Case No: T3/2017/2079

IN THE COURT OF APPEAL
CIVIL DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 10 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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(10.43 am)

SUBMISSIONS BY SIR JAMES EADIE (Continued)

SIR JAMES EADIE: My Lords, good morning. I was on the fifth point. The fifth point is that past incidents and allegations are relevant to the criterion 2(c) analysis and were treated as such. I will come to the facts in a bit more detail in due course. I am simply on the points of principle at the moment. The reason for that submission is obvious: past and present record of respect for IHL was one of the three indicia, if you remember, from paragraph 2.13 of the User's Guide, but that is no more than reflective of past incidents plainly being a relevant feature even if the analysis itself -- and the ultimate question is a prospective one, as we have seen -- but there is no question here of past incidents or allegations being ignored or not taken very seriously or indeed not forming the core of the criterion 2(c) analysis. The Divisional Court, if you have their judgment still to hand so I can make, as it were, repeated reference to it, found as a fact firstly that the Secretary of State -- it is in core bundle tab 7, if you have it --

A MEMBER OF THE BENCH: What has happened is I have taken those out and I think my clerk has not put them back in again.

SIR JAMES EADIE: There is certainly an unmarked one here if you want it for the time being.

A MEMBER OF THE BENCH: Yes, thank you. (**Handed**). Thank you, yes.

SIR JAMES EADIE: My Lord, I was going to refer you to the first of the relevant findings under this submission by the Divisional Court. Could you go to page 140 and go to paragraph 208(6) in the Divisional Court's judgment. They find:

> "… the Secretary of State and his advisers treated the allegations drawn to their attention in the third party reports seriously and as a matter of concern."

They also find, in their judgment, that the Secretary of State and his advisers did so as part of a broader consideration of the incidents of concern coming to their attention from any source. It was not just the third party reports, it was from any source.

A MEMBER OF THE BENCH: Sir James, can I just be clear. I may not have understood the submission correctly. When I noted your oral submission to us a moment ago, I think you said past incidents are relevant.

SIR JAMES EADIE: Past incidents and allegations.

A MEMBER OF THE BENCH: Right. This is only talking about allegations. Can you take into account a past incident as distinct from an allegation if you do not ask yourself the question, did the incident actually happen?

SIR JAMES EADIE: As a matter of fact whether the incident --

A MEMBER OF THE BENCH: As a matter of fact but also whether, as a matter of mixed law and fact, it amounts to a violation of IHL.

SIR JAMES EADIE: My Lord, my submission is you can, and I am going to develop that, because submission 8, when we get to it --

A MEMBER OF THE BENCH: Yes, I see.

SIR JAMES EADIE: -- is going to be something like that there is no obligation to ask the binary question, but I oblige(?) my Lord's question.

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

SIR JAMES EADIE: I am going to take it in stages. I am afraid we are going to get to that point through a couple of earlier ones.

A MEMBER OF THE BENCH: No, that is fine, of course.

SIR JAMES EADIE: I deliberately put the two concepts together. I suspect they may merge (**Several inaudible words**).

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: For the purposes of this submission, we respectfully submit they were entitled to make those findings and you see, if you go back to paragraph 120, a similar point being made under the heading "General observation". That is an important finding of fact for obvious reasons, in the context of the argument presented. It is a point I will come back to, but that is a finding that was made after the most intensive analysis of all of the open and closed material by the Divisional Court. That is the fifth submission.

