 86 of its judgment, described these reports as collectively constituting a substantial body of evidence suggesting that the Saudi-led coalition has committed serious breaches of international humanitarian law. At the same time, the United Kingdom Government has been issuing licences under the Export Control Act 2002 for the export of arms and military technology to Saudi Arabia, and large quantities of equipment have been exported pursuant to those licences. This includes ordinance for airstrikes, ammunition and jet aircraft.

We say that the decisions not to suspend existing licences and to continue to issue new licences contravene the standards to which the Government has itself chosen to adhere. Those standards are contained in the Consolidated Guidance

laid before Parliament in 2014, which in turn reflect the EU Council Common Position and the Arms Trade Treaty. As the Divisional Court noted at paragraph 28, the Consolidated Guidance makes clear that political considerations play no part in licensing decisions. That guidance makes clear unequivocally that a licence will not be granted where there is a clear risk that the arms might be used to commit a serious violation of international humanitarian law (IHL).

My Lords, can I start by explaining what our case does not involve?

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: First, we are not inviting the court to make factual findings about whether Saudi Arabia has or has not committed serious violations or any violations of IHL. The findings we invite the court to make concern the legality of the Secretary of State's decision-making process. Our grounds of challenge and our grounds of appeal are orthodox in public law terms. Our complaints are about the way the Secretary of State reached the view the clear risk test was not met. We say, in short, that he reached that view without properly engaging with the open evidence showing a pattern of breaches of IHL, many of them serious (that is ground 1), without asking questions identified as critical in the User's Guide (that is ground 2) and on the basis of an error of law as to the meaning of "serious violation of international humanitarian law" (that is ground 4).

The second point is that we do not contend that the existence of a pattern of past violations, some of them serious, necessarily entails as a matter of law that the clear risk test is met. Our case is more modest than that. It is simply that a conclusion as to the existence or otherwise of a pattern is an important and necessary starting point when assessing a state's past and present record of compliance with IHL, something which the Secretary of State accepts is a key factor when applying the clear risk test.

To explain what I mean by that, if, for example, you have evidence that a state is engaged in training its military personnel to ensure that they comply with IHL but, despite that training, a pattern of violations continues, the continuing pattern tells you how much significance you can attribute to the training. Equally, if you have evidence of a state conducting investigations into incidents where it is alleged that violations of IHL have occurred, and in many cases exonerating itself, evidence that IHL was in fact breached in those instances is relevant to an

assessment of the reliability and effectiveness of the investigations. In short, if your assessment of the question of whether there is a pattern of past violations is flawed in public law terms, so will be your assessment of the clear risk test. One infects the other. That is particularly so in a case such as the present, where it is accepted the decision was a finely balanced one.

The third point is that we do not say that the Secretary of State, when asking whether a pattern of past violations can be established, is bound by the conclusions reached by NGOs or international organisations. Nor do we say that such conclusions establish any sort of legal presumption. Our case under ground 1 is again more modest than that. It is that in this case public law rationality required the Secretary of State, when faced with relevant, consistent and apparently well-founded factual conclusions from a wide variety of reputable and respected bodies, either to accept those conclusions or to have proper reasons for rejecting them in whole or in part.

Fourth, it is not and has never been part of our case that the Secretary of State must give those reasons in public. We recognise that it may be proper to think that it would be undesirable for him to state publicly whether in his view there is or is not an established pattern of past IHL violations. That is why we supported the Secretary of State's application for a declaration under section 6 of the Justice and Security Act. Our case, supported by the open submissions of the special advocates, is that the relevant analysis has not been done at all, even in closed. You, of course, will be in a position to test that case by reference to the closed materials.

The fifth point is that under our first ground of appeal, we do not say here and did not say below that rationality requires the Secretary of State to form a view about each and every incident where there is a credible allegation that IHL has been violated. There may be some where the evidence does not permit any conclusion to be drawn. But, faced with such consistent -- and, indeed, we would respectfully submit, overwhelming -- evidence of a pattern of violations, some of them serious, rationality requires him either to accept that such a pattern is demonstrated or to form a view about a sufficient number of them to negate the evidence of a pattern.

Sixth, under our second ground of appeal, we do not say that the Secretary of State is obliged to answer each and every question identified as relevant in the User's Guide. We focus on three very basic questions identified there: one, whether Saudi Arabia has legislation in place prohibiting violations of IHL; two, whether there are mechanisms in place to secure accountability of members of the armed forces for breaches of IHL; and three, whether there is an independent and functioning judiciary. The second and third are, of course, linked. We submit that those are fundamental questions. The Secretary of State does not know the answer or has not considered the answer to those questions. Without answering, the Secretary of State could not reach a safe conclusion on the clear risk test, we say.

But -- and this is important -- we do not even need to go that far. Our submission is just this: that when considering questions that are that fundamental to the analysis, the Secretary of State would at least have to have good reason for not posing and answering the questions.

A MEMBER OF THE BENCH: Mr Chamberlain, I am sorry, I do not want to interrupt you, but can I just ask; is the second ground of appeal, like the first ground of appeal, founded in the public law doctrine of rationality?

MR CHAMBERLAIN: Yes. So, we say that, at least, the Secretary of State would need to have good reason for not asking questions that are as critical as that, and no such reason has been given.

The seventh and final introductory point is that we are not seeking from this court an order requiring the suspension of existing licences or prohibiting the grant of new ones. What we are seeking to do is to establish that the Secretary of State's decision (which, as I have said, he accepts was a finely balanced one) was flawed and must be retaken. If we succeed in that, the Secretary of State will no doubt need to consider a great deal of new material arising since the date of the hearing before the Divisional Court in February 2017. If we succeed in the appeal, he will do so on a correct legal basis as declared by this court.

My Lords, can I move to my second head of submissions, and that is the statutory period?

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: The statutory framework begins with the Export Control Act 2002, and that is in authorities bundle 1, tab 1. So, section 1(1) of that Act provides:

> "The Secretary of State may by order make provision for or in connection with the imposition of export controls in relation to goods of any description."

1(4) makes that subject to section 5, and if we turn onto the next page, we will see the general restriction on control powers in section 5. Section 5(2) provides that the power may be exercised for the purpose of giving effect to any EU provision or other international obligation of the UK. 5(3) makes it clear that "international obligation of the UK" includes a common position adopted by, or taken by, the Council under Title V of the Treaty on European Union. That is the part of the Treaty on European Union which gives effect to the Common Foreign and Security Policy.

Over the page, then, at section 9, 9(2) gives power to the Secretary of State to give guidance about any matter relating to the exercise of functions relating to the licensing power, and 9(3) imposes an obligation on a Secretary of State to give guidance at least about the general principles to be followed.

Now, the next important piece of law is in the next tab, and that is the Export Control Order, which is an order made under the 2002 Act. Article 3 of that order I hope you have in the version which was handed up for insertion. If you go to the end of tab 2, I hope your bundles have a version which includes Article 3. If not, we can make sure your bundles are updated over lunch.

A MEMBER OF THE BENCH: This is headed "Military goods".

MR CHAMBERLAIN: Yes. That simply prohibits the export of military goods subject to Articles 13 to 18 and 26. For the key one for these purposes, I am afraid you need to go back to the beginning of that to see, being Article 26, which is the provision which deals with licensing.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: Immediately over the page from that you will also see Article 32, which makes specific provision empowering the Secretary of State to amend, suspend or revoke the licence.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: The next important document is the Common Position. You have that at tab 4. The first point to make about the Common Position is about its status. As I said before, it is made under Title V of the Treaty on European Union. That is the Treaty provision which gives effect to the Common Foreign and Security Policy. Now, unlike many other parts of EU law, that does not give rise to obligations which are binding directly on the UK in domestic law; it gives rise to obligations which are binding on the international plane, which is why, when we looked at the Export Control Act, this was referred to as an international obligation.

Article 1, turning over the page, provides that it is mandatory for states to assess export licence applications for items on the EU Common Military List on a case-by-case basis against the criteria in Article 2, and Article 2 then sets out the criteria. You can see criterion 2 starting in the second column of the left-hand-facing page, just below the bottom hole-punch, going over to the middle of the first column on the next page. I would ask your Lordships just to put a line next to that.

I draw attention also to Article 10:

> "While Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, these factors shall not affect the application of the above criteria."

That picks up a point I have already mentioned in opening, which is -- and this is common ground between the parties -- the application of these criteria does not depend in any respect on discretionary considerations to do with the United Kingdom's commercial or industrial interests, political considerations as to the Divisional Court compendiously (**Overspeaking**).

A MEMBER OF THE BENCH: I understand that is common ground. As a matter of interest, it says "where appropriate, they may take", but where would it be appropriate?

MR CHAMBERLAIN: That would be where the criteria do not prohibit export but nonetheless there is a discretionary decision whether to grant an export licence. If the Secretary of State concludes, "There's nothing in these criteria to prevent me granting an export licence," that is just saying that, in considering whether you do

or you do not, the member state can take account of these political or industrial considerations.

A MEMBER OF THE BENCH: I do understand, Mr Chamberlain, of course, your fundamental point that this imposes a duty on member states to deny an export licence where the conditions for the existence of that duty are met.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: But would you accept that whether the condition is met is fundamentally an exercise in evaluation? Would you accept that?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Would you accept that that task of evaluating whether the condition has been met is, at least in the first instance, entrusted to the Government?

MR CHAMBERLAIN: Yes, I accept all of that, my Lord. Our basic case, as I am sure my Lord has apprehended, is that that is all true -- yes, it is an evaluation for the Secretary of State -- but you have to conduct that evaluation in a public law compliant way, and if there is a flaw in one part of the process leading to that evaluation then the court can on orthodox public law terms intervene and point out that flaw, quash the decision and send it back to be reconsidered, so it is an absolutely orthodox public law test but I accept without cavil my Lord's point.

There is also, of course, Article 13, which makes it clear that the User's Guide which is regularly reviewed shall serve as guidance for the implementation of this Common Position. Your Lordship may have seen -- this is a point we may come to later -- I am making the point that the User's Guide is akin to statutory guidance. If this were a matter of pure domestic law, you sometimes see in domestic statute reference in the statute to guidance. This is obviously not a domestic statute but it is the equivalent.

Can I then ask my Lords to look at the consolidated criteria themselves?

A MEMBER OF THE BENCH: Is there any difference between the parties as to the extent to which it is necessary to follow in whole or in part that guidance? Is there anything between the parties on that point?

MR CHAMBERLAIN: I think there is a slight difference between us when we come to ground 2, because we say that, on the face of it, the questions identified by the guidance as relevant to the exercise of the judgment required by criterion 2(c) are

to be asked unless there is at least good reason for not asking them. That is exactly the same principle that would apply if one were looking at statutory guidance in the UK. One looks at the guidance. One is not bound by it but one at least has to have a reason for not following the process set out in the guidance, and the three questions that we identified at the beginning -- does Saudi Arabia have law which prohibits IHL violations, does it have mechanisms for securing accountability and, third, does it have an independent functioning judiciary? -- are all questions set out in the guidance as questions that are relevant to that exercise. If you are going to, as a responsible Secretary of State, answer that ultimate question, the clear risk question, without even asking those questions -- without knowing the answer and without even asking those questions -- you would have to have a reason for that. We do not know what the reason could be. It might be that it is just too embarrassing to ask the question or something of that sort. But we have not been given any reason either in open or, as far as we are aware, in closed, although of course your Lordships will know more about that than me.

A MEMBER OF THE BENCH: Is there any EU jurisprudence on the role of guidance such as this?

MR CHAMBERLAIN: Not as far as we are aware, but we will double-check that point.

A MEMBER OF THE BENCH: Thank you.

MR CHAMBERLAIN: Can I show you now the consolidated criteria? The consolidated criteria are to be found at tab 5 and they are contained in a written statement made to Parliament on 25 March 2014. There are a few points to note here. On the second page, at the top -- the first full paragraph at the top of the second page -- you can see the Government policy for assessing applications for licences to export was set out on behalf of the then Foreign Secretary on 26 October 2000. Since then, there have been a number of significant developments. One was the 2002 Act, then there was the adoption of the Common Position and also the Arms Trade Treaty.

Over the page, at the top of the right-hand-facing page, this statement of the criteria is guidance given under section 9 of the Export Control Act, and it replaces the previous version.

Then, just by the bottom hole-punch, you can see criterion 2, headed:

> "The respect for human rights and fundamental freedoms in the country of final destination, as well as respect by that country for international humanitarian law.
>
> Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:
>
> [(a) is not relevant here];
>
> (b) exercise special caution and vigilance in granting licences on a case-by-case basis and taking account the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union; and
>
> (c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law."

Now, it has always been accepted by the Secretary of State that Saudi Arabia is a country where serious violations of human rights have been established by the competent bodies of the UN, Council of Europe and European Union. In pre-action correspondence we asked the question of whether the Government accepts that criterion 2(b) applied.

Can I just show your Lordships the answer to that question? It came in the Government's response to the letter before action, which you have in supplemental volume 4, tab 52, D48. You can see the question set out at G. This is the Government's response where they set out all the questions they have been asked and then they give the answers:

> "Please confirm that the Government accepts that special caution is required in respect of issuing export licences to Saudi Arabia for military equipment which may be used in Yemen, in accordance with Article 2 criterion 2(b) of the Common Position [and then] please confirm whether special caution has been applied."

Then they said:

> "In answering these questions, we set out the relevant part of criterion 2 as follows [and they set out (b) and (c)]. We confirm that special caution and vigilance is exercised in granting licences to the KSA on a case-by-case basis and taking account of the nature of the relevant items to be licensed. In these particular circumstances the relevant items are those which could be used in the conflict in Yemen."

So, until very recently, certainly, it did not appear to us there was any dispute that (b), as well as (c), applied. It does appear, though, from the Secretary of

State's skeleton argument that there is, at least to some extent, an attempt to row back from that on the basis, as I understand it, that criterion 2(b) is said to be relevant to the human rights issue whereas (c) is relevant to the international humanitarian law issue. We say that when you look at the criterion as it is set out, there is nothing on the face of it which disaggregates the position in that way. So, we say that (a) is clearly relevant to human rights because it is dealing with internal repression, and (c) is clearly relevant to international humanitarian law -- that is what it is dealing with -- but (b) is relevant in principle to both. It is simply saying that where you have a country where there are established breaches of international human rights law, you have to exercise special caution and vigilance. We say that the Government's initial view on that, which is that, yes, you do exercise special caution and vigilance, was correct, so both of these apply.

A MEMBER OF THE BENCH: Do you accept that criterion (b) is in terms about human rights and (c) is about international humanitarian law?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Those are, are they not, two distinct bodies of international law?

MR CHAMBERLAIN: They are. But, my Lord, let me put it this way. If you have a country where there are, as there are here, established violations of international human rights law, that itself gives cause for vigilance and caution in relation to whether that country will or will not comply with international humanitarian law. Now, why do I say that? Because international human rights law and international humanitarian law cannot be seen as wholly distinct, non-overlapping bodies of law. Indeed, there is quite a lot of jurisprudence to suggest you may have to look at them together. Why? Because whether international humanitarian law applies depends on whether there is an armed conflict going on and what sort of an armed conflict there is.

So, a country which is established to have committed serious human rights violations is also a country where you may have reason to believe IHL violations may be committed, so the two cannot be disaggregated, we say, and the Secretary of State's original position was correct. Nothing turns on this, however, because the Secretary of State accepts and indeed avers that special caution and vigilance was applied to this.

Now, can I then invite you to look at the heading "Other factors" which you find at the bottom of the page under criterion 8?

A MEMBER OF THE BENCH: Before you move on, can I just ask a fairly fundamental question on criterion 2(c)?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: When one is evaluating what a clear risk is that items might be used in the commission of a serious violation of international humanitarian law, presumably you are not talking about the risk that there might be one or occasional, but something more than that? Is there a qualitative or quantitative element to be satisfied when saying there is likely to be an infringement? So, if you had 1,000 sorties, for example, and there was a risk that one might go wrong, I assume one would say that is not going to be enough?

MR CHAMBERLAIN: My Lord, we say the qualitative element comes in through the word "serious", so we are looking at serious violation of international humanitarian law. If there is a risk of a serious violation of international humanitarian law -- "clear risk" being the words of the criterion -- then that is enough. One is looking at that.

We will come on to what we say is the correct interpretation of the words "serious violation" under ground 4, and I am not going to jump-start now --

A MEMBER OF THE BENCH: It may not be an issue, but I was just interested to know. You are saying the qualitative and quantitative consequences of the risk are to be found in the words "serious violation", but you seem to be saying -- and, again, nothing may turn on this -- that it could be sufficient were there to be one serious incident.

MR CHAMBERLAIN: Yes, it could. We would say that. So, another bomb in a wedding, for example, or another clinic hit. I am going to come on to the examples in due course, and what we say constitutes a violation and what we say constitutes a serious violation. But for the moment we do say there is here a list of violations which are alleged by, on the one hand, NGOs and also the UN Expert Panel. If one looks at that last and takes, for example, the missile fired at a Médecins Sans Frontières clinic -- I will come to that example in due course. Your Lordships will have seen reference to that in the papers. It is what caused Médecins Sans Frontières to withdraw all of their staff from Yemen. If your

Lordships were to come to the view that there was a clear risk of another such incident, that would be enough to trigger criterion 2(c) -- more fully, a clear risk that UK-supplied weapons might be used to commit such a violation, but nobody has said that that aspect of the test is in play here because the quantity of UK-supplied weapons is so enormous that if there is a risk that the Saudi military is going to commit a serious violation of international humanitarian law, there must be a risk that it will be doing so using UK-supplied technology.

A MEMBER OF THE BENCH: Can I ask you, Mr Chamberlain, about what the standard is that one is trying to evaluate? I assume it is common ground that risk, even a clear risk, is something lower than a certainty.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: On your submission, presumably you would say lower than a probability (**Inaudible**)?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Would you accept that it is something more than a mere possibility?

MR CHAMBERLAIN: Yes, because of the word "clear".

A MEMBER OF THE BENCH: Right.

MR CHAMBERLAIN: But there is some discussion, as you will have seen in the interveners' submissions, in particular the submissions of Oxfam, of clear risk. Perhaps we can return to that.

A MEMBER OF THE BENCH: Of course.

MR CHAMBERLAIN: I accept that the word "clear" is there and must have some meaning. Our essential point about this is, before you get to the evaluation -- and we are not at the stage of evaluation -- you have to have made a public law compliant, rational determination or analysis of a prior question, which is the state's past and present record of compliance with IHL. In other words, you have to look at what has happened in the past and then, having made a satisfactory analysis of what has happened in the past, go on to consider the question of whether, in the light of that history, there is a clear risk of a serious violation taking place (**Overspeaking**).