The sixth submission, which, as it were, reaches towards the question my Lord, Lord Justice Singh just posed to me, is that those incidents and allegations are to be and were here considered within the framework of and by reference to the relevant principles of IHL. So, the consideration of any incident or allegation raised, for example, in the third party report is precisely about whether those incidents do or do not raise concerns about, for example, to take the most relevant two, respect for the principles of distinction and proportionality. That is the very

purpose of the analysis. That is the very purpose of the analysis because ultimately the question, as we saw yesterday, and the judgment that needs to be reached, is about the attitudes of the recipient state and whether or not there is a clear risk of the kind identified in 2(c). We do respectfully submit that that is precisely the exercise that was undertaken. The Divisional Court at 185 --

A MEMBER OF THE BENCH: Could I just ask a question arising out of this last proposition (**Inaudible**) making. Basically, it comes to this, it seems to me: yes, the Secretary of State and his advisers were looking at the allegations that were made, the reported facts that were made and treating them seriously as a matter of concern, but what does that actually mean? When it says it is a matter of concern, is it because the Secretary of State was seeking to find an answer as to whether in his mind they established, in all probability, a pattern, or was it with a view to raising the issue? What does it mean in reality, not just the words? What was the process that was going on (**Overspeaking**)?

SIR JAMES EADIE: I am going to come to that to the extent I can in open, and you will appreciate there is additional assistance in relation to that in closed. I am going to make a discrete submission about the facts and what they were doing and why they were doing it.

The short answer to my Lord's question is that they were not, as it were, seeking to answer the binary question of yes, no or even likely in relation to all incidents or groups of incidents, but the "seriously" and "concern" bits do indicate that they were looking at these incidents precisely with a view to seeing the extent to which they raise concerns under IHL. That is the very reason for doing so. Do they raise concerns, for example, about whether or not there was deliberate targeting of civilians? If there was deliberate targeting of civilians then you would have a clear incident or a clear breach of the principle of distinction. But they were also looking at the incidents of concern to see whether or not, if there was a pattern that appeared to be emerging -- strikes on hospitals, to take an obvious example -- sufficient steps were being taken to ensure that sufficient precautions were taken in the targeting processes.

The very purpose of doing any and all of that analysis is driven by IHL. I was about to give you a reference to 185 in the judgment of the Divisional Court, where they say these allegations were looked at or looked at "through the prism",

were the words they used, of IHL. When you translate the principles of IHL into the manner in which you look at these allegations, you are doing that in order to make those sorts of judgments, but those sorts of judgment, the sort of questions that arise and the analysis that is undertaken are all, as it were, driven by and informed by the relevant principles of IHL.

A MEMBER OF THE BENCH: Yes. The difficulty I have -- I am happy to be guided on it by you to some extent, to the extent which one can deal with them here -- is that it is one thing to look at matters and say, "Well, this is concerning; I'm going to act on the assumption that they're probably correct and therefore they need to be rectified." That is one thing you can do, or you can look at something and you can say, "I just don't know whether they're true or not true, but I can't really form a view about it." Or you can say, "That doesn't look realistic to me." But just saying they are of concern really is a generic expression which does not really sort of focus on what the consequences are of that concern.

SIR JAMES EADIE: Or capture, if I may respectfully add to that thought, the degrees between yes, no, is there a violation and, as it were, simply --

A MEMBER OF THE BENCH: "I can't tell."

SIR JAMES EADIE: -- treating them as a matter of concern in general terms and not taking account.

A MEMBER OF THE BENCH: That is the problem.

SIR JAMES EADIE: But there are many steps, as it were, many approaches, between those two extremes. The submission that I have to make good on the facts is that when the Divisional Court used "treated them seriously and with concern", it was not just, as it were, asserting and leaving that they were out there amorphously and no one was focusing on IHL and they just noted them and moved on. The submission I have just made is that the --

A MEMBER OF THE BENCH: It sounds as though what you are saying is, on the facts, what you will be seeking to persuade us is that the concern amounted to a conscious decision that these matters needed to be addressed. I think that is what you are saying.

SIR JAMES EADIE: And more. It still prompts the question that my Lord started by putting: they need to be addressed how and by reference to what? The submission I have just made is the "how and by reference to what" are the principles of IHL,

in particular distinction and proportionality, because obviously if you are conducting military operations and they involve principally an air campaign then those are the two key principles of IHL that are likely to be in play. Cutting right down to the chase of it, all of those principles, if you leave aside the possibility of deliberate targeting of civilians, are designed to test and to see whether a particular allegation or incident leads you into a place where you say it looks as though there might be a problem with the nature of the precautions that are being taken or the systems that are in place, which are designed to protect against excessive collateral damage. International humanitarian law accepts there can be some collateral damage but the question is (**Overspeaking**).

A MEMBER OF THE BENCH: What it comes to, I think you are saying, is this was not a case, as the Divisional Court found, as you have quite rightly said, on the evidence, where the Secretary of State says, "Well, I'm not going to go into that."

SIR JAMES EADIE: No.

A MEMBER OF THE BENCH: That is your first point. Your second point is that the reference to concern -- treating these allegations seriously and as a matter of concern -- was that they were matters which needed to be addressed in some way. That is what you are saying?

SIR JAMES EADIE: Needed to be addressed in some way and by reference to the principles of IHL.

A MEMBER OF THE BENCH: Yes, all right.

SIR JAMES EADIE: It is that that provides the prism or the framework for the analysis.

A MEMBER OF THE BENCH: When you have looked through a prism or adopted an analysis, the interesting thing is why you do not come to at least your provisional conclusion.

SIR JAMES EADIE: Well, I am going to make submissions about that in a moment, which is that there are principle difficulties with doing that. I am afraid I am taking them in stages, so a lot of this is going to be submissions 7, 8 and 9, but you get the drift of it.

The sixth one, which is the one I am on at the moment, I do emphasise -- and I hope I have emphasised enough in answer to my Lord the Master of the Rolls -- and that is that the "seriously and of concern" bit carries with it, as it were, the paragraph 185 through the prism of IHL. It is important they are applying, as it

were, to whatever analysis they are able to conduct, the right systems of law, the right questions, effectively. Non-sequitur that that leads you to a binary yes/no answer. That is the sixth submission. It is the final sentence of 185 that is really the nub of the sixth submission.

The seventh submission is that there is nothing irrational (or, we would add in brackets, inconsistent with criterion 2(c) or the User's Guide) about considering all such incidents and allegations in that manner and then focusing on potential patterns of concern and/or specific incidents of particular concern and then engaging with the recipient state, obviously, if and to the extent that can be done given the extent of the relationship, to seek to understand what happened in fact and then consider and explore the attitude of the recipient state in the light of that. That sort of approach allows the proper and effective use to be made -- perhaps the most effective use to be made -- of any privileged access that does exist, and acknowledges that, even with such access, there may be a whole variety of different reasons, including sensitivity of information, that may render the picture ultimately incomplete.

It recognises, moreover, that across member states in the EU, signed up to the Common Position -- and bear in mind whatever approach you decide is required as a matter of rationality, at least we will have an echo into the operation of the Common Position on which the criteria are based. It has to work, as it were; the mandatory approach has to work both for us and for France and Germany and Spain and everyone else who signed up to the Common Position, and they may well have different degrees of access -- access to different information, to different intelligence, to different source material from their diplomatic posts, one of the sources that was referred to in para 2.13, as you remember.

The rationality of this approach is all the more so if the incident itself is or may be subject to ongoing investigation in the recipient state itself. It focuses, as an approach, on the aspects likely to be of most concern rather than acting as a quasi-court, recognising that the true question is as to the risks of violation in the future, informed centrally by making a judgment about the attitudes of the recipient state. That is the seventh submission.

The eighth submission is that it is not necessary under criterion 2(c) for conclusions to be reached about whether a particular incident or a particular group

of incidents did or did not amount to a violation of IHL or as to any particular degree of likelihood that they did or did not do so. I do not repeat in that respect all of the submissions I have made earlier about *Tameside* and criterion 2(c) and the User's Guide and the nature of the analysis that 2(c) is focusing on, but I highlight only two additional points under this eighth submission. First, to conclude that there was such a requirement would be intensely problematic because there are likely to be the most serious constraints (and indeed potentially serious objection in principle) to exporting states having to reach conclusions on whether specific incidents of concern do or do not in fact -- or mixed fact and law -- amount to violations of IHL. Governments are not courts. They are engaged, under 2(c), in a governmental risk analysis -- fundamentally a risk analysis -- about the possible future use of exports by and to a sovereign foreign government.