A MEMBER OF THE BENCH: But are you saying -- and I do not think you are saying this, are you? -- that it is only if there has been in the past a pattern of actual

violations can you find that there was …? Surely you could say, "We made the assessment that there is a clear risk, looking to the future" --

MR CHAMBERLAIN: You could.

A MEMBER OF THE BENCH: -- even if it has not been established that there were past violations?

MR CHAMBERLAIN: That much I agree. If, for example, a state made public statements indicating that it was planning to undertake a course of conduct which would be violative of international humanitarian law, that would be an example of my Lord's case. But if there is, in truth, an established pattern of violations or, as in this case, there is evidence of such an established pattern and that evidence has not been grappled with, that is a flaw in the decision-making process which infects the evaluation of the clear risk test. Can I explain this in more detail, how we say we get there?

A MEMBER OF THE BENCH: Yes, that would be helpful.

MR CHAMBERLAIN: Before we do that, can I ask your Lordships to look at the heading "Other factors"? It is at the bottom, underneath criterion 8.

A MEMBER OF THE BENCH: Which bundle? Back in authorities bundle 1?

MR CHAMBERLAIN: Sorry, we are back in authorities bundle 1, tab 5. We were looking at criterion 2. Turn on and you will see 3, 4, 5, 6, 7, 8 and then, underneath that, "Other factors". You will see this gives effect to what we were looking at before, which is Article 10. So:

> "Article 10 of the Common Position specifies that member states may, where appropriate, also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the criteria in the Common Position."

Then at the very bottom of the statement, before you get on to the next written statement, you can see:

> "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."

A MEMBER OF THE BENCH: What is the source of that?

MR CHAMBERLAIN: That is also, I think, in the Common Position but I will just check that. If it is not in the Common Position, it is certainly in the User's Guide. I will check that.

A MEMBER OF THE BENCH: It would be helpful to track that (**Overspeaking**).

MR CHAMBERLAIN: Absolutely. I take the point, my Lord, and I will try and answer it (**Several inaudible words**) you. So, as I said, in the light of this, it is common ground, as the Divisional Court recorded at paragraph 28 of its judgment, that the application of criterion 2 does not involve critical considerations. If there is a clear risk that UK-supplied arms might be used to commit a serious violation, the question does not arise whether it would be, for example, in the UK's economic interest to continue to supply arms anyway. The consolidated criteria require that arms exports should not be licensed in those circumstances.

Now, the suspension power, which I showed you in Article 32, is also the subject of a policy or a statement as given by ministers to Parliament. I think I am right in saying we do not have that in the bundle, but it does not matter because it is recited in the judgment below. Can I just show you that statement. It is in the Divisional Court's judgment, if you have the core bundle at tab 7. You need to go forward in that to paragraph 195 on page 133. I would just ask your Lordships to cast an eye over that statement.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: (**Pause**). So, that is the policy in relation to suspension. Can I then ask my Lords to look at the User's Guide. That is back in the authorities bundle at tab 6. Now, I think this may be the answer to my Lord, Lord Justice Irwin's question. If one goes to page 40, internal pagination, under the heading "How to apply criterion 2", at 2.2 you can see "Information sources", and you see:

> "A common EU base of information sources available to all member states consists of EU HOMs reports, EU human rights country strategies and in certain cases EU Council statements/conclusions on the respective recipient countries. These documents normally take into account information available from other international bodies and information sources. However, because of the essential case-by-case analysis and the specificity of each licence application, additional information might be obtained as appropriate from …"

Then here are the lists. They include, as you will see, documentation from the United Nations, the ICRC and other international and regional bodies, reports from

international NGOs and reports from local human rights NGOs and other reliable sources. So that is 2.2.

If one then goes forward to 2.10, that deals with the relevant principles established by instruments of international humanitarian law. It explains what international humanitarian law is, previously often known as the law of war. At the bottom paragraph on that page:

> "The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection."

Over the page it goes on to say:

> "The most important instruments … are the … Geneva Conventions ... and their Additional Protocols … complemented by treaties on particular matters including prohibitions of certain weapons and the protection of certain categories of people and objects, such as children and cultural property."

Further information is there given.

Now, over at the page at 2.11, you can see:

> "Serious violations of international humanitarian law include grave breaches of the four Geneva Conventions …"

There is then reference to the Rome Statute. That is the formulation used by the Divisional Court which we say does not grapple with the dispute between the Secretary of State and us as to what exactly "serious violations" means. We will come to that in a moment. In other words, it is neutral on that issue.

A MEMBER OF THE BENCH: I am so sorry, I have not quite followed that.

MR CHAMBERLAIN: 2.11 includes --

A MEMBER OF THE BENCH: Is what the Divisional Court, as it were, cited?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: In what respect is it neutral?

MR CHAMBERLAIN: It is neutral because it says "include" but we would respectfully submit that does not mean exhaustively include. We will come to explain why we say that, by reference to, in particular, the ICRC material, which, as your Lordships will know, is regarded as authoritative on the question of international law and, in particular, customary international law, and by reference to the

jurisprudence of the Tribunals for the former Yugoslavia and the *Tadic* case which is referred to there.

A MEMBER OF THE BENCH: I just want to try to understand where this fits into the analysis.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Are you saying that the Secretary of State, when carrying out the evaluation as to whether the criteria were satisfied or not, did not have in mind the full breadth of what is "international humanitarian law"? Is that the point?

MR CHAMBERLAIN: He did not have in mind the full breadth of what constitutes a serious violation of international humanitarian law. He appears -- and I will take your Lordships to the documents that show this -- when taking the decision, to have thought that some element of deliberateness was required akin to the kind of **mens rea** that would be required to constitute a war crime. It goes slightly further than that in one part of the Secretary of State's submissions, but essentially what the Secretary of State did not have in mind -- and this is our ground 4 -- was that one could commit a serious violation of international humanitarian law without the mental element necessary for a war crime or for a grave violation. One could do so by a single serious incident. I am going to show you an example of such an incident, where the rules of international humanitarian law were considered in detail by the UN Expert Panel and a very clear conclusion was reached by them that they were almost certain that international humanitarian law had been breached on the facts, and yet if you apply what appears to be the Secretary of State's analysis, you will reach the conclusion that that is not a serious violation of international humanitarian law. I am going to show you that in detail.

A MEMBER OF THE BENCH: You say the error of the Divisional Court was that they also did not appreciate this point? Is that what you are saying?

MR CHAMBERLAIN: They do not seem to have appreciated this point, but what they certainly did not do is consider in detail whether the Secretary of State's decision was infected by a misdirection. That is our ground 4.

Can I then show you 2.13 in the User's Guide. That is headed "Clear risk". This first paragraph in 2.13 the Secretary of State accepts contains matters he needs to consider:

"A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law …"

So, record, commitments and capacity -- those are the three headings which the Secretary of State accepts must be considered. Then this:

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

That is where we get that word "pattern" from.

Then there is, on the facing page, mention of Common Article 1 of the Geneva Conventions and then this towards the bottom of that page:

"Relevant questions to be considered include:

Is there national legislation in place prohibiting and punishing violations of international humanitarian law?"

Now, we will be suggesting and submitting in due course that it is not a coincidence that that is the first question in the list. Why? Because it is absolutely basic, when you are assessing a state's capacity, to ensure that its actions are consistent with international humanitarian law, but does it actually in its law prohibit violations like that? The answer is, as I will show your Lordships, when the Secretary of State took this decision, he just did not know; he had not bothered to ask:

"Has the recipient country put in place requirements for its military commanders to prevent, suppress and take action …"

Then various other questions, including, over the page -- and you will see it at the bottom of the facing page 56:

"Have mechanisms been put in place to ensure accountability for violations of international humanitarian law … including disciplinary and penal sanctions?

Is there an independent and functioning judiciary capable of prosecuting serious violations of international humanitarian law?"

Now, these are all, as I will come on to suggest, very basic requirements when you are assessing a state's compliance. You do not go so far as to say that no state could possibly, under any conceivable circumstances, pass the test if these questions were asked in a particular way, but that is not the question we are asking. The question we are asking is, could you rationally assess compliance with the clear risk test, or whether the clear risk test is met, without even having asked these questions?

A MEMBER OF THE BENCH: Mr Chamberlain, I understand that is how you put the case.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Is it therefore simply a helpful place where one finds these basic questions? I imagine your position would be exactly the same even if you did not have the User's Guide, because you would say rationality requires these basic questions to be asked. Is that right?

MR CHAMBERLAIN: I would say that, my Lord. I would say that. The User's Guide takes the matter a bit further because, as we have seen from the text that immediately precedes the bullet points, "relevant questions to be considered include". But I absolutely accept, as my Lord puts to me, that User's Guide or no User's Guide, nobody could properly assess the question of a state's capacity to comply with international humanitarian law without knowing whether the law of that state prohibited violations of it.

A MEMBER OF THE BENCH: Could I just take you back for a moment to page 54 and that reference to isolated incidents?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH:

> "Isolated incidents of international humanitarian law violations are not necessarily indicative … and may not by themselves be considered to constitute a basis for denying an arms transfer."

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Now, when we had our exchange before, you said that actually even one serious incident could be enough.

MR CHAMBERLAIN: Yes. We are dealing with two different questions: one, what is the position in the past; and two, what is the clear risk a clear risk of? That is the future question. When you are looking at the past, what it is asking is, "Look, is

there a pattern?" If there is an international humanitarian law violation, a one-off, but, for example, the state has fully recognised what happened on that occasion, has undertaken a prompt and effective investigation, has punished those who were responsible for it and has given credible commitment that that will never happen again, that is the kind of case which we would respectfully submit the authors of this User's Guide are considering. It may be one or it may be a few. But you would then say, "This is not a case where we have a pattern of established violations of international humanitarian law and therefore we cannot say there's a clear risk." There may be a risk but not a clear risk that that can occur. Where you have a pattern of violations of international humanitarian law and that pattern of violations continues notwithstanding the fact that commitments are being given, training is being given, there is engagement between the United Kingdom and Saudi Arabia and, despite all of that, there is still a pattern of violations, that fact is relevant, must be relevant, to the question of whether in the future (which is the second part of the analysis) the clear risk of a serious violation is established. That is the way we put it.

Now, my Lords, can I move to my third head of submissions, which is the open evidence from NGO reports and from international bodies as to Saudi Arabia's past and present record of respect for international humanitarian law. It is going to be necessary -- I cannot take you to all of the evidence about this but I am going to take you to some examples, if I may. Before I do that, can I just show you where the Divisional Court in its judgment summarised this material? They summarised it at paragraphs 61 to 85 of the judgment.

A MEMBER OF THE BENCH: Can we put away the authorities bundles?

MR CHAMBERLAIN: Yes, you can put away the authorities bundle, absolutely.

Would your Lordships just take up paragraph 61 for the moment. It is under the heading "Claimant's evidence". As I have said, it would not be possible to go through all of the underlying material in the time available. What I am going to do, therefore, instead, is I am going to show you a selection of the underlying material, one report by Human Rights Watch, one report by Amnesty International and two reports of the UN Expert Panel in 2016-2017. Before I do that, can I make some general points just by reference to the summary which you have here?

The first thing to note about the material -- and this comes out, really, from 61 and 62 -- is the sheer quantity of it and the variety of reputable sources from which it comes. You can see the United Nations, the European Parliament, the Council of the European Union, the International Committee of the Red Cross, Médecins Sans Frontières, Amnesty International, Human Rights Watch, and there is also reference to the House of Commons Committees and the press.

Now, it is also important, in our respectful submission, to note that this material comes not only from NGOs, as sometimes is the case, for example, in immigration cases, as your Lordships may be familiar with, but also from international institutions whose views are entitled to particular weight. I just draw attention to a few of those. At 65 there is the European Parliament resolution of 9 July 2015. At 68 is a further resolution on 25 February 2016.

At 74 there is the UN Committee on the Rights of the Child report. One can see:

> "(a) Hundreds of children have been killed and maimed as a result of indiscriminate airstrikes and shelling by the state party-led coalition on civilian areas and camps for internally displaced persons …
>
> (b) Prohibited tactics such as inducing starvation …
>
> (c) More than 3 million children in Yemen face life-threatening levels of malnutrition and thousands are currently at risk of dying from diseases owing to the dire humanitarian crisis …"

Then at 76 to 79 there is a summary of a large collection of material collated by Ms Feltham of the appellant, from identified open sources. You have a selection of that material in the bundle.

So, sometimes one is dealing with, in these sorts of cases, an isolated report, but this is not what we are dealing with here.

Now, can I ask the court to recall that two points were made by the Divisional Court at paragraph 201(ii) of its judgment. These were in the nature of generic criticisms, if I can put it that way, of the open material. These are both relied upon by the Secretary of State in his skeleton argument at paragraph 13. You can see them at the bottom of 201(ii), and the first point, at the last two sentences of that paragraph:

> "Such organisations often have not visited and conducted investigations in Yemen, and are necessarily reliant on second-hand information. Moreover, ground witnesses may draw

conclusions about airstrikes without knowledge of all of the circumstances."

My Lord, I am going to ask you to have those two criticisms in mind when you go through the examples of the reports which I want to show you.

What I am going to submit -- I will give you the headlines in advance -- is that what you find is actually the opposite. Many of the NGO reports that we are looking at, and certainly all of the ones I am going to show you, are based on first-hand visits to the areas affected in the immediate aftermath of the strikes and contain carefully documented first-hand evidence. In the case of the MSF report, which I will show you, it is a report by the organisation whose clinic was hit. Not only were they on the ground, my Lords, but were actually hit by a Saudi missile. Far from simply accepting the conclusions of ground witnesses, these reports contain fully reasoned analysis of the evidence gathered and explain in detail the inferences they draw from that evidence, which rules of IHL they say were violated and why.

A MEMBER OF THE BENCH: Where are you reading from now?

MR CHAMBERLAIN: This is a submission, my Lord.

A MEMBER OF THE BENCH: I am so sorry.

MR CHAMBERLAIN: In particular, another complaint that is made is the reports do not simply assume that because a large number of civilian casualties resulted from a particular strike, therefore it must have breached international humanitarian law. Of course, we accept it does not follow from the mere fact that there is a large number of civilian casualties that IHL has been breached. I am going to show you the way that the conclusions are drawn, and we would respectfully submit they are forensic pieces of work. If you are going to disagree with the conclusions drawn, it is incumbent on a rational decision-maker to say why.

A MEMBER OF THE BENCH: I just want to understand the exercise we are now engaged in.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: So, the Divisional Court have the material before them.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: They take a view about the relative strengths and weaknesses and, on the one hand, the sources of information available to the

Government, and on the other hand the sources of information and reliability of the information gathered by NGOs.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: They take a view on that relative (**Inaudible**). What does it require for this court to interfere with their evaluation of that issue?

MR CHAMBERLAIN: For this court to interfere, it would have to reach the view -- and this is a view which we will invite the court to reach -- that the Divisional Court went wrong in its evaluation, that it failed to take into account critical points.

What are the critical points we say it failed to take into account? Well, first of all it made generic criticisms which were not properly open to it on the evidence. Its two generic criticisms were, "Well, much of this material was not first-hand," and I am going to show you that is simply not a fair criticism, particularly given that the Secretary of State did not have anyone on the ground, whereas the NGO reports were based on first-hand evidence from people on the ground, and secondly, if the complaint was that the report simply jumped from "large numbers of civilian casualties, ergo IHL breach", that is just not a fair criticism of the reports -- they do not.

Most importantly, what the Divisional Court did not focus on and what is actually the key to this judicial review claim is what the Secretary of State made of this material. Was the Secretary of State's analysis of this material permissible or was it flawed in a public law sense? We say when you have this quantity of open material from apparently reliable sources, it is incumbent on a public law decision-maker to look at that material and engage with it. That is the word used. I will come to the authority that uses that word in due course. Engage with it.

How do you engage with material like that? Well, you look at the conclusion of the individual reports and you say, "Either I accept it or I don't accept it, and if I don't accept it, why don't I accept it? That might be because I've got material they didn't have." It might be because the methodology adopted in this particular report was a flawed methodology. It could be for any number of reasons. What we will find when we look at this material is that the Secretary of State simply has not engaged at all with it. He said, "I've taken it into account," but we have seen nothing to indicate what he made of it.

Now, my Lords, can I ask you to look at the first example of this, which I propose to invite you to consider. It is the Human Rights Watch report of June 2015 entitled, "Targeting Sa'ada" and it is in supplemental bundle 3, tab 22, page C58. Can we start by looking at the methodology section at C65.

A MEMBER OF THE BENCH: Again, I am trying to put this in its proper context.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: I asked you what exactly was the criticism of the Divisional Court that engages us in this court, and you mentioned two factors.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Then you went on and you said the question is whether the public law authority, here the Secretary of State, engage with this material.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Are you saying that the Divisional Court failed to appreciate or perceive that he did not engage with the material?

MR CHAMBERLAIN: Indeed we are. What we are saying is that the Divisional Court essentially said, "Well, this material was all before the Secretary of State. He doesn't really have to say what he made of it. It all goes into the melting pot and the Secretary of State makes a decision on clear risk. As long as he's taken it into account that's okay, given the criticisms that have been made of it."

A MEMBER OF THE BENCH: I see.

MR CHAMBERLAIN: We say that when you have this volume of material from this type of provenance -- in other words, reputable NGOs and international organisations -- the demands of public law rationality go further than that. You have to say that, given that is what the material says -- the material establishes a pattern of violations, some of them serious -- either we accept that there is such a pattern and then go on to consider the analysis of whether the clear risk test is met, or we say there is not such a pattern, but in that case we have to say why not, in the light of this material. That is essentially the case.

Now, if you look at the methodology section -- I am not going to read it all out -- you can see it is based on detailed visits and interviews on the ground, something which is not said of the Government's own evidence. The Government does not have people on the ground in Yemen, for perfectly obvious and understandable reasons; the NGOs do. For your note -- I will not ask you to look

at it now -- there is further detail as to Human Rights Watch's methodology at paragraph 14 of Ms Stratford's written submission in this case.

So that is the methodology -- detailed field research and interviews. If one then looks at C70, you can see what happened in this case. The declaration -- the so-called Sa'ada declaration -- and Sa'ada, just for context, is a town about the same size as Cambridge; it is about 100,000 people. You can see what the declaration was at C70:

> "Starting today, and as you all remember, we've declared through media platforms and through the leaflets that were dropped and prior warnings to Yemeni civilians in those two cities to get away from those cities where operations will take place. This warning will end at 7.00 pm today and coalition forces will immediately respond to the actions of these militias that targeted the security and safety of the Saudi citizens from now until the objectives of this operation are reached. We've also declared Sa'ada and Marran as military targets loyal to the Houthi militias. As a result, the operations will cover the whole area of these two cities, and thus we repeat our call to the civilians to stay away from these groups and leave the areas under Houthi control or where Houthis are taking shelter."

Now, look at the bottom of C70:

> "Issuing a warning of impending attacks to the civilian population is in line with the obligation under the laws of war to take all feasible precautions to minimise civilian harm and in particular provide effective advanced warning. However, the general and vague nature of these warnings would be of little help to civilians. Even more problematic, and a clear violation of the laws of war, is the coalition assertion that the entire cities of Sa'ada and Marran are military targets. The laws of war prohibit attacks that treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects."

Then if you look over the page at 72, you will see what actually happened:

> "… 210 distinct impact locations in built-up areas of the city consistent with aerial bombardment."

In other words, a clear breach, we would respectfully submit -- and that is what Human Rights Watch concluded -- of the rule against area bombardment.

Just for your note -- I am not going to go to it now -- I will give you where that rule is to be found. It is to be found in Article 51(5)(a) of the first Additional Protocol to the Geneva Conventions and, secondly, as a matter of customary international law, set out in the ICRC handbook, authorities bundle 2, tab 32,

internal page 43. I am going to come back to that occasion and see what the UN Expert Panel said about it in just a moment.

The short point we make is that to declare an entire city the size of Cambridge to be a military target is the most flagrant breach of international humanitarian law one can imagine, and that is what Human Rights Watch said and that is what the UN Expert Panel said. What did the Secretary of State think about that? We have no idea. He just has not told us.

What you will see in relation to the warnings -- we will come to it when we see the UN Expert Panel report -- is that leaflets were dropped one to two hours before the bombardment started. A large portion of the population of that town were illiterate and could not read the leaflets. There was a warning on the radio some four or five hours before the bombardment started, but what were the inhabitants of that town to do? Many of them had no petrol, as the UN expert report shows, and they could not get in their cars and get out, and they were being told that the entire city was a military target, in breach of the rule against area bombardment, and the attacks then started. That is the first example.

I will show you the second report that we say is a good example of what was in front of the Secretary of State. It is the next tab, 23, and it is Amnesty's report, Nowhere Safe for Civilians: Airstrikes and Ground Attacks in Yemen. Now, that took the form, as you can see from C112 to 113 -- there is a summary there, in the second paragraph -- of a detailed investigation into eight coalition airstrikes which, between them, killed 141 civilians and injured 101, most of them women and children, in Southern Yemen. A summary of the findings is set out at 112 to 113.

Over the page you can see the methodology used. This is at 114:

> "Amnesty International carried out field research in Yemen in May, June and July 2015, during which time the organisation's delegates visited the sites of scores of airstrikes and ground attacks in Ta'iz, Sana'a, Aden and Sa'ada. Amnesty International visited multiple airstrike locations and investigated the circumstances and impact of the attacks. Fragments from munitions used in the attacks were documented by Amnesty International delegates and analysed by weapons experts. The organisations' delegates interviewed survivors, families of victims, witnesses, medical and NGO personnel and activists on the ground. All interviews were conducted in Arabic and the interviewees were informed of the purpose of the interviews, which they consented to."

So, that is the methodology used. Just recall what was said in the Divisional Court judgment; not first-hand reports. Further detail about the methodology used by Amnesty can be found in Ms Stratford's submission at paragraph 16.

A MEMBER OF THE BENCH: Where do we have Ms Stratford's submission?

MR CHAMBERLAIN: It is at the end of the core bundle, tab 20, and that particular passage is internal page 10.

A MEMBER OF THE BENCH: Thank you.

MR CHAMBERLAIN: 115 to 116 then sets out -- this is now addressing the second criticism, which is, "Well, you're just assuming that, because ground witnesses told you there were large amount of cavities, therefore you jump from that to a conclusion about IHL." Well, no. Here at 115 you have a detailed discussion with footnotes of the law applicable to the conflict. It explains which rules of IHL it says were violated and it explains over the page and following, in the rest of the report, detailed conclusions drawn about each of the eight airstrikes considered.

My Lord, then there are the two reports of the UN Expert Panel, and I do need to show you both of those because they are obviously an important part of the case. The first one is at C205, starting at C199 in tab 31 of the same bundle. Can I just explain what the UN Expert Panel was. Your Lordships may find it of use to have open at the same time the second authorities bundle right at the end, into which we have inserted -- and I hope it has reached you -- the UN Security Council Resolution pursuant to which the Expert Panel was appointed.

A MEMBER OF THE BENCH: Which tab?

MR CHAMBERLAIN: We have put it in right at the end of tab 35. I hope it has reached you.

A MEMBER OF THE BENCH: Yes.

A MEMBER OF THE BENCH: Is this 2140?

MR CHAMBERLAIN: Yes, it is 2140 of 2014, my Lord. What this resolution did was, as sometimes happens when a conflict starts, the UN Security Council starts to think, "What can we do about the conflict?" One thing that they did was they set up a sanctions regime whereby individuals can be subject to sanctions as a result of their conduct in relation to the conflict. As part of that regime, they appointed a panel of experts. If you turn to paragraph 18 of the Security Council's resolution, which is headed "Designation criteria", this is how we are going to designate

people as suitable for the imposition of sanctions. 18 underscores that such acts as described in paragraph 17 may include -- and those are acts that threaten the peace, security or stability of Yemen -- at (c), planning, directing or committing acts that violate applicable international human rights law or international humanitarian law or acts that constitute human rights abuses in Yemen. Then one can see that there is provision for the Sanctions Committee, and at paragraph 21 you can see the provision which sets out the Panel of Experts to assist the Committee in carrying out its mandate.

One of the things the Panel of Experts is looking at is, have there been breaches of international humanitarian law, and, if there have, then it is up to someone else, namely the Sanctions Committee, to say whether anybody should be put onto the sanctions list as a result of that. So, it is part of their mandate to look at whether there have been breaches of international humanitarian law or not.

Now, going back at this stage -- you can put that away now -- to the first UN Expert Panel report, it sets out at paragraph 123, which is on C209, a section headed "Acts that violate international humanitarian law and human rights law and cross-cutting issues". You can see there the methodology used by the UN Expert Panel. It is right to say that the UN Expert Panel did not itself have its expert on the ground in Yemen. That is because they were not permitted to go there or they could not go there safely, but you can see what methodology they did adopt, and that is:

> "… several methods to obtain information and corroborate violations, such as conducting interviews with refugees, humanitarian organisations, journalists and local activists and undertaking a trend analysis relating to the conduct of hostilities. The Panel obtained satellite imagery to assist in substantiating widespread or systematic attacks."

So, again, we would respectfully submit, a rigorous methodology was used.

Then it deals with acts that violation international humanitarian law. At 123 we can see it is setting out the relevant principles of international humanitarian law, the principle of distinction, the principle of proportionality, and at 124 it concludes:

> "All parties to the conflict … have violated the principles of distinction, proportionality and precaution, including through their use of heavy explosive weapons in, on and around residential areas and civilian objects, in contravention of international humanitarian

> law. The use of such attacks in a widespread or systematic manner has the potential to meet the legal criteria for a finding of a crime against humanity."

Now, I just want to show you one finding in particular, and that is that the finding which is summarised at 128 but dealt with in much greater detail in an annex to the report, about the targeting of Sa'ada, which is what the first report we looked at, the Human Rights Watch report, was also dealing with. This is what they say:

> "The coalition's targeting of civilians through airstrikes, either by bombing, residential neighbourhoods or by treating the entire city of Sa'ada and region of Marran as military targets, is a grave violation of the principles of distinction, proportionality and precaution. In certain cases, the Panel found such violations to have been conducted in a widespread and systematic manner."

One can see what they meant by that by looking at the footnote. That is a reference to the Rome Statute of the International Criminal Court which sets out and defines war crimes. We say that actually when one is looking for serious violations of international humanitarian law you do not need war crimes because that term, serious violations of international humanitarian law, is wider than war crimes. This report actually finds that in certain cases the violations were conducted in a widespread and systematic manner and it makes specific reference to the Rome Statute of the International Criminal Court.

Now, can I just show you what is said about the targeting of Sa'ada and Marran at 140 on page 213. On 8 May, the entire city of Sa'ada and region of Marran were declared a military target:

> "Sa'ada 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 humanitarian law. Figure 5 provides a satellite image of Sa'ada with additional imagery contained in maps 1 to 8. It is a comparison of satellite images taken on 6 January, before the launch of coalition airstrikes, and 22 May, during the early stages of the coalition's campaign. Sa'ada also faced systematic indiscriminate attacks, including on hospitals, schools and mosques by the coalition."

You can see at 141 further detail is given about that.

Can I also ask you to look -- this is perhaps the most telling material here -- at annex 56. We have not given you the entirety of it. It is an enormous report.

Annex 56 deals with indiscriminate coalition airstrikes and issues of proportionality and lack of effective advance warning in Sa'ada.

A MEMBER OF THE BENCH: What page is it?

MR CHAMBERLAIN: C236. I am not going to read it out, but the overview paragraph gives you a flavour of the methodology used. Then the penultimate paragraph on that page makes it clear that:

> "… collective punishment of a civilian population is prohibited under all circumstances and therefore the targeting of the city raises extremely serious concerns, including violations of the principles of precaution, proportionality and distinction."

And then this:

> "During its initial investigation, a staff member of a UN agency who was based in Yemen at the time, interviewed by the Panel, said that initially prior to the coalition-led airstrikes in Sa'ada, warning leaflets were dropped across Sa'ada, perhaps an hour to two hours before the strikes were conducted. The same source, along with another UN staff member from a different agency, stated that, due to the fact the attacks were occurring across an indiscriminate area including civilian homes as well as schools and hospitals, and that it is an area of high illiteracy, the leaflet drops were deemed largely, if not almost completely, ineffective as a warning mechanism and alert system."

Then over the page:

> "In more recent discussions with an independent expert of IHL [and I should just note at this stage there was an IHL expert that was a member of this panel of experts, which was Lucy Matheson] it was raised that even if leaflets had been dropped as an advance warning mechanism, the main cause of concern was that a whole governorate had been labelled a military target and, as such, a one- to two-hour warning or evacuation notice period was simply not enough time to allow civilians to safely evacuate an area."

That is why I said this is a city the size of Cambridge:

> "A further confidential source told the Panel that Saudi Arabia had issued radio warnings approximately six or seven hours before the onset of airstrikes … also before the leaflet drops, but that, along with the short timeframe for such a large-scale evacuation, fuel shortages had impeded civilians' ability to leave the area within the prescribed timeframe."

Then there is detail in the next paragraph, and you can see the pictures which show the devastation of that city.

Over the page at 237:

> "During the Panel's July-August 2015 investigative period, in meetings with Yemeni refugees and third country nationals in Djibouti, the Panel was told that initial airstrikes had occurred at certain times of day, but then it had become almost non-stop, across all times of the day and the night … Sa'ada has suffered the most with 226 destroyed buildings identified on 22 May 2015, in less than three months of coalition campaign."

So, that is a flavour of the first report. Now, can I just show you what was said by the Divisional Court about this at paragraph 141? My Lord asked me the question of how we are going to convince this court to overturn the findings of the Divisional Court, and I obviously have to grapple with that question. I will just show you what was said about this at 141. This is part of the judgment where the Divisional Court is dealing with a statement. You will recall the May declaration made by Brigadier-General Asiri, who was at that time the Saudi coalition spokesperson. You will have seen he is no longer in that post due to his removal in connection with the murder of Mr Khashoggi. But what he said then was that the entire city was a military target. At 141 we can see he was highlighting:

> "… the population in Sa'ada and Marran had been put on notice through social media and leaflet drops to evacuate prior to military action. This was in accordance with proper practice. IHL requires adequate advanced warning to be given to civilians who may be affected by military attacks."

My Lords, "adequate advanced warning". You have seen the conclusions drawn both by Human Rights Watch and by the UN Expert Panel here. Dropping leaflets on a largely illiterate population one to two hours before attacks and giving a radio broadcast a couple of hours before that, to a population where there are fuel shortages, and telling them, "You've got to get out of the entire city and region before the bombing starts," is not on any view adequate warning.

My Lords, I do not need this court to make a finding to that effect. It is not our case that this court or any court should be making findings that the Saudi coalition has breached international humanitarian law on this occasion. As I said at the outset, our submission is much more modest than that. It is that the primary decision-maker, the Secretary of State, needed to engage with this material and needed to say, if he does not accept what is said, for example, by the UN Expert Panel here, why not. "Maybe you do accept it. If you do accept it, factor it into your analysis; if you don't accept it, say why not."

There are all sorts of answers to that question that one could conceivably give. It might be that the Secretary of State says, "Well, I know much more about the processes that were going through the Saudis' minds on that occasion than you do." But we have had none of that at all, simply a failure to engage with this material. We say that is what makes this decision unlawful. To say, as the Divisional Court did, that the declaration simply indicates that they were complying with their obligation to give adequate warning itself does not engage with the criticisms that have been made in both the Human Rights Watch report and the UN Expert Panel report.

Now, can I just show you the second UN Expert Panel report. This is really the most comprehensive report you have in the bundle. This is the last example I am going to show you (**Overspeaking**).

A MEMBER OF THE BENCH: That was not in open at the previous --

MR CHAMBERLAIN: It was in closed previously.

A MEMBER OF THE BENCH: It was in closed only.

MR CHAMBERLAIN: It was in closed before the Divisional Court but we had a report but we had an open press report of it, so we were able to make submissions about it.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: We did not have the full report ourselves, although the special advocates did. The Divisional Court clearly did consider it.

A MEMBER OF THE BENCH: Just to get it clear, because the Government had only had it under conditions of confidentiality, it could not at that point be put in open.

MR CHAMBERLAIN: That is right.

A MEMBER OF THE BENCH: But they communicated the gist of it in open and then allowed it to be seen in closed.

MR CHAMBERLAIN: Yes. I am just going to show you what that report said, because when one thinks about the criticisms that are being levelled at this material by a Secretary of State who has not engaged in any detail with any (**Inaudible**), those criticisms can, we respectfully submit, be seen to be baseless. The second report is in bundle 3, tab 45, starting at C329. Its methodology is set out at 335 to 336. If one goes forward to 335, paragraph 4, above the heading "Methodology" you see them setting out their mandate under the UN Security Council Resolution and

various other resolutions that we have not put in the bundle which amended it. They simply make the mandate even wider. At 4 you can see:

> "In its investigations, the Panel complied with paragraph 11 of the 2016 resolution which pertains to the best practices and methods recommended by the Informal Working Group of the Security Council and has maintained the highest achievable standard of proof even though it was unable to travel to Yemen. Emphasis has been placed on adherence to standards regarding transparency and sources, documentary evidence, corroboration of independent verifiable sources and providing the opportunity to reply. The Panel has maintained transparency, objectivity, impartiality and independence in its investigations and based its findings on a balance of verifiable evidence."

Then it deals with satellite imagery, commercial databases used, that public statements of officials were considered, and it makes the point that, whilst it has been as transparent as possible, it has not identified sources if that would put the sources in danger.

Then at 6, it says it reviewed social media but no information gathered was used as evidence unless it could be corroborated using multiple independent or technical sources, including eyewitnesses, to appropriately meet the highest achievable standard of proof. That is the methodology.

Now, if one goes forward to C338, you can see the section of the report that deals with acts that violate international humanitarian law and human rights law. 118 explains the mandate again. 119 explains the evidentiary standards:

> "The Panel has maintained the requisite high level of evidentiary standards in respect of each incident investigated and reported, even though it did not have physical access to Yemen."

120 explains that there were investigations into ten airstrikes that led to, between them, 292 civilian fatalities, including at least 100 women and children and destroyed various buildings including a hospital and a marketplace. Detailed case studies were then provided in the annex. I am going to come back to this table in due course, when we look at the information that was available to the Secretary of State, but just while we are on it now, what is going to be key is to look at these dates. These are ten airstrikes taking place during 2016, so when the Secretary of State says, as we will in due course see, "Well, we've been providing training to the Saudis on IHL compliance and we've had quite a lot of engagement with Saudi military interlocutors," one thing that I am going to invite your

Lordships to do is to look at that training and those conversations and to ask yourselves the question of what were the dates on which that training was provided and what was happening at the same time that that training was being provided and after it had been provided. Of course, the Secretary of State has not asked that question because the Secretary of State has not reached a view that there was a breach of international humanitarian law in any case. I will come to where that is all set out in due course.

Now, 121 has a summary of one particular strike, the last one, where you can see 132 died and 695 were injured in a strike on a funeral -- civilian funeral hall -- in October 2016.

122 to 125 details the technical analysis of the physical evidence. I am not going to invite you to read that now but just give you that for your note.

126 makes the point:

> "None of the member states comprising the coalition that operated air assets provided the Panel with access to information on the events listed in table 7, its requests notwithstanding. This is in non-compliance with paragraph 8 of resolution 2266."

It makes the point, "We asked the Saudi coalition for its response on these, they were required to give that response by resolution 2266 and they failed."

Nonetheless, the Panel goes on to record its conclusions, and at 127 it records that:

> "In eight of the ten investigations, the Panel found no evidence that the airstrikes had targeted legitimate military objectives."

At footnote 147:

> "The exceptions being airstrikes 1 and 10. The use of precision-guided weapons in eight of the ten incidents indicated that the intended target was hit."

I pause to note, by the way, that that figure of eight out of ten is remarkably consistent with what the Secretary of State has found, using the MOD's Tracker system, which is that the Secretary of State was unable to identify a military target in the later reporting periods in 75 per cent, three-quarters, of cases.

More to the point, in eight out of ten cases no legitimate military target found, and:

> "For all ten [cases], the Panel considers it almost certain that the coalition did not meet IHL requirements of proportionality and

precaution in attack. The Panel considers that some of the attacks may amount to war crimes."

Then 128 to 131 is also important. We will come to the Abs hospital strike in just a moment, but:

"… the Panel finds that the coalition violated principles relating to the protection of and respect for hospitals and medical personnel; the protection of the wounded and sick; and the protection of persons **hors de combat** in its strike on the hospital.

129. All States whose forces engage in or otherwise participate in military operations … are responsible for 'all acts committed by persons forming part of its armed forces' [and so forth]."

Then at 130, this links back to the Panel mandate:

"Those individuals responsible for planning, deciding on and/or executing airstrikes that disproportionately affect civilians and civilian infrastructure may fall under the designation criteria contained in paragraph 17 of resolution 2140 [as we have seen]. Their acts may also fall under paragraph 18 …"

Then at 131 this general conclusion is drawn:

"The Panel finds that violations associated with the conduct of the air campaign are sufficiently widespread to reflect either an ineffective targeting process or a broader policy of attrition against civilian infrastructure."

A MEMBER OF THE BENCH: Mr Chamberlain, does it follow from paragraph 126 that the Panel was unable to ascribe any of these particular actions to any of the members of the coalition?