It is difficult to see how realistically they could reach firm conclusions on a yes/no or likelihood basis. It might be possible, but it is difficult to see how, realistically, one could insist upon that as a mandatory process for a variety of pretty obvious reasons. The questions that would have to be addressed in order to produce a yes/no answer are potentially extremely complicated. IHL itself, in principle, as the court will no doubt be aware, is not free from controversy in principle, when one tries to apply it in particular circumstances. Even if the basic principles are clear -- distinction, proportionality -- the developed principles are themselves a matter of some controversy, as at least some of the analysis conducted by the Divisional Court in the beginning part of its judgment tends to indicate. They have focused on the particular and basic principles, as you saw in paragraphs 23 and 24 of the judgment, highlighting especially the principles of distinction and proportionality for obvious reasons.

So, IHL may not be free of controversy in principle, but in the context of active and ongoing military operations, the questions that would require resolution are likely to be especially factually complex, with facts no doubt continuing to emerge as the conflict continues. If one was to try to engage with the factual and principle complications, you would be likely to end up with, in effect, a trial of many layers, if you are seeking to determine if any single incident was in fact in violation of IHL.

A MEMBER OF THE BENCH: So, does this proposition then amount to an acceptance -- maybe I should have picked this up before -- in that it is accepted that the Secretary of State did not attempt to do this?

SIR JAMES EADIE: The Secretary of State did not attempt to --

A MEMBER OF THE BENCH: Did not attempt to make --

SIR JAMES EADIE: A binary yes/no answer.

A MEMBER OF THE BENCH: To reach a conclusion. There are conclusions on (**Inaudible**) did it happen or did it not happen, or the other one, which you have swept up in your submissions (**Inaudible**) is, was there a likelihood? You are saying even that was something which was not practicable?

SIR JAMES EADIE: Yes. Well, the --

A MEMBER OF THE BENCH: The likelihood of a probability that something occurred.

SIR JAMES EADIE: There is a requirement in relation to each incident or any individual incident, yes.

A MEMBER OF THE BENCH: I think the way it is put is there has to be an assessment of enough incidents to see whether there was a pattern emerging rather than each individual one.

SIR JAMES EADIE: Yes. I am going to come directly to that, but it is an acceptance of it. It is.

A MEMBER OF THE BENCH: So, that is common ground, then, that there was no attempt to do so. Now, you explain in your submissions to us reasons why that is so. Because of the admission, it may not matter, but could one not normally expect the Secretary of State's evidence to say there were all these reasons why it was not practical to do so? You are telling us.

SIR JAMES EADIE: My Lord, I am telling you.

A MEMBER OF THE BENCH: But should we not expect the Secretary of State to produce that as a matter of evidence to say, "I couldn't do that," or, "It wasn't practical for all these reasons"?

SIR JAMES EADIE: My Lord, I do not think I need go as far as to say I could not do that. No doubt one could make the attempt, as it were, but this is about a rational judgment as to the approach to be taken to the prospective question, so these submissions, as it were, build up. I do not need to demonstrate, there is no burden

on me to demonstrate, by evidence or otherwise, that you could not do it in any particular case. You might --

A MEMBER OF THE BENCH: You say it was not irrational to do --

SIR JAMES EADIE: I say it was not irrational to adopt the approach I have adopted. These reasons why it would be especially difficult go directly to that rationality question.