MR CHAMBERLAIN: It certainly does follow that the Panel was not able to say specifically, in the absence of a response, which of the coalition members was responsible, but the background to this is that Saudi Arabia is far and away the lead party in the coalition and, although this challenge focuses on the export of arms to Saudi Arabia, I do not think it has ever been suggested by the Secretary of State that it would be an adequate answer to this challenge to say, "Oh, well, it might have been another coalition member." It has never been part of the Secretary of State's case. To all intents and purposes, these airstrikes are being carried out by Saudi planes.

A MEMBER OF THE BENCH: You cannot infer that from this text.

MR CHAMBERLAIN: No.

A MEMBER OF THE BENCH: You are saying that the Secretary of State should have assumed that?

MR CHAMBERLAIN: My Lord, let me put it this way. If Saudi Arabia is part of and the lead partner in a coalition which is responsible for violations of this kind, ten of them, over the course of the campaign, that would in and of itself be enough, in our respectful submission, to indicate that the criteria were satisfied. There is no indication here -- nobody has suggested, the Secretary of State has not suggested, as far as we are aware, that any of these strikes might properly be attributed to anyone else.

A MEMBER OF THE BENCH: But it might be. I think your fundamental submission under ground 1 is that there was enough independent evidence from reputable sources at least to require the question to be asked --

MR CHAMBERLAIN: Indeed.

A MEMBER OF THE BENCH: -- "Has there been a violation?" but the answer might be, "Actually, we don't know whether it was Saudi Arabia that did it and therefore we conclude there wasn't a violation by them." But your fundamental submission, as I understand it, is the Secretary of State did not ask the right question --

MR CHAMBERLAIN: Indeed.

A MEMBER OF THE BENCH: -- and if his answer was, "I don't accept," this, that and the other, then it was incumbent on him to say why?

MR CHAMBERLAIN: Exactly. If the Secretary of State were going to come back and say, "I've read all of this and I accept it all; there do seem to have been ten almost certain violations of IHL causing large numbers of civilian casualties over the course of 2016, but my conclusion, based on the material I have separately, is actually that it was the UAE that did all of that and not Saudi Arabia," or that it was some other state that did all of that, then one would have to assess the rationality of that. But there has not been that engagement, so I respectfully adopt the way my Lord puts it.

A MEMBER OF THE BENCH: I am just seeking to clarify what your submission is.

MR CHAMBERLAIN: Yes. I would say that it has to be engaged with and that might be one conceivable way of engaging with it, but there is no evidence that has been done. My Lord, that then is the body of the report.

Can I just show you, then, the annex? The annexes to the report are also very important. Annex 2 is at 355. That deals with the investigative methodology. I am not going to read it out but it sets it out in a great deal of detail. Again, I am

not going to read the annexes themselves out but I just want to show you where they are. They start at 369. Again at 369, paragraph 2 references the highest evidentiary standards.

Can I just take one of the annexes as an example. This is starting at 371, the attack on the Al-Khamis market.

A MEMBER OF THE BENCH: What does that mean, that expression, "highest possible evidentiary standards"? What does that actually mean? It is a statement.

MR CHAMBERLAIN: Yes, it is a --

A MEMBER OF THE BENCH: What weight does that carry?

MR CHAMBERLAIN: Well, it is a statement that refers back, and you will have seen reference before to a Security Council resolution that is not in the bundle -- perhaps we can provide that to you over lunch -- which simply indicates the basis on which the Panel draws its conclusions. We will see if we can provide that further, the Security Council Resolution, because it sets out the methodology that is required.

A MEMBER OF THE BENCH: You did refer to paragraphs 4 and 5.

MR CHAMBERLAIN: Yes. If you look at annex 2, which you have at 355, that sets out what the standards are, so I think this may be the answer, in fact, rather than looking at the Security Council resolution. These are the standards. You can see it relies on, for example, "at least three or more of the following sources of information" and so forth. So, it is an extremely rigorous process where the standards are transparently set out and then followed. Then I will just take the first of the airstrikes as an example at 371. The background is set out with the sources set out in the footnotes. The public response of Saudi Arabia is then set out at 373. This is also important. It is the JIAT, Joint Incident Assessment Team.

A MEMBER OF THE BENCH: Is the constitution of the JIAT set down somewhere? It is scattered throughout the judgment in the papers.

MR CHAMBERLAIN: I will see if I can find the answer to that.

A MEMBER OF THE BENCH: To see who and how and what the basis of that is.

MR CHAMBERLAIN: Yes. It consists of people from the different coalition partners.

A MEMBER OF THE BENCH: Yes, that is certainly the case.

MR CHAMBERLAIN: You can see the JIAT. So, the JIAT's conclusion was that the operation took place on a Tuesday and the target was a legitimate high-value

military objective that conferred a strategic advantage. It was located 34 kilometres from the Saudi Arabian border and therefore posed a threat to the troops' position there. That is the conclusion of the JIAT

What do the Panel do? Well, they examine that conclusion critically. They set out their own analysis of violations of IHL from 10 to 14 and they summarise their findings at 15. There is there a detailed analysis of the particular rules of IHL that were said to have been violated and the reasons why the inference is drawn that the violation took place. Then the summary of findings is they simply do not accept what the JIAT said, they are unconvinced that principles in relation to proportionality were respected in this incident, and if precautionary measures were taken, they were largely inadequate and ineffective. That is the conclusion.

Now, I am not going to read all the other annexes. There are detailed findings in respect of these ten cases. I would just ask you to flag one which will be relevant in just a moment. That is the Abs hospital case, which you have at C383. You can see what happened here. This was a strike on a Médecins Sans Frontières hospital. 19 people were killed, including a Médecins Sans Frontières staff member, Mr Abdul Kareem al Hakeemi, and 24 injured.

Just looking at what the Panel did, if you turn over to 385, again the JIAT provided a response. The JIAT said that the target was a legitimate military target; it was a car transporting an injured fighter to the hospital. But they say they must extend an apology for this unintentional mistake and provide the proper assistance to the families with affected persons. What you have here is a detailed analysis of the physical evidence, a consideration of the Saudi response and then the Panel's observations on those findings at 385 to 386. Then you have the Panel's assessment on the targeted civilian vehicle.

This is at 14 on 386:

> "… not convinced that the 'moving vehicle that entered the compound' was a legitimate military objective. [It was] a civilian car transporting wounded individual(s) … to the hospital. The Panel cannot conclusively state that the wounded in the vehicle was/were fighter/s or civilian/s. Yet, this alone does not make the vehicle a legitimate military objective because those wounded, if they were fighters, had become **hors de combat**, and are protected from direct attack under IHL."

Then at 16:

> "The Panel finds that the hospital was protected from attack under IHL at the time of that attack, and there is no demonstrable evidence to indicate that the facility and medical personnel had lost their protected status …"

At 17:

> "The Panel finds that the Saudi Arabia-led coalition also violated IHL principles relating to the protection of wounded and sick persons, medical personnel, persons **hors de combat** and civilians in this airstrike."

At 18:

> "The JIAT statement demonstrates that the Saudi Arabia-led coalition did not consider the presence of, and impact on, the hospital or its occupants in its proportionality assessment undertaken prior to the airstrikes. Any proportionality assessment should have considered, at least: the high number of civilian casualties …; impact on other protected persons, including the wounded, the sick, medical personnel, and **hors de combat**; and the special protection afforded to hospitals under IHL."

At 19:

> "[The] statement demonstrates that the … coalition did not comply with the strict IHL obligation to issue a warning prior to the attack. An attack could only have taken place after a reasonable time …"

It concludes there was a violation of the principles relating to precautions in attack.

Now, I am going to give you, as well -- I know that time is pressing -- just a reference to the MSF report of that attack, because when you are considering what you draw from these reports, one thing you have to consider is what is the cumulative effect of them; do they corroborate each other? We have already seen the HRW, the Human Rights Watch, report on the targeting of Sa'ada, corroborated by the UN Expert Panel independent report on that. Here we have the UN Expert Panel looking at this attack on a Médecins Sans Frontières hospital which is corroborated by Médecins Sans Frontières's own analysis which you see in supplemental bundle 1, tab 10, AF11, page B323. I will just look very briefly at that, if I may, just so show you what we say about this. It is supplemental bundle 1, tab 10 and little tab AF11. Again, I will try and be quick with this.

B324 tells you 19 people were killed, 24 injured. At the time there were 23 patients in surgery, 25 in the maternity ward, 12 in paediatrics and 13 new-borns. If you go to 326, the missile made impact between -- at 326 you can see, right at the top, the main impact between the ER/triage area and the outpatient department.

At the bottom of that page you can see what happened five minutes before the attack:

> "A civilian vehicle brings patients from another airstrike to the hospital. Passengers reportedly in civilian clothes, no weapons visible."

At 328, the bold text in the middle of the page:

> "The car was visually inspected at the gate by the hospital ER guard. The people in the car were wearing civilian clothes and no weapons were visible."

Further details of those killed are at 330. Five children killed and four injured.

Then you have, at 331 to 334, an analysis of the position under IHL. It is perhaps a slightly less rigorous analysis than you see in the UN expert panel report, but still an analysis. It goes through the relevant stages. Stage 1:

> "Abs hospital was a fully functional medical facility providing all available services to the local community."

Stage 2 is that it was duly identified. It had MSF logos on the roof. And, not just that, but its co-ordinates had been communicated to the Saudi-led coalition regularly. The latest occasion on which that had occurred was five days before the attack.

Stage 3, the neutrality of the hospital had not been compromised. So, here is a report from MSF staff indicating there were no non-routine activities taking place in this hospital; it was just operating as a hospital.

Stage 4, no notification or warning received of the impending attack.

Now, you put that together with the analysis in the UN Expert Panel second report and you have not just one report but two reports, one of them from people who were not only on the ground but were an organisation whose staff members were on the ground at the time of the attack. It is difficult to imagine how one could have a more powerful methodologically sound analysis of the position.

My Lords, can I move to my fourth head, which is what is known in open about the Secretary of State's decision-making process in this case. Your Lordships will have seen that one of the things the Secretary of State relies on is that, "That's all very well, looking at the open report, but I have other information." Before we get to the other information, I will deal with each of the six strands of additional information which are relied on by the Secretary of State.

Before we get to that, can I just show you what the Secretary of State's pleaded case is about what obligations there are on the Secretary of State as a matter of rationality when faced with this overwhelming body of open-source material. In the core bundle tab 13 -- it is in the Secretary of State's summary grounds -- in fact, the summary grounds were filed at the permission stage but there were no detailed grounds filed; they were quite detailed to start with from the Secretary of State -- we do not make any criticism in that respect; I am just letting your Lordships know what the position is.

If we then turn to paragraphs 45 and 46 on page 272 of the core bundle, at paragraph 46:

> "Criterion 2(c) imposes no burden on the Secretary of State to find or explain why views expressed by these or any other third parties are wrong. The fact that those views have been expressed and the bases for such views are matters which have naturally been and have been taken into account. However, they are to be considered alongside all of the information available to the Secretary of State, some of which, as already noted, may not be publicly available."

That is the Secretary of State's pleaded case: "I have to take them into account but no obligation that goes beyond that."

I have already drawn attention to the two general criticisms that you have seen in the Divisional Court's judgment about the quality or nature of the material. People were not on the ground in some of these cases and you seem to have assumed what ground witnesses told you. But it is of note that you will not find anywhere in the open materials before ministers any critique for analysis of any of the individual NGO or UN reports. Nor will you find in the open parts of the submissions or summaries before ministers any attempt to grapple with or engage with the content of these reports.

So, what do we know about how the decision was taken? Well, can I just show you the GLD response again to the letter before claim. That is in the supplementary bundle 4, tab 52, page D40. It is paragraph 8(b). 8 says:

> "The Government takes allegations of breaches of IHL by the coalition very seriously. In particular:
>
> …
>
> (b) The available information is assessed to identify whether the alleged event occurred as reported, who was responsible for the event, and whether the responsible party's actions are assessed as compliant with IHL or not."

That is the assessment we were told in pre-action correspondence was carried out.

The same response had been given to questions in Parliament. But, as the Secretary of State now accepts, what was said to the appellant in the pre-action response and said by ministers in written and oral answers in Parliament, turned out to be wrong. They had to be corrected in July 2016, after the permission hearing, in response to a specific request from the appellant. The correction is at supplemental bundle 1, tab 30. This is quite important.

A MEMBER OF THE BENCH: Supplemental bundle tab 30?

MR CHAMBERLAIN: I am sorry, it is supplemental bundle 1, NC8. I am sorry.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: It is a written ministerial statement at page B255. The original statements were, "We have assessed that there had not been a breach of IHL by the coalition." The correction read, "We have not assessed that there has been a breach." Now, the Divisional Court at paragraph 186 said that the original statements were affected by what it described as an infelicity of expression. We say it is more than that, given in particular what the special advocates have said in opening about how the Secretary of State's analysis proceeds.

In any event, Leigh Day, the solicitors for the appellant, pursued the matter in correspondence and asked a further question in response to this statement that had been made in Parliament. That is at supplemental bundle 4, tab 6. Having seen the statement made in Parliament, they said, "Is it still your case that all allegations" -- this is at 68, requested clarification 1(a); this is the Government Legal Department's response to the Leigh Day letter -- the question at 1(a):

> "… whether it is now your case that all allegations that have come to the attention of MOD are tracked and assessed to identify whether the alleged event occurred, who is responsible and whether the responsible party's actions are assessed as compliant with IHL or not."

The answer to that is given at D70. The answer is in the last sentence of 1(a) on D70:

> "Neither the MOD nor the FCO reaches the conclusion as to whether or not an IHL violation has taken place in relation to all specific incidents of potential concern."

Then at 1(c):

> "Neither the MOD nor the FCO reaches a conclusion as to whether or not an IHL violation has taken place in relation to each and every incident of potential concern which comes to their attention."

Now, my Lords, the special advocates addressed this question in an open note -- a note that was made open in front of the Divisional Court. Can I just show you that note?

A MEMBER OF THE BENCH: These are some cryptic response in the sense that --

MR CHAMBERLAIN: Well, they are.

A MEMBER OF THE BENCH: -- they say they do not reach a conclusion in relation to all specific incidents but do not indicate whether they might do so in relation to some.

MR CHAMBERLAIN: Exactly. My Lord, that is the difficulty we have with this response. Here is what we know from the special advocates' submissions in open before the Divisional Court. It is from the core bundle at the end, tab 24, page 485. I hope that has been inserted into your bundle. Exactly the point that my Lord the Master of the Rolls has just made was noted by the special advocates. If you look back to 484, the special advocates at paragraph 8 say this:

> "C has highlighted in correspondence an apparent contradiction in D's position. On 16 February, it was stated all allegations are assessed to identify whether the responsible party's actions are compatible with IHL or not. On 14 October, GLD stated neither the MOD nor the FCO reaches a conclusion as to whether or not an IHL violation has taken place in relation to all specific incidents."

Then at 11:

> "On review of the open and closed material, the special advocates submit that it is quite clear that the first statement made on behalf of the defendant and quoted at paragraph 8 above is wrong or at least misleading. In particular, the Tracker [this is the MOD 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. 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."

That was what was before the Divisional Court.

Just before we break, may I just invite your Lordships to look at the current position that is set out by the special advocates in their note for this court. It is in the core bundle, tab 3, page 27, paragraph 7(ii):

> "The court's conclusion that all reported incidents were being examined and analysed by the UK Government does not extend to any examination or analysis of the likelihoods of those incidents evidencing a lack of respect for IHL as, being a violation of IHL, there was no process by which the information and analysis from the Tracker, including the 'wide-ranging and sophisticated analysis' summarised at 183 of the open judgment, was used to reach a view as to the likelihood of a violation having occurred in any individual case. In turn, there was no process by which it could be identified whether or not a pattern of breaches emerged. Although the successive IHL updates include a section on overall assessment of Saudi compliance with IHL, that was not informed by a process which considered the likelihood of there having been a breach in relation to specific allegations of violations. That is so, even in relation to the most serious alleged violations, such as the Great Hall incident. That analysis contains no conclusion either way as to whether the Great Hall incident, in which 140 people died, or any of the other likely coalition strikes appearing from the Tracker and recorded in the IHL update, is likely to have constituted a violation of IHL. Indeed, there is no conclusion in relation to the question posed."

To summarise, my Lords, it appears from what we know in open that the materials before the Secretary of State did not grapple or engage with the NGO or UN material and also did not contain, even in closed, any freestanding analysis of the likelihood whether IHL had been violated in any individual case.

My Lords, I see the time.

A MEMBER OF THE BENCH: How are you progressing according to your trial framework?

MR CHAMBERLAIN: My Lord, it will be a task to finish within the allotted time, but I have to try and do that.

A MEMBER OF THE BENCH: Yes. Thank you.

(1.02 pm)

(The luncheon adjournment)

(2.00 pm)

MR CHAMBERLAIN: My Lords, on the question of timing I have had a brief discussion with my learned friend and I will do my best to get through it all by

3.30 pm, but if I need to go until 3.45 pm, I am told by Sir James and by Mr McCullough that that should not be a problem so far as completing matters within the time allotted is concerned.

A MEMBER OF THE BENCH: Yes. I have seen on the timetable it has a slightly ambiguous comment for Sir James's contribution, to the end of the court day. That is how very open-ended it is. But we will not be able to go beyond 4.30 pm at the latest.

MR CHAMBERLAIN: My Lords, just before the short adjournment, I had taken you to what the special advocates had said in open about the nature of the process or analysis undertaken by the Secretary of State in relation to the alleged incidents of breaches or violations of IHL. Your Lordships will have seen both from the note before the Divisional Court and from the open version of the grounds of appeal of the special advocates before this court, that in their submission -- of course your Lordships will have to test that against the closed materials in closed session -- the position is that no analysis is undertaken by the Secretary of State in relation to any incident as to whether in that incident there was or was not a breach of IHL.

Now, can I show your Lordships the document that was before the Secretary of State when the decision was taken. This is in effect the submission. It is in supplemental bundle 1. There are a number of documents but, given the time, I will economise and show your Lordships the main one. This is a submission from the head of policy at the Export Control Organisation to the Secretary of State. At that time, it was the Secretary of State for Business, Innovation and Skills but the portfolio has since been transferred to the Secretary of State for International Trade. You have it in supplemental bundle 1, tab 4, EB11. It starts at B93. What this document does is it summarises:

> "The recommendation you see at B93 is that you agree in principle with the Foreign Secretary's recommendation but defer a final decision until advice has been received from counsel and senior Government lawyers during the next few days."

If we go forward to B95, you can see a summary there of a Foreign and Commonwealth Office advice. You can see from the first bullet point there that MOD had been tracking at that time 114 incidents of potential IHL concern:

> "This is only a very, very small percentage of the overall coalition airstrikes carried out. Preliminary analysis of the UN Expert Panel

> report has revealed a further 19 and MOD have separately become aware of more, bringing the total to 145."

I can give your Lordships the exact figure, but by the time of the hearing I think we were talking about something like 250-odd incidents, or 200-and-something.

SIR JAMES EADIE: Eight.

MR CHAMBERLAIN: 208, my learned friend tells me. You can see from the second bullet point:

> "Based on 'all the information available', however, FCO maintain that we have not established any violations of IHL by the coalition in this conflict."

So, my Lord the Master of the Rolls asked the question in relation to the rather ambiguous answer that was given in correspondence at an earlier stage, and the difference between what was said to Parliament on the first occasion and what was said in the corrected version. Here what is said is, "We have not established any violations by the coalition in this conflict." What you do not see there is any reflection of the position, as we understand it to be from the special advocates' open submissions -- "and, by the way, we don't actually undertake any analysis of whether IHL has been undertaken in any given case."

Another point to note about that second bullet point: "We have not established any violations." We are not talking about serious violations here; they just have not established any violations at all. Then you see that FCO acknowledge that there are gaps in their knowledge and there are always gaps in their knowledge, essentially, but they think they have enough information to enable them to reach a view. Then you see that Saudi Arabia is seeking to comply with IHL and had broadly IHL-compliant processes in place:

> "Given the very small percentage of incidents which are considered to be of potential concern, it is not clear that a pattern of violations can be discerned, so while there is a risk here, the risk is not clear."

There is then reference to an investigation into one particular strike. This is not the strike we looked at. It is a different strike on a different MSF clinic. That is referred to there. The remainder of the submission over the page sets out the concerns of officials in the Department for Business, Innovation and Skills (at that time) as to this process. You can see that there are three particular concerns set out. The first is that, although only about a third of the incidents being tracked were coalition strikes, the MOD was only able to identify a military target in "the

majority of cases". That is a mistake because, in fact, the true position is that the MOD was not able to identify a military target in the majority of cases, and indeed, as you will see from the documents, in the later reporting periods immediately before the decision under challenge, the MOD was not able to identify a legitimate military target for three-quarters of the cases considered.

A MEMBER OF THE BENCH: That is at the time of the decision, is it?

MR CHAMBERLAIN: Yes. The second concern was that the vast majority of strikes were not being tracked at all and the FCO cannot be certain that these are IHL-compliant. The third concern, which you see there as well -- this is a very important concern -- is that the FCO and MOD appear to have very little insight into so-called dynamic strikes. Now, a dynamic strike, my Lords, is where, rather than being pre-planned, the pilot of a jet aircraft sees a target on the ground and the decision is taken in a dynamic way to attack that target. What is said is, while we have something cited in the pre-planned process, the MOD has less insight into dynamic strikes, and these account for "a significant proportion of all strikes".

The submission then goes on to say that the arguments are finely balanced and the FCO is the competent authority to assess compliance with criterion 2. Now, it is clear this is clearly a matter which was causing some anxiety to officials because you can see in the next tab, if it has been inserted, I think, in our bundle at EB13 -- it is not there but it should have been. I hope it has been inserted in your Lordships' bundles at 101(a).

A MEMBER OF THE BENCH: It is in mine, yes.

MR CHAMBERLAIN: You can see at the bottom of 101(a) there is an email from Mr Bell, who has given a witness statement in these proceedings. He is the head of the Export Control Organisation, which is the part of the relevant department that deal with export controls, and he recounts a conversation with the Secretary of State:

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

He makes the point that the FCO is the competent authority.

My Lords, that is what was before ministers. There were other documents as well, but in the time available I need to concentrate on the key ones. Essentially,

what the minister was told was, "We have not established there has been a violation of IHL serious or otherwise in any case." That is what they were told.

My Lords, looking at that document from a public law perspective, one asks the question of whether that was enough. From the claimant's perspective one looks at it and asks these questions: "Well, we've not established a violation of IHL in any case -- even the area of bombardment of Sa'ada? Even the attack on an MSF clinic? Even the Great Hall strike in Sana'a, killing 149 people and injuring 500?" Answer: we do not know. All the Secretary of State is told is we have not established any violation -- any violation, never mind a serious violation -- in this case.

Now, I mentioned the Great Hall strike, and I should say, actually, as a matter of fairness, the Great Hall strike occurred after this decision, but the material before the Divisional Court included material right up to and including the time of the Division Court hearing, which was in February 2017, and the special advocates' grounds of appeal indicate that, even up to that point, there was still no conclusion there had been any breach of IHL, so this conclusion obviously relates to what was before the Secretary of State at the time but the conclusion did not change, right up to the hearing, even in the light of the UN's second Expert Panel report with its ten almost certain cases of breaches of IHL, some of them possibly amounting to war crimes.

A MEMBER OF THE BENCH: I understand that, but what is the relevance to our decision of material that postdates the decision?

MR CHAMBERLAIN: The relevance is it was considered. As is often the case in first instance judicial review proceedings, the Divisional Court took its decision based on all the material that was available to the court up to the point of the first instance decision. The position on appeal is of course different, because it is well established that an appeal court does not look beyond the material that was before the first instance court. In the first instance court, as is usual in judicial review -- it happens, for example, in immigration cases and other cases, as my Lord, Lord Justice Singh and my Lord, Lord Justice Irwin I am sure will be familiar with -- you look at all the material available to the decision-maker even postdating the decision, because otherwise you will be in a position where you may have to go back and retake the decision even though the material is there.

A MEMBER OF THE BENCH: Mr Chamberlain, I am sorry to interrupt you but it may be relevant to this question. May I just ask you to help me with this. When the claim form was filed, the decision under challenge at page 277 of the core bundle was identified in two parts. The first part is where it says to be an ongoing failure to suspend.

MR CHAMBERLAIN: Exactly.

A MEMBER OF THE BENCH: So that is said to be a continuing failure. That was still the case by the time of the hearing at the Divisional Court?

MR CHAMBERLAIN: Yes, absolutely. It is an ongoing failure.

A MEMBER OF THE BENCH: Yes. More than once you have referred in the last few minutes to "the decision" and the date of the decision, but the actual decision identified in the second part on page 277 was 9 December 2015, which predates the material you have just been showing us.

MR CHAMBERLAIN: Yes. Your Lordship is absolutely right to say that we were inviting the court to look at all the material that was before it, and part of the jurisprudential answer to the question of why that was appropriate was because we were challenging an ongoing decision, and we were entitled to challenge that on the basis of the material available up to the date of the first instance court's decision at the hearing -- that is to say February 2017 -- but we accept the position on appeal is different because the appeal court does not look at the fresh materials save in the *Ladd v Marshall* type of case.

A MEMBER OF THE BENCH: Anyway, as this quite formally establishes, so, the complaint is not simply about the original decision but about an ongoing and continuing policy?

MR CHAMBERLAIN: Exactly. Certainly on the basis of the special advocates' materials we have seen, even by the time of the hearing in front of the Divisional Court, the view was still taken that they had not been able to establish a breach of IHL and there was no attempt to analyse the question of whether IHL was breached or not in any individual case, even the Great Hall strike -- a point made by the special advocates at paragraph 7(ii) of their appeal grounds. So that is the position before the Secretary of State.

Now I need to address the six strands of material which the Secretary of State says, "Well, that's the open material but I had available to me other material which

the open sources, the NGOs, the UN Expert Panel didn't have." The six strands are summarised by the Divisional Court between paragraphs 103 and 175 of its judgment.

The first strand is the so-called tracked. The evidence about the Tracker is summarised in the Divisional Court's judgment between paragraphs 104 and 120. Now, I remind your Lordships of what the special advocates said about this in their open note before the Divisional Court. They have made the point that in its original version the Tracker had contained a column "IHL breach?", and that had been taken away, been removed, when the Secretary of State realised it was not going to be possible to fill in that box.

The Divisional Court says, at paragraph 185 -- I will just show you that part of their judgment, on page 131 -- they are satisfied that the explanation was simply that they originally thought they would be able to determine definitively whether there had been individual allegations:

> "… however, when it was realised … that this was not possible the column heading was changed. In our view, the point does not materially advance the claimant's case."

My Lords, the Tracker, of course, was not part of the claimant's case but was part of the Secretary of State's case. Our case was based on the open source material. It was the Secretary of State who was relying on the Tracker to provide something extra, something over and above the open source material.

We make a number of additional points in relation to the Tracker at paragraph 31 of our skeleton, if I can just invite your Lordships to look at that. We have set out there -- and I hope by setting it out there I do not have to go to the underlying document in each case because you have the references -- what the evidence shows about the Tracker. Essentially, it is a database:

> "Allegations of breaches of IHL come to the MOD from a variety of sources, including media, NGO reporting and UN bodies. All such incidents of concern are recorded, and the issues addressed by the MOD are: (a) whether it is possible to identify a specific incident; (b) whether the incident was likely to have been caused by a coalition strike; (c) is it possible to identify the coalition nation involved [so that is the question I think my Lord, Lord Justice Irwin asked]; (d) is it possible to identify a legitimate military object; and (e) is the strike carried out using an item that was licensed under a UK export licence?"

Now, issue (b), whether the incident was likely to have been caused by a coalition airstrike, is one to which in principle sensitive material, in particular mission reports, may be relevant. But even here the Ministry of Defence says that it has:

> "… no insight into incidents caused by artillery attacks or attack helicopters as we have almost no visibility of coalition ground force operations."

And on (d), which is obviously a very important factor, whether you can identify a military target, the MOD says they:

> "… 'do not have access to any of the operational intelligence which the coalition use' and 'without being directly inside the Royal Saudi Arabian Air Force targeting process and understanding the rationale and the specific situation on the ground at the time of a strike … are not in a position to interpret whether a target was legitimate or not from a mission report'."

I have already made the point that they had even less insight into dynamic than pre-planned strikes, at point (vi). At (vii), the issues do not include the alleged consequences of a strike including reported civilian casualties. Nor, at (viii), do they consider whether the strike was against a target such as a hospital which attracts special protection under IHL.

We say, as a result of that, that it is clear for that that the information gathered is insufficient to enable them to answer the question of whether the responsible party's actions are assessed as compliant with IHL or not. That is no doubt why that column was taken out of the Tracker. They simply cannot answer the question.

They key point we have set out at paragraph 32, and it is this: that the Secretary of State's evidence was that the MOD had been unable to identify a legitimate military target in the majority of cases, and in later reporting periods they were unable to identify a military target in three-quarters of the cases examined.

My Lords, can we just pause there for a moment. We absolutely accept that, just because you cannot identify a military target does not mean there was not one. We accept that. But if you cannot identify a military target, you have nothing to gainsay the analysis that you see in the open reports that there was a breach of IHL, because whatever else you need to show that there was not a breach of IHL, you need to identify a military target. Despite the apparently good liaison relationship between the United Kingdom military and the Saudi military, the

Saudi military do not supply their operational intelligence to the UK, and the consequence of that is that in three-quarters of cases in the later reporting periods, it is not possible to identify a military target.

We do not obviously know which are the cases concerned, but just imagine you have a case where a clinic has been hit and you have a report in front of you from Médecins Sans Frontières and you take that together with a detailed analysis from the UN and you ask yourself the question of whether there was a military target. Just as an example, take a case where there is not an identified military target. That is three-quarters of the cases. You then have nothing, no information on the basis of which you can gainsay the inference drawn in the open materials that, yes, there was a breach of IHL. That is because the Saudis have chosen not to share information. There is nothing; there is no material on the basis of which you can conclude that there was anything other than a violation of IHL. That is the Tracker system, the first of the six strands of material.

The second strand is dealt with in the judgment at 121 to 125, under the heading "US knowledge of Saudi Arabian military processes and procedures". We make two points about that, and we make them at paragraph 33 of our skeleton argument. If you do not have access to operational intelligence and you are not directly inside the air force targeting processes then it is very difficult to see how insight into military processes is going to assist you to get beyond the position in the open reports, particularly so when, as the evidence makes clear, one category of airstrikes which accounts for a significant proportion (dynamic strikes) are a category in respect of which the UK has little insight.

The third strand is dealt with at 126 to 127 of the judgment. That is UK engagement with Saudi Arabia. Now, I made this point earlier but I want to try and make it good. You will see that at paragraph 127 of the judgment there are set out the dates on which the UK provided training in IHL to members of the Saudi Arabian military air force. The dates are, you can see from the excerpt there, 27 July to 14 August 2015, 20 to 27 October 2015, 11 to 29 January 2016 and 5 August 2016. That comes from Mr Watkins's statement at paragraph 34.

Could you just keep that open for a moment, keep those dates open, and put them next to the dates that you see in the second UN report, at table 7, page C369 of the third bundle, towards the end of the third bundle. Now, I accept, my Lords,

that if the United Kingdom is providing training to the Saudi military, that is intrinsically a matter which can go into the mix in deciding whether the clear risk test is met. In deciding what weight to attribute to it, you need to put those training sessions against the report that we have of what was actually going on on the ground. You cannot do that if, as the Secretary of State has done, you decide not to undertake any analysis of the question of whether IHL was or was not complied with in individual instances. If you look at these dates set out in the UN Expert Panel second report, what you see is that all of these events took place after the first three training sessions. Numbers 5 to 10 took place after all the training sessions had completed.

Here is the United Kingdom providing IHL training, and on the open evidence, despite that training, there are ten cases where the UN Expert Panel finds it almost certain that IHL was breached. I am sorry, I said it was 149. I gave you the wrong number. The last of them was the Great Hall incident in Sana'a where 132 civilians were killed. That is quite a good example, we would respectfully submit, of why, when you are analysing the weight to be given to these additional pieces of information, you need to analyse that weight by reference to what is actually going on on the ground, and there is simply no evidence at all that that has been done by the Secretary of State or the Divisional Court.

The fourth strand is the Saudi investigations into incidents and the establishment of the JIAT. That is dealt with at 128 to 133 of the judgment. We deal with that in our skeleton argument at paragraph 27. Can I just make my submissions by reference to that. If one looks at 27(4) in our skeleton argument, you can see that the Divisional Court (**Inaudible**) recorded the submission made to it by us that there was little comfort to be gleaned from the existence of these investigatory procedures because (a) they had been too slow -- and that is not our assessment; that is the assessment of Mr Tobias Ellwood MP, Parliamentary Under-Secretary for Foreign and Commonwealth Affairs in a statement to the House of Commons -- they had been too few in number (that is to say 5 per cent of the total incidents reported) and their reports and methodology and exiguous public summaries had been the subject of justifiable criticism -- and we referred to a letter from the Human Rights Watch.

What we did not have at the time, although the Divisional Court did in closed, was the full second UN Expert Panel report. You will recall that in that report there are a number of annexes. What the annexes do is they take the ten incidents one by one and, in respect of quite a few of those incidents, they measure or they analyse what the JIAT said about the incident and then they critically evaluate that. You will see that in some of the incidents -- for example, the market incident -- there is a short paragraph from the JIAT and then a long analysis of what is wrong with that paragraph by the UN Expert Panel.

Before you can reach, in a public law sense, a satisfactory conclusion about the weight to be attached to the existence of these JIAT reports, you need to be in a position, as the UN Expert Panel was, to evaluate them. If what you are seeing from the JIAT reports is a pattern in which often incidents are either minimised or the Saudi coalition is completely exonerated while an independent and authoritative body such as the UN Expert Panel is looking at what the coalition had said and saying, "We don't buy this; the following rules of IHL were nonetheless violated in this case," then that is a very significant feature which falls to be taken into account in weighing the weight to be given to the JIAT report.

Now, before the short adjournment, my Lord, Lord Justice Irwin asked the question whether there is information in the bundle about a constitution of the JIAT. I am told that we do have some information about that. That is in supplemental bundle 2. This is bundle 2, NC13, page B495.

A MEMBER OF THE BENCH: Is that a press statement by JIAT?

MR CHAMBERLAIN: Yes. If you go forward to 495 -- yes, it is a press statement; your Lordship is right -- you can see that the team consists of four team members who have experience and speciality in legal and military aspects and it includes members from the Kingdom of Saudi Arabia, Yemen, Qatar, Bahrain and the United Arab Emirates.

A MEMBER OF THE BENCH: What is the date of this?

MR CHAMBERLAIN: I am not sure. I will find that date. Can I also show you, just on the same topic, in bundle 3 -- because one of the points we have made was that there was considerable concern expressed at the time, including by Human Rights Watch, as to the constitution of the Panel.

A MEMBER OF THE BENCH: Sorry. Before you go there, can I invite you just to cast an eye down the first two paragraphs of 495. Do you still have that open? That may give you some assistance about the nature of the Panel and its work(?).

MR CHAMBERLAIN: So, if you look at bundle 3, tab 41, you will see a press report there about one of the members of the Panel.

A MEMBER OF THE BENCH: What is the relevance of this?

MR CHAMBERLAIN: It is simply an example of one of the criticisms that had been levelled at the Panel.

A MEMBER OF THE BENCH: (**Overspeaking**) an NGO; I understand that.

MR CHAMBERLAIN: Yes. We are not inviting the court to make findings about the Panel at all. What we are saying is that Panel reports cannot be looked at without forming one's own critical view about the underlying events they are describing. That is what the UN Expert Panel does. It goes through the events that it is looking at, the ten events, says, "Here's what the Panel said," if the Panel dealt with that event, and then it critically evaluates the JIAT report. If one looks through the UN Expert Panel's second report and accepts the conclusions that they reach, it would be very difficult indeed, in my respectful submission, to then look at the existence of a very small number of exiguous summaries of reports and conclude on the basis of that that the existence of those reports enabled you to negative the clear conclusions drawn in the open source material.

Essentially, the point I am making, my Lords, is that it is another example of why it is that one has to reach a sound conclusion on the basis of the conclusion available to one as to whether there is or is not an established pattern of breaches, and once one has reached that conclusion, one can then evaluate properly the weight to be given to the existence of the JIAT and its report.

A MEMBER OF THE BENCH: Do you always have to form a concluded view?

MR CHAMBERLAIN: Not always, no. It has never been part of our case that you have to form a concluded view in every case. The problem here is that there has not been a view formed in any case. I will come to that in a moment. It certainly is not our case -- and we expressly disavowed, although the Divisional Court did seem to think this was our case -- in writing and orally the submissions that the Secretary of State was required to form a concluded view as to whether IHL had been breached or not in every case. What we said was that if you have a

substantial body of reputable material showing that there is a pattern of violations of IHL, some of them seriously, you either have to accept that there is such a pattern or you have to have reasons for displacing that pattern in a sufficient --

A MEMBER OF THE BENCH: Why could you not, as a rational decision-maker, say, "This is the material which is out there. There are reputable NGOs, there are international panels which are concerned" -- I hope I can use that word, at least, without forming any concluded view -- "but it's all part of the material that I must take into account, but I am not going to form a final view of my own that there actually was a violation of international humanitarian law. There are all sorts of reasons, one of which may be that I haven't been able to identify a legitimate target but I don't know; there may been one"? There could have been all sorts of other factors in your mind. I think what Sir James really submits in essence, in response to this challenge, is that there was a multi-factorial assessment or evaluation which the Secretary of State was required to do, and one of the factors to be taken into account, but only one, was the various views that you have shown us.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: This is not a forensic or judicial process. Why is there some kind of inference to be drawn which then has to be rebutted as if this were some kind of civil pleading?