A MEMBER OF THE BENCH: There is something that has been at the back of my mind, and perhaps I can bring it to the forefront of my mind now and ask for your help, please, on this. Although, quite understandably, we are all focusing on paragraph (c) in criterion 2, I have for myself been wondering whether any help can be derived from its context, which includes, of course, paragraph (b), and paragraph (b), which is in various places but I have it in the Divisional Court judgment at paragraph 8, where they quoted it, does, in contrast to the prospective risk assessment you have been helping us about, in fact look back to where serious violations of human rights have been established. That appears to be looking to the past. But, perhaps interestingly, there it says:

> "… have been established by the competent bodies of the UN, the Council of Europe of by the European Union."

You made the submission earlier that the exporting state's government is not, as it were, a court, so I wondered whether there is any assistance (**Overspeaking**).

SIR JAMES EADIE: There is that contrast. It rather depends who the competent bodies are.

A MEMBER OF THE BENCH: Quite.

SIR JAMES EADIE: The competent bodies they are referring to are likely to be, I imagine, the European Court of Human Rights, which is the fundamental judicial body operating under the Council of Europe --

A MEMBER OF THE BENCH: I wondered that. I wondered if that is what that is getting at.

SIR JAMES EADIE: There is that contrast, is your point?

A MEMBER OF THE BENCH: I guess I am just wondering whether, on your submission, any help can be derived from that contrast.

SIR JAMES EADIE: My Lord, it may be that if that contrast can properly be drawn -- and one can see, for the reasons you have just given, precisely why it might be drawn -- it simply bolsters the point that could be made freestanding without 2(b)

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anyway, which is that the Government is engaged in an exercise of rational judgment in relation to the prospective risk analysis required by 2(c), and it is not a court. But if and to the extent that is reinforced by 2(b) then I see the force of that.

Since we are going through the difficulties, or the serious constraints, as I put it, as to why this is not required as a matter of rationality, and I am on the mixed principle complexity and factual complexity, a trial of many layers, one would have thought you would need, if you were going to say yes or no in relation to a sovereign foreign government -- that there has or there has not been a violation of IHL in relation to any particular incident -- the fullest information, statements from all concerned, and you would have to be extremely careful about drawing inferences, one imagines.

A MEMBER OF THE BENCH: Are you saying, then -- let us return to this theme, because I think this is quite critical in the area we are in now -- that the Secretary of State did not attempt for good rational reasons to form a concluded view about whether the past incidents were in breach or not in breach of IHL, nor indeed to form a concluded view about the likelihood of that or the key reasons for that? Does that mean that your case is the Secretary of State proceeded on the basis that they may have been breaches?

SIR JAMES EADIE: My Lord, yes. That is what leads to the engagement, if one wants to put it that way. The nature of the processes --

A MEMBER OF THE BENCH: You say he is keeping an open mind. You are saying the concern found by the Divisional Court is a reflection of the fact that the Secretary of State had an open mind that they might be?

SIR JAMES EADIE: Had an open mind that they might be and recognised that, in the light of whatever information was available to him from whatever source, the "might" could be at the higher end of the scale or the lower end of the scale, with an infinite variety in between. But what that ultimately led to was a selection, in terms of either pattern or seriousness of incident, of those incidents on which extra focus will be placed and engagement would occur with the foreign sovereign state.

Just to finish the complexity and the sort of analysis that would be required to do a yes/no analysis or some balance of probability or likelihood analysis, ultimately reaching a conclusion, can I just refer you to the Divisional Court's judgment at 181. It is in particular, on this point, 181(ii), but the whole of 181 is

pretty important for this purpose, because this is their disagreement with the submission that you see recorded at paragraph 180, which is the point we are on. They disagree for the variety of reasons they there set out, but on this inherent difficulty can I just invite you to re-read 181(ii). (**Pause**). The point that, my Lord, we have just been discussing is reflected, as it were -- the constant rider to all of this is it is not necessary to do that but that does not render these incidents of concern irrelevant, but that is the point that is reflected in the final sentence of 181(i).

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: So, there is the inherent complexity and impracticality in such an exercise that is the subject of 181(ii) in the Divisional Court's judgment, but there is the additional point that the information necessary to enable questions of that complexity to be answered is highly unlikely to be available or even obtainable by most of the states who signed up to the Common Position. However privileged your access is, the likelihood is you are not going to have the sort of complete picture that the state which is engaging in military operations will have. That is so even if you have privileged access.

A MEMBER OF THE BENCH: Because this is really the nub of this issue, sir James, can I just ask for your help a little bit more about this. It may or may not be helpful to think of analogous situations, but we are dealing here with rationality.

SIR JAMES EADIE: We are.

A MEMBER OF THE BENCH: That is the litmus test. Reasonable people might say that all the time in our own lives we assess future risk by reference to past events, so typically everyone in this room has probably applied for an insurance policy and you apply for car insurance and the company will ask you whether you have had any accidents in the last five years. They are not interested in knowing whether it is possible that you had accidents; they want to know. I think the fundamental submission Mr Chamberlain makes is that you do, as a matter of rational behaviour, in order to assess future risk, at least try to answer the question of whether there was a violation of IHL, not simply, "Do I have concerns; is it possible that there was?" because the risk for the future may well be of a qualitatively different kind if your view is that this was a violation of IHL from the situation where your view is simply that it is possible.

SIR JAMES EADIE: My Lord, there are a couple of answers, perhaps, to that. The first is that the example you give of the insurance company is a focus on the past which is pretty straightforward to answer: have you had a crash or have you not had a crash? There is no difficulty with doing that. You know; you have access to all the relevant information to answer that very, very simple and basic question. You do not have to make judgments, you do not have to have access to the sort of issues that would need to be addressed in order to answer, for example, a claim that the foreign sovereign state had acted disproportionately in the conduct of military operations, so the degree of complexity is very, very simple.

The second, and perhaps more principled, answer is that I do not accept necessarily that, in the context we are dealing with, there is a clear or easy way of solving that dilemma, but the rationality of the approach that was adopted allows for the Government to consider, within a range of seriousness and possibility, but without finally addressing the binary question, as it were, it allows for degrees of serious incident to be factored in, and they are factored in for a purpose, and that purpose is to enable proper engagement, proper exploration in terms of further materials or further facts that can be discovered, and in particular picking those incidents or patterns to explore with the foreign state in order precisely to see what reaction you get, given that attitudes are so simple to this analysis.

Although I can see there are certain circumstances in which, in different contexts, one can perfectly contentedly say, "It's not good enough just to say, 'It was possible I had a crash yesterday'; you actually have to say whether you did or you didn't," it is a context-by-context question ultimately, and the context here is very special but does allow for that gradation of seriousness to be brought to bear without the need to answer the binary question.

One of the reasons I gave for that was because of that potential complexity of the question itself, and the second reason I was going on to was that the information necessary is highly unlikely to be available anyway. If you just flick forward in the judgment, for example, to paragraph 201(iii), you will see that even in relation to the United Kingdom Government, the point that is there made is that there are likely to be gaps because almost every one of the applicable IHL principles would require access to the range of information about decision-making, intelligence available, options, strategic importance and so on, and it is likely that

if you were a foreign state conducting an ongoing military operation, much of that information is likely to be highly sensitive.

The example I keep coming back to is, suppose we were in the position of Saudi Arabia and were conducting a military operation of this kind and a third state was, as it were, sitting on our shoulder, doing the clear risk assessment of this kind for the purpose of seeing whether they would continue to export military arms to us, how would the Government be likely to react to the control of information to the extent to which it engaged. Whether that example is necessary or not, one can see degrees of sensitivity even with your closest allies in relation to some parts of the information.