MR CHAMBERLAIN: Well, my Lord, let me put it like this. We do not say that the mere fact that you have conclusions from a particular body -- Amnesty, Human Rights Watch, UN Expert Panel, whatever -- in and of itself creates a legal presumption, that that has to be accepted. What rationality demands in any given case is going to be fact-sensitive. In this case you have an overwhelming body of open source material whose provenance is impeccable, whose reasoning is apparently impeccable -- or at least no reason has been given for doubting its reason -- and the Secretary of State simply says, "Well, we haven't found any violations in any cases." I ask the question that I asked at the outset: "Really? Not even in relation to the area bombardment of an entire city, where the reasons why that constituted a violation of international humanitarian law are extensively set out not just by Human Rights Watch but also by the UN Expert Panel?" One is entitled to ask the question -- I mean, in the Secretary of State's words, it is multifactorial -- of what enables you to reject that finding. We are simply not told.

That is just one example. What enables you to reject the finding made by the UN expert panel in relation to the Great Hall incident, which was a double attack where missiles were fired at first responders who went to the aid of those who had been injured in the first strike? What enables you to reject or not to find that there was a violation of international humanitarian law in that case? Maybe there is something, but there is nothing on the face of the papers to indicate what that something is. We say it is an absolutely standard application of nationality principles in public law that when you have such an overwhelming body of material it does give rise to an obligation to engage with it. That is the way we put it; you have to engage with it. There is nothing here to indicate that has been done beyond the assertion that the Secretary of State has looked at it all and considered it.

A MEMBER OF THE BENCH: Can I just put my question here to you. You have repeatedly talked about the failure to reach a conclusion one way or the other.

MR CHAMBERLAIN: Yes, yes.

A MEMBER OF THE BENCH: Is your criticism really that there was a failure to attempt to do so?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: They are two quite different things; you can say, "We attempted to do so but we aren't able to reach a conclusion because," for example, "the Saudi Arabian military won't share their intelligence with us on military targets so we can't come to a view about that." I am just trying to understand is that what you are saying, that there was no attempt to do so, or is it that, had they made an attempt, they could and should have reached a conclusion?

MR CHAMBERLAIN: My Lords, certainly we do say there was no attempt. The way we put it -- and this picks up a formulation used in one of the authorities which I am going to come to in just a moment -- is that there was no attempt to engage or grapple with the conclusions drawn.

A MEMBER OF THE BENCH: Right.

MR CHAMBERLAIN: You have seen the type of conclusions that are drawn, for example, in the second UN Expert Panel report. They are pretty detailed. They explain which rules are said to have been violated and why that Panel reached the view that those rules were violated. In many of them there is no dispute about the

relevant facts. Take the MSF clinic, for example. In that case the Saudis accepted what the facts were. They said, "Yes, there was a car containing fighters and we fired at that car." The UN Expert Panel says, "We've taken that on board, but the problem is the car was in the curtilage of a hospital with a lot of civilians, including many children, in it, and for that reason the attack constituted a violation of the principles which protect those types of civilian objects and civilian installations."

And furthermore, even if the car was thought to contain fighters, nonetheless there was still a breach of the obligation to take all feasible precautions to avoid civilian casualties and a breach of the principle of proportionality. These are all conclusions they accept, so just forget the question of whether there might be a military target. We know there was a military target -- or at least we know the Saudis say there was a military target, but why --

A MEMBER OF THE BENCH: The Panel did not accept that. The Panel reached the view that it was not a legitimate military target.

MR CHAMBERLAIN: For reasons that it gave.

A MEMBER OF THE BENCH: Quite.

MR CHAMBERLAIN: They said they were **hors de combat**.

A MEMBER OF THE BENCH: Quite. Is this not the problem the Secretary of State may face? You say a rational decision-maker can only reach one view, but the Secretary of State was faced with a friendly state saying, "We took the view there was a legitimate military target," and the Secretary of State also has evidence from the Panel saying, "We take a different view." I know they went on to consider the alternative if it was a legitimate target -- I understand that -- but just on this narrow question of fact, what is the Secretary of State rationally required then, on your submission, to do? Does he have to form a view or does he say, "I understand that there are these bits of information out there which I've got to take into account"?

MR CHAMBERLAIN: Let me put it this way, my Lord. Just taking that example, since we are on the example, we do not understand at the moment -- it may be that Sir James can assist on this -- how a rational decision-maker could conclude, in the light of all the information which is before that decision-maker about the Abs Hospital attack, that that was not a violation of international law. We simply do not understand how that could be concluded. But we do not need to go that far

because there is no evidence at all to show that the Secretary of State ever grappled with that issue.

A MEMBER OF THE BENCH: That is why I put it in the way I did. It seems to me your real complaint -- and it is a major complaint -- is there was no attempt to do so.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: There could be all sorts of reasons, as my Lord has indicated (**Several inaudible words**) why actually it was not really possible to reach any sort of firm conclusion one way or the other, but you are convinced they never got to that stage really because they did not attempt to do so.

MR CHAMBERLAIN: That is right. We do say that. We do not know and we cannot imagine what reason there could be for not accepting that conclusion, but conceivably there might be such a reason. We absolutely, with respect, adopt the way my Lord puts the point, that there was no attempt to do so.

A MEMBER OF THE BENCH: Is it a question of merely looking at the episode in detail? What is it you say was the obligation? That is point one. Point two, how broadly did they need to do it? If you are looking at the incident of this MSF hospital, you can look at the detail, but to what end; with what conclusion; with what judgment? I want you to be clear about that. As the second half of the same thing, I think you have to meet what is said by the other side in the skeleton argument as captured in paragraph 25, where slightly (**Several inaudible words**) forgive us for putting it that way, you are driven, it is said now, reluctantly to accept that the Secretary of State was not required to form a judgment about every past incident in which a breach of IHL is alleged to have taken place, but you are driven to formulate a vague and impractical legal obligation requiring the Secretary of State to consider a sufficient number of these incidents. So, two questions that come together: (1) to what point does a significant incident need to be looked at; (2) what do you say to that, that your, as they would have it, fallback position is to require something that is inchoate: what sufficient number, how many, how often?

MR CHAMBERLAIN: Yes. Well, my Lord, I see the way it is put and I see that what is said is that the obligation is an unclear one. It comes from the fact that we say the open materials show a pattern of violations. That is what they show. They,

between them, constitute overwhelming evidence of a pattern of violations, and so what rationality requires, when you have evidence of a pattern of violations, is a sufficient analysis of a sufficient number of the alleged violations to displace the pattern.

If, for example, the Secretary of State went through the alleged violations and said, "We have the following problems with the conclusions that are reached in relation to 1, 2, 6, 9, 12, 15, 18 and 25; the others, we make the following detailed points about them but we are unable, having considered all the material, to reach a concluded view about," that might be a different matter. But what we see is none of that. We simply see no attempt at all to reach a view about any of the alleged cases even where the open materials seem to point unequivocally to a conclusion, and so we are left completely in the dark as to why, even in those clear cases, no conclusion has been reached that IHL has been violated.

Can I just show you one place in the judgment. Perhaps I will do that when I come to that part of the submissions, if I may. Can I deal, before we deal with that, with the fifth strand. I will come on to the judgment and make my submissions in relation to the judgment in due course, but can I deal first with the fifth strand.

We have looked at the JIAT (**Inaudible**). The fifth strand of evidence consists of public statements made by Saudi officials, which are dealt with at 132 and 149 in the judgment. We set out our submissions about that at paragraph 28 of our skeleton argument. So far as the May 2015 declaration is concerned -- and, again, to answer my Lord, Lord Justice Singh's point, this is another good example -- this is a case where a public statement is made by the Saudi coalition spokesman, Brigadier-General Asiri. The UN first Expert Panel report deals with that statement. The Divisional Court said it thought that the statement was an example of warning being given, and yet the UN Expert Panel report deals in quite a lot of detail as to whether that warning was adequate, and it comes to the very clear view that it was not because it was a very large city. Ultimately, whether the warning was adequate or not, what the statement did was evince an intention to treat an entire city consisting of something like 100,000 people as a military target. It explained why that was contrary to international humanitarian law, contrary to the rule against, as it is known, area bombardment. Nowhere in the papers do we see

anything approaching an analysis or a reason given for concluding that that is not so.

You will see that the Expert Panel report deals with the attack on Sa'ada and it says, even if you leave aside the question of whether the warning was adequate (which it was not, for the reasons the Expert Panel has given) it is like saying Cambridge is a target -- the whole of it. Now, you can accept that there are military targets in the city, but IHL is clear that you cannot treat the whole city as a target, for the very obvious reason that what are civilians to do. Where is the answer to that? There is not one in the papers, in our respectful submission.

More to the point -- and this picks up a point we have already made, but I make it again -- in order to understand the weight to be attributed to a statement of the coalition, you have to understand the background against which that statement is being made. You have to understand, that is to say, whether at the same time, contemporaneously with that statement, there are incidents being perpetrated which constitute breaches or which the evidence suggests constitute breaches of IHL. Without knowing what is happening on the ground and forming a view about what is happening on the ground, or at least attempting to form a view about what is happening on the ground, to take my Lord's formulation. You cannot properly analyse and evaluate the extent to which the statement deserves weight. Why is that? Because if you are saying one thing but doing another then the statement is not something that can be relied upon as a weighty contribution to the analysis of the clear risk test.

Sorry, I am telescoping slightly, but of course there was a second statement made, which we deal with in paragraph 28 of our skeleton, and that was the statement by Brigadier-General Asiri on 1 February 2016, where he said, "Now our rules of engagement are: you are close to the border, you are killed." Now, the Divisional Court's answer to that was that, viewed in context, neither of these statements indicates that the coalition were or were intent on employing targeting practices that were incompatible with IHL or that there was a clear risk that they would do so. We say it was wrong for the reason we give at paragraph 5. On its face it was a clear threat to act in flagrant violation of IHL: "You are close to the border; you are a target." It is a textbook example of a breach of the principle of discrimination. You cannot treat someone as a target or treat a location as a target

simply because it is close to the border, particularly in somewhere like Yemen, where the population is extremely impoverished and is not in a position to simply move around.

Again, we are not inviting the court to make findings about this; we are simply saying that the weight to be given to these statements needed to be evaluated in the context of what was known openly about what the Saudi-led coalition was in fact doing at the time. That is what is missing from the analysis undertaken by the Secretary of State.

The sixth strand -- and I hope I can be relatively brief on this -- is the FCO updates on IHL. Those are dealt with at 150 to 175 in the judgment. As to those, we recall what the special advocates have said about those in paragraph 7(ii) of their note:

> "Although the successive IHL updates include a section on overall assessment of Saudi compliance with IHL, that was not informed by a process which considered the likelihood of there having been a breach in relation to specific allegations and violations."

To pick up my Lord's formulation, the formulation that comes from the special advocates is very much along the lines of the way that my Lord put it, so what is said is he was not informed by a process which considered the likelihood, so they are not saying just that no conclusion was reached; there was no process which considered that likelihood. The vice here is the absence of the process, not necessarily the absence --

A MEMBER OF THE BENCH: (**Overspeaking**) the combination. I think you would say that it is the absence of an attempt into process and of an explanation of why it was not possible to do it. It is the two I think you are saying, really.

MR CHAMBERLAIN: Yes, exactly.

Now, I said I was going to take your Lordship to one key part of the judgment. I will come and do that, but can I just gather together my submissions under ground 1 in the following way. We produce our submissions under ground 1 to five propositions. First, the open sources provide, as the court said at paragraph 86, a substantial body of evidence suggesting that the coalition has committed serious violations of IHL. In this case we say the open sources were important because of their provenance and because of their methodology. As to provenance, there is a great deal of authority which is both domestic and international and

which is collected in the written submissions of the interveners as to the weight to be attached to decisions of reputable NGOs such as Amnesty and Human Rights Watch. So far as domestic authority is concerned, we draw particular attention to paragraphs -- well, I think it is in paragraph 10 where domestic cases are dealt with, but paragraphs 8 to 10 in general of Ms Stratford's submissions, which you have in the core bundle at tab 20, pages 3 to 7.

Can I just show you one authority. It is a very simple and straightforward immigration case. It is in bundle 2 of the authorities and it is a case called *IA (Syria)*. It was dealing with a much more straightforward case than this, I accept, but I just want to pick up some of the language used by Toulson LJ in that case. We, I think, inserted it, and I hope your Lordships all have this inserted right at the end of the second authorities bundle. It is not quite at the end; it is 34, so it is the penultimate.

A MEMBER OF THE BENCH: (**Overspeaking**) was it, 34?

MR CHAMBERLAIN: Yes. The complaint in that case -- and this was a country guidance case -- was that inadequate consideration had been given to a particular letter that had been written by Amnesty International. At 23 you can see what Toulson LJ said. He said:

> "Inevitably, in the area that such bodies are investigating, there may be difficulties in obtaining evidence from fully identifiable sources, but Amnesty International are well aware of that. It does not follow that a tribunal is bound to share their opinions on any particular matter, but the substance of that report did require the tribunal properly to engage with it. The way in which the determination dealt with the report of Miss Laizer was so cursory as not in substance to engage with its content on the relevant point at all."

You can see then at paragraph 26 the conclusion drawn and the issues raised in the Amnesty International report need to be evaluated.

A MEMBER OF THE BENCH: Was this an appeal from the Immigration Asylum Appeal Tribunal?

MR CHAMBERLAIN: Yes, so it would have been an appeal on a point of law.

A MEMBER OF THE BENCH: Yes. But we are not dealing here with a judgment.

MR CHAMBERLAIN: No.

A MEMBER OF THE BENCH: The Secretary of State is not required to write a judgment.

MR CHAMBERLAIN: No, he is not. But, with respect, there is a similarity in this sense: whether one is dealing with an appeal on a point of law or one is dealing with a challenge on grounds of rationality, the requirements of public law are quite similar. If you have something which calls for an answer, you need to grapple with it and engage with it and answer it: do you accept it or do you not accept it; if you do not accept it, why do you not accept it?

In that case it was a single letter from Amnesty International; in this case we are dealing with a vast quantity of open source reporting, not just from Amnesty International but from a whole range of other NGOs and, importantly, from international organisations set up by the UN Security Council resolution with the support of the United Kingdom, whose methodology is set out transparently and whose conclusions are fully reasoned. When you have that type of material, rationality does require you to, to use Toulson LJ's formulation, engage with that material. We say what has happened in this case is that there has been no attempt properly to engage with the material. For that reason, the process and the reasons given are inadequate.

I have already made my points about methodology. We say the open source reports, taken together, constituted an overwhelming body of evidence and the Secretary of State had to say what he made of that.

The second proposition, as I made clear at the outset, even with an overwhelming body of evidence pointing one way, the Secretary of State did not have to accept the conclusions drawn by those open sources but he had to grapple or engage with them. I have already shown you the Secretary of State's summary grounds. He denies being under any obligation to find or explain why the reports are wrong. Those are the words he used. The Divisional Court agreed. They said at paragraph 207 that the third party reports do not raise any legal presumption that criterion 2(c) is triggered, although, as the Secretary of State accepts, their content must be properly considered in the overall evaluation. Again, we say the demands of rationality are fact-sensitive. In this particular case the cogency and quality of material from apparently authoritative sources meant that it had to be grappled with.

Can I just show you one passage which encapsulates the difficult with the approach which the Divisional Court took in this. It is in the Divisional Court's

judgment in paragraph 208(8) at page 141. In 208 there is a series of subparagraphs. This is what the Divisional Court said:

> "It is clear why the Secretary of State took the view that he did that criterion 2(c) was not triggered, notwithstanding … His assessment of all of the material in the light of the advice tendered by officials and fellow ministers was that the necessary risk was not established. We should add that it was not legally necessary for him to engage directly [there is that word again] with everything that has been said by others on the topic."

My Lords, we are not saying it is necessary for him to engage with everything; it would be nice if he would engage with anything that had been said with others on the topic.

My Lord, Lord Justice Irwin, asked me the question very fairly as to how far do we say the obligation goes. I recognise that the answer we have given does not yield a clear principle which one can apply to every single case. That is because the demands of rationality are fact-sensitive. The answer is you have to engage with enough of what is being said to displace the evidence of a pattern of violations, but in this case the answer to the question that my Lord put to me does not matter because the Secretary of State has not engaged with any of it. By "engage" I mean to unpack the formulation that my Lord the Master of the Rolls put to me -- attempted to deal with the conclusions reached in the open reports.

A MEMBER OF THE BENCH: Not merely the conclusions of fact but the conclusions of what they mean in international humanitarian law?

MR CHAMBERLAIN: Yes, indeed. He has not engaged with either. The third proposition, and relatedly, it was not the claimant's case that the Secretary of State had to reach a concluded view about every one of the instances where the UN Expert Panel or an NGO had said that there had been a violation of IHL. In fact, the Divisional Court understood that that is what we were saying. You can see that from 180 in their judgment. But we were not saying that, and that is clear from the note that we put in accompanying our reply submissions which you have in tab 9, 189. It is 1(d) at the bottom of 189:

> "This submission does <u>not</u> entail that the Secretary of State must 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 either be evidence that the authors or methodology of the open source reports are unreliable or an

independent analysis of 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 has neither."

A MEMBER OF THE BENCH: It seems to me at the moment that the way the analysis works from your perspective is that you are saying it is a very, very important consideration -- it may or may not be the most important but it is a very, very important consideration -- for evaluating future risk, what has happened in the past, and you cannot downgrade it. You have to start with that. That is, on any footing, you say, a very important consideration and therefore you have to decide, if you are the decision-maker, how you are going to deal with that critical factor. You can deal with it in a number of different ways, but you say what you cannot do is you cannot simply say, "I'm not going to go into that. I know what all these people are saying but I'm not going to form a view about that; I just understand they're saying there have been these breaches but I'm not going to form a view about that; I'm going to rely upon a whole series of other things such as training or statements," or so on. What I think you are really saying at the end of the day is that what has happened here is that the decision-maker, the Secretary of State, has devalued the significance of past events to an unacceptable degree in making the decision. I think that is what it comes to, ultimately.