A MEMBER OF THE BENCH: Can I follow up my Lord's question and your reply to it. I agree with my Lord that it does seem to be at the heart of ground 1 that we are in now that we (**Inaudible**). One of the things that might be said is that the nature of the investigation and requirements of it as to past occurrences of breach of IHL may rest to some extent on the seriousness of the consequences, and here we are dealing with very serious issues of potential loss of life as a result of serious breaches of IHL. You can imagine, as you eloquently painted it, the picture of a rational process where, because of complexities, it is not possible to reach a final conclusion and it may be even very, very difficult, if not impossible, to reach a view on likelihood. But it might be said that, in view of the very serious consequences of this particular course, and the significance of breaches of IHL on the consistent basis, that the rational approach requires you to do the best you can, so you cannot simply say it may or may not have done; you are forced by the consequences and the seriousness of the exercise to say, "I know it's difficult and I know there are gaps, but I have to do the best I can to reach some view about likelihood."

SIR JAMES EADIE: My Lord, I think my answer to that would be that the seriousness of consequence is a factor which is highly relevant and uppermost in everyone's mind but it does not lead, I respectfully submit, to the requirement to answer that binary question. It does not do so for all the reasons I have given: you can properly respect, you can properly test, you can properly probe the attitudes of the recipient state for respect for IHL, you can properly reach a prospective risk assessment judgment, without doing so when you recognise the sort of difficulties

that I am going through. That does not indicate any lack of seriousness and it does not indicate any lack of concern for the sort of consequences that my Lord identified, which are accepted. I think that is the answer I would give. One has to bear in mind all along in relation to this, both in relation to complexities and in relation to the potential absence of information -- it is a point I keep coming back to -- that this has got to work for all states that sign up to the Common Position.

A MEMBER OF THE BENCH: But you are not saying, Sir James, as I understand your position, that it would be impossible. What you are saying is that two different rational decision-makers could adopt two different approaches. The Secretary of State has adopted this approach. It may be that there are NGOs and panels of experts appointed by the UN who do feel --

SIR JAMES EADIE: Able to.

A MEMBER OF THE BENCH: -- able to form a concluded view that there has been a violation of IHL. I do not think you are going so far as to say it is impossible in principle to take that approach, but what you are saying is that you are not required by public law to do it.

SIR JAMES EADIE: That is exactly what I am saying, but I will have something to say in due course about the concern which a decision-maker such as the Government here might properly have about the true ability, having regard to exactly the sort of factors I have just been going to, of anybody being able to say in public with a degree of assurance that some of the bodies -- I will not beat about the bush, the UN Panel of Experts, for example -- were able to bring to bear on a set of issues on which they were incompletely cited. I am going to have something to say about that, but my Lord is right that my argument of principle is that this is a rationality judgment and that allows two different possible approaches even to this question.

A MEMBER OF THE BENCH: Sir James, it is, I know, hard to have questions coming, but they do help us to focus. Could I put two things. Firstly, the propositions you advanced I noted as best I can, but I do not see them, I think, in quite that way in the written submissions, unless I am wrong. Would it be possible to have the propositions you have put in a note?

SIR JAMES EADIE: In a note, of course.

A MEMBER OF THE BENCH: It is just so that I am sure I have got it right. Then I wanted to pick up something you mentioned a moment ago. You said imagine the

boot was on the other foot and that Saudi was the supplier to the UK, and how would the relationship --

SIR JAMES EADIE: I hope not facetiously. I was not intending it to be a facetious example, just a (**Inaudible**) sensitivity.

A MEMBER OF THE BENCH: No, no. I took the sense of that to be that that is one of the aspects governing the rationality of the approach that was taken, but we need to tease this out. Would it be a rational approach to say, "It will be too difficult for the relationship between us and them for all other purposes and therefore we will not proceed to either a binary judgment or a judgment about the probability; we won't press through to that conclusion because that will be damaging to the international relations of the United Kingdom"? Are you saying that is part of the rational approach to be taken or is it simply that to do so would be to diminish the information we get? What is the basis of saying that?