MR CHAMBERLAIN: Yes, my Lord. I respectfully adopt that formulation too. We do say that. There are all the six other factors. We know that great reliance was placed on the six other factors. But we say that it was not a rational process to rely on those six other factors. Why? Because the first factor -- which of course we accept is not the only one but it is on any view a key factor -- tells you how much weight can properly be attributed to the other six. You have got the training, but there are five really serious cases where the UN Expert Panel's second report has found it is almost certain there was a breach of IHL, six of them, after the last of those training sessions. That tells you something, if you accept that material, about the weight you can attach to the training. If you do not accept the conclusions reached then you say why you do not accept them. You do not need to say it in public.

A MEMBER OF THE BENCH: You can also say, "I'm not able to form a view about it." You can say that.

MR CHAMBERLAIN: You could say that and then you could give reasons and say, "Well, I've looked into that and the problem is that there are too many imponderables." One might reach that view. But there are quite a number of incidents -- and we have given some examples -- where we actually find it difficult to see how one could say that -- cases where actually the facts are not significantly disputed. The only thing that is disputed is how one applies international humanitarian law to those facts. The UN Expert Panel has explained in great detail how it applies international humanitarian law to those facts in what we would say is **prima facie** an impeccable way. What is wrong with it? Maybe there is something wrong with it. I do not know, but neither does the Secretary of State because the analysis has not been done.

The fourth proposition is that the open evidence about the process undertaken by the Secretary of State shows that the process he undertook was not designed to and did not in fact analyse whether IHL had been violated or seriously violated in any particular case. We know that the original intention had been to do that, but the column was removed from the Tracker. We know that the MOD, despite its apparently close liaison relationship with the Saudi military, did not have access to operational intelligence. That is key because that is what would have shown that there were military targets. We know that, despite its access to military satellite imagery, it was still unable to identify a legitimate military target in the majority of cases, three-quarters in later reporting periods. We know that the special advocates have submitted that neither the Tracker nor the FCO updates contain any conclusion about the likelihood that IHL has or has not been violated in any individual case. That is an important formulation because it is not necessarily a binary question of "has it or hasn't it?". They do not even contain an analysis of the likelihood.

So, my Lord puts to me the question, "Well, maybe you do an analysis of an individual incident and you say, 'Well, we think there's a strong possibility that there's been a breach but we can't be sure,'" but even that has not been done. And we have a letter dated 14 October 2016, which you saw, indicating that the Government has not thus far been in a position to reach a conclusion as to whether or not a violation of IHL has occurred. Just to give you the reference to that, it is supplemental bundle 4, tab 60, page D68.

The fifth proposition, then, is our conclusion that there was no proper or rational basis for rejecting the apparently cogent conclusions drawn from the open reports that there was a pattern of violations of IHL by the Saudi-led coalition, some (indeed, many) of them serious.

A MEMBER OF THE BENCH: If the fundamental submission you are making is that there was a failure to ask the right question -- the attempt made, as my Lord has put it, to embark on the right exercise -- and I also bear in mind what you said at the beginning about what the appropriate remedy would be, even if we were to accept this argument. You are not saying there was only one answer reasonably available to the Secretary of State but he would have to reconsider?

MR CHAMBERLAIN: My Lord, can I just clarify what I mean by the submission I have made?

A MEMBER OF THE BENCH: Of course. Thank you.

MR CHAMBERLAIN: I do say there was, on the papers, no proper or rational basis, but I am not saying that there could not have been. That is why my submission is simply that the matter needs to be remitted. I am absolutely not saying, as I hope I made clear at the beginning --

A MEMBER OF THE BENCH: Yes, you did.

MR CHAMBERLAIN: -- that we are able to say on the basis of the materials here that you should order the Secretary of State to suspend licences; apart from anything else, of course, if the decision were quashed it would have to go back to the Secretary of State and updated information postdating the hearing before the Divisional Court will have to be considered, and that might show all sorts of things one way or the other. As a matter of fact, of course, there had been many further incidents of concern but there may also be matters on the other side, so I cannot make any submissions to you as to what the answer would be if the matter were to go back. But we do say that, on the materials available, there was no rational process undertaken which would enable the Secretary of State to reach the conclusion that he reached.

A MEMBER OF THE BENCH: That is very helpful.

MR CHAMBERLAIN: My Lords, can I deal with ground 2 very quickly. We deal with this in our skeleton argument at 49 to 54. Can I ask you just to look, for the factual position, at supplemental bundle 4, tab 52, page D48. Now, you will recall

a number of questions were asked of the Government in relation to the bullet points which you saw in the User's Guide. You will recall that it said that the relevant questions included -- and then there is a number of bullet points.

Just by the bottom hole-punch on D48, the question asked was:

> "Confirm whether Saudi Arabia has in place legislation which enables the prosecution and, if appropriate, punishment of persons suspected of perpetrating violations of IHL. Please provide details of this legislation."

At 65, the telling response:

> "We are not in a position to advise on the domestic legislation of the KSA."

Then:

> "Please confirm whether Saudi Arabia has ever prosecuted or punished a member of its armed forces for perpetration of a war crime pursuant to this or other legislation."

Answer:

> "We are not aware of any such initiatives from the KSA. This does not preclude the possibility that these have taken place. We would not ordinarily expect another state to share this information with us."

Question:

> "Please confirm whether Saudi Arabia has instigated any form of criminal or disciplinary investigation into any allegation that a member of coalition forces violated IHL in Yemen."

And again:

> "… not aware of any such initiatives [but] does not preclude the possibility that these have taken place. We would not ordinarily expect another state to share this information with us."

So, the state of the Secretary of State's knowledge on these three issues -- there are more than three but we have concentrated on three in particular -- is "don't know/didn't ask/don't have to ask".

A MEMBER OF THE BENCH: That might put it too high. Did not ask?

MR CHAMBERLAIN: Well, there is no indication the question was asked. It is difficult to see that that answer could have been given if the question had been asked, but of course your Lordships may know more in closed than we do in open about this.

A MEMBER OF THE BENCH: I am not implying anything (**Overspeaking**).

MR CHAMBERLAIN: No, no. I know that my Lord is not implying anything about that, but I am just putting down a flag for the closed hearing that your Lordships will be in a position to look at the closed documents and see if there is any information to indicate that that question was asked.

A MEMBER OF THE BENCH: Can I ask this question. To what extent is ground 2 a standalone ground of appeal in this sense: if you succeed on ground 1, presumably you do not need ground 2; if you fail on ground 1, will ground 2 save you?

MR CHAMBERLAIN: Well, this was a question which my Lord, Lord Justice Irwin, and Flaux LJ, at the permission hearing, raised. The way that they put it was that the two grounds stand together and they are part and parcel of the same criticism that the approach that was made to the decision was an irrational one. Can I answer my Lord's question a bit more directly in this way. If we succeed on ground 1, the Secretary of State will need to know whether the approach that he took to these questions was adequate in a public law sense, because if we succeed in ground 1 then one of the things we will be saying is, "Okay, Secretary of State, you need to go back and look at up-to-date information but you also need to ask these fundamental questions. You need to ask your interlocutors in Saudi Arabia, 'Do you have legislation that prohibits violations of international law? If so, what is that legislation?'" it is an easy question for the Secretary of State to ask if, as he says, he has a strong liaison relationship with Saudi Arabia. "Have you ever prosecuted someone?" The answer may be more than yes or no; it may be, "Well, no, but here are the initiatives that we have on our statute books; here's the context." But none of that --

A MEMBER OF THE BENCH: Is this because it does not have to be this case?

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: In any case where there is a risk of a breach of IHL, if there are sufficient means of recourse in that country for those infractions to be decided upon appropriately, with convictions or punishments to follow, then that does not preclude you necessarily from licensing the export of arms. Is that the point?

MR CHAMBERLAIN: To go back to the three indicia of the clear risk test, it is past and present record, public commitments and capacity to ensure that violations do not take place.

A MEMBER OF THE BENCH: (**Overspeaking**) deterrent effect.

MR CHAMBERLAIN: It is capacity, if one is asking, "Do you have the capacity to ensure …?" Another feature of this, of course, is that IHL itself imposes obligations on states to investigate and prosecute in cases where that is appropriate and there have been violations of IHL. If a state does not have both the legal means and also the practical mechanism to secure accountability of its armed forces then that is highly relevant to its capacity to ensure that violations do not take place.

Put shortly, if you have a state that does not ban violations of IHL in its law or does not have any practical means of securing accountability and/or does not have a functioning independent judiciary which is independent of the king, then those facts are highly relevant to your assessment of whether there is a clear risk that a serious violation might occur. Why? Because --

A MEMBER OF THE BENCH: It is impunity. Is it not impunity?

MR CHAMBERLAIN: It is impunity. That is why we --

A MEMBER OF THE BENCH: Obviously, none us has any concluded views on any of these issues, but it seems to me, at least, speaking for myself at this stage, that I am not sure that ground 2 does necessarily stand or fall with ground 1, because ground 1, as I understand your last submission, was really focused on the record issue.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: Ground 2, at least on your submission, you say, is a series of relevant questions which a rational decision-maker needs to ask in answering the capacity question. That could still be relevant on whether there is a clear risk for the future even if somebody did not have the past record.

MR CHAMBERLAIN: My Lord, I would respectfully agree with that. If I said earlier that they stand or fall together, I do not mean to put it in that way.

A MEMBER OF THE BENCH: No, I know you do not, but I --

MR CHAMBERLAIN: They are aspects of the same complaint. That is to say, they are aspects of our rationality complaint about the process by which the decision was taken, but they are different aspects. In principle, it is conceivable that you might

say aspect number 1 is not made out but aspect number 2 is made out, in which case you could still find that the decision that was taken was irrational in the sense that relevant factors that were so centrally relevant that they could not be left out of account were in fact left out of account. Then you would remit the decision to the decision-maker to ask those questions and to factor the answers in to the assessment of clear risk. That is the way we put it.

Your Lordships will know -- and I do not have time to take you to it -- of the case law. *Katun* is one case and *Plantagenet Alliance* is another case. They are very well-known cases and my learned friend relies on them, and he says that the questions that are relevant is itself a matter -- what counts as relevant questions itself is a matter for the decision-maker subject only to *Wednesbury* rationality.

A MEMBER OF THE BENCH: Do you accept that?

MR CHAMBERLAIN: Of course. But that last caveat, subject only to *Wednesbury* rationality, is quite important. There can be cases -- we have drawn attention to Sedley LJ's judgment in the *Health Stores* case, paragraph 63 of his judgment in that case -- which are so centrally relevant to the issue under consideration that no rational decision-maker could proceed to answer the question without enquiring into those matters. These three matters fall into that category. But we do not even need to go that far. Why? Because, as I have said in the skeleton argument, and I mentioned at the outset, at the very least, if you are not going to enquire into the question of whether the country in question has legislation, has a method of securing accountability and has an independent and functioning judiciary, you have to have a reason for it. "What's your reason? Why didn't you ask the question of your Saudi interlocutors? Were you too embarrassed or what?"

My Lords, those are our submissions on ground 2.

Can I deal, as quickly as I possibly can, with ground 4, mostly by reference, if I may, to the skeleton argument. We deal with ground 4 at paragraph 55 and following of the skeleton argument. Now, what we say at 55 is that there was, before the court below, a dispute between the parties about what was meant by the term "serious violations of international humanitarian law". Can I just show your Lordships what we said about the meaning of that term to the Divisional Court in our note that we handed up accompanying our reply submissions. It is again in the core bundle, tab 9, page 190. It is 2A:

> "It is not accepted that serious violation of IHL is synonymous with grave breach of the Geneva Conventions or Additional Protocols. The wording of Articles 89 and 90(2)(c)(i) of Additional Protocol 1 make plain that 'serious violations' is a wider category. A latter provision makes reference to 'a grave breach or other serious violation'. The Tribunal in *Tadic* made the same point [that is the International Criminal Tribunal for the Former Yugoslavia] at paragraphs 90 to 94(3), setting a much more general threshold criterion. Furthermore, it is important to bear in mind that criterion 2, as Sir James said, looking to the recipient state's respect for IHL is not overtly concerned with questions of individual criminal responsibility."

That is an absolutely key distinction, in our respectful submission. What criterion 2(c) is looking at is the compliance by a state with international humanitarian law, whereas what you are looking at when you are searching for grave breaches for war crimes is breaches of international humanitarian law which are such as to give rise to individual criminal responsibility, the kind of thing that might end you up in the Hague, if I can put it like that -- not looking at individuals but looking at states.

Now, the Secretary of State's position before the Divisional Court -- and we have set out what the position was at 56 -- is that the term "serious violation" is synonymous with war crimes and grave breaches.

A MEMBER OF THE BENCH: Sorry, can you --

MR CHAMBERLAIN: Paragraph 56 of our skeleton, where the relevant references are to be found.

A MEMBER OF THE BENCH: Thank you. Yes.

MR CHAMBERLAIN: Now, the Divisional Court said two things. At paragraph 16 it said that the phrase includes grave breaches and war crimes and it italicised the word "includes" so as to indicate, no doubt, that there may be other things included within the term. But if you then look to paragraph 18 in the Divisional Court's judgment, you can see this, at page 92:

> "Article 8 of the ICC Statute requires a mental element for a 'grave' breach, ie a wilful or deliberate or intentional act. In our view, the generic term 'serious breach' would include reckless as well as deliberate or intentional acts."

Now, my Lords, what that seems to indicate is that the Divisional Court was still of the view that some mental element of a kind that would give rise to individual criminal responsibility was required. We say that is not correct. The key question, as Sir James accepts, is not so much what the Divisional Court said but what the

Secretary of State understood by the term, and we say that both the Secretary of State and, if you look at paragraph 18 here, the Divisional Court appear to have been looking for something deliberate or, if not deliberate, at least reckless.

The short point that we make is that on a correct interpretation of the term "serious violation of international humanitarian law", that can include conduct which is not deliberate or intentional or reckless -- for example, just to give an example, an egregious failure to take all feasible precautions, of the kind that your Lordships saw in relation to the MSF clinic. It is a good example because here you have a clinic which repeatedly gives it coordinates to the coalition. It has its logo on the roof. And yet, a civilian car is struck within the curtilage of the hospital, killing 19 civilians and an MSF volunteer -- including an MSF volunteer, I think.

A MEMBER OF THE BENCH: I would like to say that is an example of reckless conduct, because it is knowing there is a risk and taking it.

MR CHAMBERLAIN: Could be.

A MEMBER OF THE BENCH: Can I just ask you, suppose the state had not engaged in that kind of conduct but what happens is that there is a very large and serious consequence for civilians. Does that constitute a serious violation of IHL?

MR CHAMBERLAIN: Yes, it can, yes. I will just show you where we get all of this from. We have set it out in paragraph 58, so I hope I therefore do not need to go to the underlying document, but if you look at 58(3) and the ICRC commentary on Article 89 of Additional Protocol 1, you can see the term "serious violations", which is used in Additional Protocol 1, and we have underlined the passage:

> "… therefore refers to conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of grave breaches."

That includes (see section 3592) isolated instances of conduct not included amongst the grave breaches but nevertheless of a serious nature. To answer my Lord's question directly, if you have an isolated incident of conduct which is not deliberate, so not included in eth grave breaches, but which gives rise to very grave consequences for civilians, like, for example, the Great Hall incident or indeed many of the incidents in the UN second export report of January 2017 -- even a single isolated instance of that conduct not included among the grave breaches can count as a serious violation of international humanitarian law.

The same point is made in the ICRC Practical Guide which we cite at subparagraph (4), which makes this point:

> "Violations of IHL are serious if they endanger protected persons or objects 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."

And then this:

> "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."

We say that correctly identifies war crimes as a specific species of serious violation, namely the type of serious violation that entails individual criminal responsibility.

I have not put it in the excerpt there, but in fact, if you look at the excerpt itself, which is in the authorities bundle at tab 33 -- I am not asking you to do so -- there is a footnote to the *Tadic* case there. You will find a footnote to the *Tadic* case in the ICRC Practical Guide. We have set out the excerpt from the *Tadic* case at 59(1). What is the requirement for a violation to be serious? The answer is:

> "It must constitute a breach of the rule protecting important values and the breach must involve grave consequences for the victim."

Again, that answers directly my Lord, Lord Justice Singh's question. That is what it is looking at. We say a similar approach can be seen from the *Galic* and *Delalic* cases. Of course, the International Criminal Tribunal for the Former Yugoslavia is looking at individual criminal responsibility but the question whether the rule in question gives rise to individual criminal responsibility is separate -- that is number 4 on the list -- from the question of whether it is a serious violation of international humanitarian law.

Now, as to whether this matters in principle, we have explained there why it does, because there is a fundamental difference between conduct by a state which is contrary to international humanitarian law and conduct by an individual which entails the individual criminal liability of that person.

Finally, there is the question, was this distinction, which one does not find dealt with in the Secretary of State's material, material in this case. Can I just ask you to look at one document on that. That is Mr Crompton's witness statement. Mr Crompton is the FCO witness. His statement is in the first supplemental

bundle at tab 5, B157. Now, we have limited information about what is in the IHL update. You will have more information when you consider the closed matter, and we invite you to look at those in detail with the assistance of the special advocates and Mr Jones in closed. But what we do have is this, at 58 on 157. What is being referred to here is the October 2015 update:

> "The Update, at paragraph 7, expressed concern at the 'worrying levels of civilian casualties in some reports' and noted that 'high levels of civilian casualties can raise concerns particularly around the proportionality criteria'. The Update notes that intent is a key element in assessing IHL compliance and acknowledges that there is often insufficient information to determine intent."

Then at 59 --

A MEMBER OF THE BENCH: Hang on, it goes on.

A MEMBER OF THE BENCH: Can you read the rest of it?

MR CHAMBERLAIN: Yes, absolutely:

> "However, it is also clear from the Update that those making the assessment were well aware that 'a consistent pattern of non-deliberate incidents [that is 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'. The Update further noted that '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'.
>
> In the light of all these considerations, the Update concluded at paragraph 9 that 'on the information currently available, given that we do not have evidence establishing deliberate incidents that could amount to an IHL breach by Saudi Arabia, in particular in relation to items previously supplied by the UK, we do not currently assess that extant export licences need to be revisited ..."

That is that.

61 makes the same point, that:

> "… a consistent pattern of non-deliberate incidents that have the same cause and where remedial action is not taken could amount to a breach, but no recognition [and this is the key point here] that a single incident which does not amount to a grave breach (see the ICRC commentary) could itself amount to a serious violation of international humanitarian law."

Further, the ultimate conclusion reached is at 82(a) at page B162, (b):

> "… ongoing analysis of IHL compliance in a position that there was no evidence of deliberate incidents that could amount to an IHL breach by ASA."

We say that when one looks at that material as a whole and when one marries that with the position that was being adopted by the Secretary of State before the Divisional Court, namely that serious violation was synonymous with grave breaches or war crimes, there is evidence there of a misdirection which could have affected the result, particularly in a case such as the present, which was admittedly finely balanced.

A MEMBER OF THE BENCH: So, you have two points -- is that right -- under this head? One is you are saying there is no recognition that a single incident could amount to a serious breach, and the second one is that there seems to be, you say, a focus on there being a requirement for a deliberate breach.

MR CHAMBERLAIN: Yes -- or at least some --

A MEMBER OF THE BENCH: Some mental element.

MR CHAMBERLAIN: Mental element, yes. Indeed, even if ones looks at a consistent pattern of non-deliberate breaches, that is itself redolent of an analysis which is looking for a mental element, because it is looking, for example, as you would look in the case of a commander who is under investigation for individual criminal responsibility and it is being said against the commander, "Well, there's a series of breaches and you've done nothing to remedy it and therefore you're essentially reckless as to the breach." What it is not recognising is that, on a true analysis of international humanitarian law and the phrase "serious violation of international humanitarian law" there is no need for any mental element because what you are assessing is the conduct of a state, not the conduct of any individual.

My Lords, unless I can assist further, those are my submissions.

A MEMBER OF THE BENCH: Thank you very much indeed. Yes, Sir James.

SUBMISSIONS BY SIR JAMES EADIE

SIR JAMES EADIE: My Lords, I am afraid I had not spotted the end of the court day, but I promise I was proceeding on the basis that it was 4.15 pm rather than 4.30 pm.

A MEMBER OF THE BENCH: There we are, you see.

SIR JAMES EADIE: Whenever it is convenient to rise, nod or wave a hand.

A MEMBER OF THE BENCH: Thank you.

SIR JAMES EADIE: My Lords, in relation to ground 1, there are obviously limits when one comes to the facts as to what can be said in open. I will do the bests I can to

deal with it as fully as I can in open. But plainly the factual picture, what was considered, how it was considered and the detail of that -- much of that may well be in closed. I was going to focus in particular on the correct approach in principle in relation to ground 1. I make ten points -- I am afraid it is rather a lot -- in relation to ground 1, principle.

It may be as well -- I am going to try and do, again, as much as possible by reference to the judgment. If you have two documents to hand, I will be going go those quite frequently (**Several inaudible words**) going to the underlying documents. It is the open judgment, which you probably have loose, is at core tab 7, and our open skeleton. I cannot remember which tab it has been slotted in at, but it is page 460. Again, you may have that loose. Page 460 in the core bundle. Those two documents I will try to do most of it by reference to.

For the purpose of the points of principle, could I invite the court to turn up first of all page 89 in the Divisional Court's judgment, paragraph 8, which sets out the terms on criterion 2, which you have been taken to again in the (**Inaudible**) this morning. It may be as well to have that open.

So, the first proposition, or the first point that we make of the ten, is that the exercise set out in criterion 2(c) is a prospective one. It asks whether there is a clear risk that the items to be exported in the future might be used in serious violation of IHL, and it is therefore evident that the nature of past incidents of concern, or past allegations of concern, are relevant not as an end in themselves but as one part of the broader assessment as to future action by the receiving state. Of course, the corollary of that is that anything else which bears upon that prospective judgment is likewise relevant.

We note parenthetically in relation to the first point that the fact that this exercise involves not merely a prospective but a predictive judgment by the Secretary of State was one of the features that the Divisional Court relied upon as supporting the conclusion that the court in this particular context should accord considerable respect for the overall judgment made by the Secretary of State. That is because its nature as a predictive judgment is one of those facts that tends to enhance the degree of respect in accordance with long-established authority, Lord Bingham and so on. But that matters less for present purposes because there is no challenge to that issue -- that used to be ground 3 -- ground 3 having been

refused permission at that stage, so the first point is the exercise is a prospective one.

The second point is that the exercise that criterion 2(c) calls for focuses centrally on "the attitude" of the recipient state or receiving state. If you just go back to the structure in paragraph 8 of the judgment, on criterion 2, you will see the title in italics and then it is:

> "Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will … not grant a licence if there is a clear risk …"

Absolutely essential to this exercise is an assessment about and a judgment about the attitudes of the recipient state to relevant IHL principles. Those attitudes, we submit, are the specific premise for and the key ingredient in the analysis that is required under criterion 2(c). Those attitudes, therefore, require particular focus on the general attitudes of the receiving state and the structures in place designed to try to secure compliance in military operations with IHL.

It also requires particular focus, understandably and for the same reason, on the reaction of the recipient state engaging in military operations of this kind to incidents of concern. How does it react when issues of concern are raised with it? That broader range on matters or factors, including, of course, but going well beyond past incidents, is clearly reflected in the use of the word "attitudes", the structure of criterion 2(c) and in the statements in and the indicative questions suggested by the User's Guide.

You were taken to the User's Guide in the authorities bundle at tab 6. Can I just invite you to take that up briefly. The key bit you were shown this morning, so it is just by way of reminder, but the key bit is in paragraph 2.13 on internal page 54 and the three particular matters that are identified at 2.13, first subparagraph.

A MEMBER OF THE BENCH: This is all under your heading "Attitude". Can you just remind me, how do you say the User's Guide fits into that?

SIR JAMES EADIE: So, the User --

A MEMBER OF THE BENCH: By reference to these three items?

SIR JAMES EADIE: Yes.

A MEMBER OF THE BENCH: Yes, I see.

SIR JAMES EADIE: The three items are designed to inform the question which 2(c) poses on its face, as it were, which is what are the attitudes of the recipient state to, in effect, respect for IHL. You see that reflected, as it were -- the focus in this ground and in this appeal has been on past incidents, and part of the reason for highlighting attitudes is because there is a broader canvass, and the broader canvass is reflected both in the three things that are focused on in that first subparagraph at 2.13 and on the breadth of the indicative questions (the Divisional Court's words, relevant to ground 2) that you then see on page 55 and over the page. One can cast an eye, as it were, down those questions which run over two-and-a-bit pages, and you will see the broader canvass effectively being painted.

We respectfully submit that the Divisional Court was right to conclude that the judgment that was required by criterion 2(c) was indeed the broad one directed at assessing the attitude of the state in order, in particular, to make the prospective judgment about whether there was a clear risk that if you exported arms they would be used in serious violation of IHL.

The third point I can take very, very quickly because I have already effectively made it and touched on it, which is that the User's Guide, as we have just seen, suggests that three particular questions or matters should be considered, and that was picked up in the Divisional Court's judgment, if you still have that to hand, at para 179, and we respectfully submit that that is the paragraph in the judgment at 179 on page 129. 179 is the paragraph number. That is an unimpeachable description of the legal position, structure and construction of criterion 2 when read together with 2.13, and you will note in particular 179(3), which directly draws on the three aspects of focus I have just drawn attention to in the first subparagraph.

A MEMBER OF THE BENCH: Sir James, can I ask you, on subparagraph (a), the recipient country's past and present record of respect for IHL; suppose a decision-maker says, "Well, I'm not going to try to reach a view on what their past record is because I'm satisfied that they are sincere in their intentions, that they do have the capacity to comply with IHL and we're helping them to train," et cetera. Is that, on your submission, compliance with what is recommended here, that you should enquire into the recipient country's past record?

SIR JAMES EADIE: In the way my Lord puts the question, if the decision-maker in question hypothetically were to exclude incidents of concern which had come to his or her attention, then I think there would be serious force in a legal objection to that as an approach, but there is -- and you will appreciate I am jumping ahead in the submission --

A MEMBER OF THE BENCH: (**Overspeaking**).

SIR JAMES EADIE: -- many a difference between that and, "You need to reach a conclusion about whether or not they had in fact been in violation in an individual incident."

A MEMBER OF THE BENCH: Your submission, if I have understood it, is that when this says, "The enquiry should include," you submit that does not mean, "You are under a legal obligation to reach a concluded view about …"

SIR JAMES EADIE: I am certainly going to make that submission in due course.

A MEMBER OF THE BENCH: Thank you.

SIR JAMES EADIE: I think the question my Lord put to me, which is a fair one because it is the starting point at the other end of the telescope, if you will, is: could a decision-maker otherwise satisfied about points (b) and (c) nevertheless positively exclude incidents of concern which had been raised about past potential violations arising in the course of a military operation. I can see a much stronger case for saying that if you cut that out entirely, and you treat those past incidents or allegations as irrelevant to the exercise then there might be a legal problem.

A MEMBER OF THE BENCH: Sir James, there is a problem here I confess should have occurred to me before, thinking about the case. The way it is put is that this is not a position of one single date of decision. It is said to be a continuing failure to take a decision. In thinking about that, we need to establish what is past and what is present.

SIR JAMES EADIE: We do.

A MEMBER OF THE BENCH: Yet I am not conscious of having seen a chronology that relates to what are said to be significant episodes with engagement and training and all the things that go a long way. It is going to be quite difficult at the conclusion of this exercise to relate what is said, "You had this training and then there was that episode," unless that is created. It may have been in existence and I do not know about it, but it will be helpful if overnight we could think about that.

SIR JAMES EADIE: I will certainly think about it. The one thing we are entirely agreed on --

A MEMBER OF THE BENCH: (**Overspeaking**).

SIR JAMES EADIE: -- is the point that my Lord the Master of the Rolls discussed with my learned friend, which is what is the date. Lots of reference to decision; we are all agreed that what actually happens and what actually happened in terms of the process of the litigation was that everything, in effect, up to the date of the hearing was treated as bearing on the rationality of the judgment and the processes and all the rest of it. So, as you will have seen in the papers, there were papers that were produced originally, there were then updating statements, the Great Hall incident happened a long time after the proceedings were issued and so on.

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: It may be difficult, at some point, to relate particular bits of, for example, training with particular incidents, but --

A MEMBER OF THE BENCH: Of course. There is always a time lag between training and effect.

SIR JAMES EADIE: Quite. But the cut-off date is, in effect -- and that is to some extent part of the answer, when I come to it, to the UN Panel of Experts whenever it was produced, which I think was the beginning of January 2017, with the trial occurring, I think, in February 2017, so that was still, as it were, under active consideration, although some of the incidents that they deal with had occurred earlier and so may have been part of the consideration already. But it was that that, in effect, all parties treated as being the cut-off date, so we are really talking about decision-making and processes up to, I think, February 2017. I suppose technically it might have run to judgment but no one quite had the energy to go into post-hearing submissions after judgment. That is the way in which it works.

So, the third point is that the three particular questions, the three particular bits of focus, properly reflected both as the three particular things to focus on in 179(iii) of the judgment but also the broader analysis in 179, we respectfully submit, is correct and has not been significantly challenged as the way in which it is all designed to work and hang together.

The fourth point is this. It is for the exporting state to consider and decide how it wishes and is practically able to address the risk analysis that criterion 2(c)

requires in any particular case where the recipient state is actively involved in armed conflict. I put it that way because criterion 2(c), as you will have appreciated, poses the question, "Is there a clear risk?" and so on. It says nothing about any mandatory process for considerations which states must adopt when answering it. There is nothing in criterion 2(c) by way of mandatory process or approach. The User's Guide is expressly cast on the basis that it is for each state to makes its own judgments. It does not lay down mandatory or quasi-mandatory rules. It is designed to be helpful document and to guide, not to straitjacket, in terms of process. It positively emphasises that fact. If you still have it open and you go to 215 --

A MEMBER OF THE BENCH: I put mine away.

SIR JAMES EADIE: My Lord, I am so sorry. Authorities bundle 1, tab 6, internal page 58, paragraph 215, emphasising it is for each state to make the relevant judgments.

A MEMBER OF THE BENCH: Since we are on this set of documents, can I just ask for help, Sir James, on the precise legal status of these documents. Please correct me if I have misunderstood, because I may have done.

SIR JAMES EADIE: Yes.

A MEMBER OF THE BENCH: The origin of all of this area is the EU's Common Position, but that does not have direct effect.

SIR JAMES EADIE: It is international law, not EU law.

A MEMBER OF THE BENCH: Exactly. So, what we have ,as it were, to use the language of incorporation, is incorporation to an extent of that international legal obligation through --

SIR JAMES EADIE: Policy.

A MEMBER OF THE BENCH: -- our policy statement in the house.

SIR JAMES EADIE: Yes.

A MEMBER OF THE BENCH: Is there any equivalent incorporation of the User's Guide or does that only operate at the international level?

SIR JAMES EADIE: I do not think, but I will double-check, the statement in Parliament referred to the User's Guide.

A MEMBER OF THE BENCH: It may be something that perhaps somebody could help be checking overnight.

SIR JAMES EADIE: Yes. I will have a double-check overnight, but no one, I think, is proceeding -- and the Secretary of State certainly was not proceeding thus -- on the basis that the User's Guide, as it were, attached by way of guidance to the Common Position, was not of some interest in terms of the approach to the (**Inaudible**) criterion.

A MEMBER OF THE BENCH: I do understand that. Given what you have said so far, does it follow, therefore, that although its origins lie in the European Union, the Common Position in substance leaves it to each member state and its own system of public law to decide how, for example, the executive's judgment on criterion 2(c) is, for example, reviewable -- or, I suppose, in theory, it could be appealable. But even if you stop at a member state having a system of law which allowed people to say, "The government's got this wrong and we'd like the court to substitute its own judgment for that …"

SIR JAMES EADIE: There would be no difficulty with that as a matter of --

A MEMBER OF THE BENCH: You could do that?

SIR JAMES EADIE: As a matter of the Common Position, you are asking the question from that perspective or indeed the User's Guide.

A MEMBER OF THE BENCH: Equally, I think your submission would be that the Common Position had left completely untouched our system of public law --

SIR JAMES EADIE: Exactly so.

A MEMBER OF THE BENCH: -- with the well-known principles of judicial review?

SIR JAMES EADIE: That is the submission I am going to make in one second's time.

A MEMBER OF THE BENCH: I am sorry.

SIR JAMES EADIE: Under exactly this heading.

A MEMBER OF THE BENCH: Forgive me.

SIR JAMES EADIE: My Lord is ahead of me but yes, that is it. There will be no objection in any individual state deciding that it wanted to transpose, as it were, from the international legal order those particular substantive criteria in any way **a fortiori** procedural positions, because the only thing you find on process is in the User's Guide which is one level down even on the international plane. There is nothing to prevent a domestic legal system reacting in terms of either substance or process as it sees fit, and our domestic public law principles fit into that scheme.

My Lord, I think someone asked the question -- I cannot remember who now, I am afraid -- whether there is anything that indicates what the status and nature of the User's Guide is actually intended to be even on the international plane. That, of course, was a matter which the Divisional Court considered, but you can turn to it in the law if you will. It is there at paragraph 11, with a quote from the introduction to the criteria guidance. Let us take it from the judgment if we may. You see the quotation and the emphasis which the Divisional Court has added in paragraph 11.

A MEMBER OF THE BENCH: Sir James, that is very clear, but I have not detected that the Government's position was they had departed from the User's Guide at all.

SIR JAMES EADIE: Well, no. The only time that becomes sharp is in relation to the nature of the questions and whether or not they will have to be addressed and answered **seriatim**, as it were, but that is ground 2, which I will come to, but my Lord is right even in relation to that, because the core finding of the Divisional Court was that they were indicative.

A MEMBER OF THE BENCH: Well, we can come to ground 2 in a minute, but so far as ground 1 is concerned, it is academic (**Inaudible**) in a way.

SIR JAMES EADIE: What this serves to emphasise is the same thing which is emphasised in 215 which I took you to, which is that these are fundamentally matters of judgment across the broad canvass (see the earlier submissions) for the individual state to make. That is perhaps unsurprising, that it should be cast in that way, and that that should be the subject of very specific emphasis, given that there may well be different levels of information available to different states who have signed up to the Common Position, and also because different states will no doubt have -- it was the subject of the discussion I was just having with Lord Justice Singh -- different ways in which they consider these sorts of issues, different systems of law by which executive decision-making is tested and so on. That operates against a set or hard-edged mandatory approach to either past incidents or allegations or reports or, more generally, to the process by which proper judgments are made about the broad canvass question that 2(c) poses.

To come from that to our domestic law -- and, again, it is just putting flesh on the bone of the discussion we have just been having -- under our domestic public law the consolidated criteria represent the policy of the Secretary of State. That is

the analysis of them in public law. They create, and criterion 2(c) creates, in effect, a self-imposed policy question when considering export licence applications, but it is up to the Secretary of State to decide under traditional public law principles how he or she considers it most appropriate to go about analysing and informing and so on in order to answer that question. He is, to put the same point by reference to case law, subject to a *Tameside* duty, and the *Tameside* duty is ultimately a duty of rational decision-making about process.

The relevant principles, if the court needs any reminding of them, probably most of them stemming back to Laws LJ in the *Khatun* decision, were pulled together and are summarised and have been set out by the Divisional Court in their judgment, if you have that to hand, at paragraphs 36, citing the beginning of the *Tameside* duty from Lord Diplock in *Tameside* and then what that means in today's detail in paragraph 37 by reference to the *Plantagenet Alliance* case. Can I just invite the court to cast an eye down particularly paragraph 37, if you would -- or perhaps 37 and 38, which is much shorter. There is no dispute about this, I do not think, but that is a helpful summation of the *Tameside* principles.

My Lords, it might be convenient to do one more sub-point in relation to this and I am on to the fifth ground, or fifth point, and I can then stop for the day, if I am allowed to. That is that this process rationality, which you see there encapsulated in the quote from *Plantagenet*, sits alongside an equally broad rationality exercise at the substantive stage, so not merely does the Secretary of State only have to make, if I can put it that way, rational judgments about how he decides he wants to go about approaching the substantive question, but that when he gets to the substantive question, there is a broad respect, according to his judgments, for all the reasons that the Divisional Court identified in detail between paragraphs 25 and 35. 35 is the conclusion the Divisional Court reached about the degree of respect of a substantive decision, but in order to get there it had particular regard to the various factors that it has identified specifically between paragraphs 28 -- look at the final two sentences of 28 if you would -- and then all the well-known statements of principle about the degree of respect which I know my Lord, Lord Justice Singh will be very familiar with having recently decided the *Bancoult* case. It is that game again. But you see the other factors, the five factors

that are there set out, 30, 31, 32, 33 and 34 -- six of them -- all leading, in essence, to the point at paragraph 35.

Now, as I say, that is not any longer a ground of appeal. It was said originally that that was an error of approach and permission was refused. That stands as a correct view of the law, and the only reason I draw attention to it is because it, as it were, sits alongside and informs the approach to process because the approach to process is informed by the question you are actually asking at the end of it, and here you have a broad set of matters feeding into an overall judgment with all of these different substantive elements to them. That is the only reason I draw attention briefly to that set of paragraphs.

My Lords, that may be a convenient moment.

A MEMBER OF THE BENCH: Yes, it is indeed. 10.30 am tomorrow.

(4.21 pm)

(The court adjourned until 10.30 am the following day)

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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