SIR JAMES EADIE: My Lord, I think it is more the latter. If I may respectfully submit, it plainly is a relevant factor feeding into a rational judgment about what process is to be followed that you may need to make judgments in dealing with a foreign sovereign state with its own intense and understandable concerns about the sensitivity of information in this most fraught context of ongoing military operations. It is proper to take into account judgment calls that will need to be made about how best you use whatever privileged access you have. I do respectfully submit that there is nothing irrelevant or unprincipled about that. If you went the whole hog and said, "We're simply not going to engage because it might affect international relations," that might be rather different, but I do submit that it is relevant and appropriate for the United Kingdom in its engagement with the Saudi government to be able to make judgments about, as it were, the selective use of that engagement process for the purpose -- and that is the reason why one might look at these incidents and say, "Well, I really want to talk about that one, that one and that pattern because I recognise that if I go to them with [whatever number it is] and start chasing down every allegation that's ever been made at a that might enable you to answer that question fully, (a) I may not get all the information anyway, but (b) I really do want to target that engagement process on those that strike me as being the most serious and therefore the most likely to give me information centrally relevant to attitudes and action."

A MEMBER OF THE BENCH: It might be said that what that leads you to do is to be less rigorous with your friends and with those with whom you do not have a close relationship.

SIR JAMES EADIE: I respectfully disagree with that. It leads you to be more rigorous with your friends but in a properly selective way.

A MEMBER OF THE BENCH: I do not know if my Lord had finished his questions, but may I ask, merely arising from but approaching it from a slightly different perspective; I have been wondering, speaking for myself only, whether any part of your submissions might rely on the comity of nations. The reason I mention that is that we are dealing here with a suggestion of law that there is a particular process which public law demands be imposed upon the Executive of this country, and it has been expressed in various different ways but you say that the question that would have to be posed is a binary question, whether one expresses it in terms of likelihood or otherwise, but it is a binary question of has there been a violation of IHL. Now, sometimes in the courts and tribunals of this country the law does require that sort of question to be asked and answered, so in asylum cases it can be the case that there is no alternative; this state, with its three branches, may have to ask the question and answer the question of has there --

SIR JAMES EADIE: Is there a real risk of ill treatment of that kind.

A MEMBER OF THE BENCH: In answering that question, it may have to be asked whether the other state has violated human rights law in the past. But we are not here, at least as I see it, in a context where, for example, some judicial body has to make that determination. I have been wondering -- and it may not be a good point at all, which is why I would like your help with it. I have in mind, for example, the *CND* case argued many years ago.

SIR JAMES EADIE: Yes.

A MEMBER OF THE BENCH: There, the Divisional Court, if I recall correctly, said that sometimes there is a foothold in domestic law which means that you have to answer the question. They gave the example of asylum law, but they said, as I recall, that otherwise the comity of nations may suggest that at least you do not require the Executive of this country to form a view about whether another sovereign state is acting unlawfully. Is that of any help at all?

SIR JAMES EADIE: My Lord, I think it is, not necessarily because it will provide a complete and total principled answer to having to engage with the matters which criterion 2(c) refers you to. There was a very specific context, as my Lord will need no telling, as it were, to the *CND* case. If I recall it correctly, the international relations and comity of nations flavour to that case was particularly around the question of whether or not the Government, as it were, should be committed to a particular legal position and international law arising out of the relevant convention that existed in that case. So there will always be context.

A MEMBER OF THE BENCH: The UN Charter.

SIR JAMES EADIE: The UN Charter.

A MEMBER OF THE BENCH: Whether, for example, the United States would be breaching Article 2(4) of the UN Charter in invading Iraq.

SIR JAMES EADIE: Yes, my Lord. So, there is a specific context there. The general point that my Lord makes about the case law flowing from *CND* has been repeatedly descended on by the courts up to Supreme Court level thereafter, principally in relation to the question of whether or not, as it were, international law sounds in domestic law. The answer is that it does if legislation tells you you have to get stuck into that. That is the explanation, for example, of the asylum cases; they pose a question relevant in domestic law which requires you on some occasions to answer the comity of nations question, if you will, of whether a foreign sovereign state has committed violations of human rights which give rise to a real risk that there will be ill-treatment of the kind prohibited under the Refugee Convention or Article 3 of ECHR. Again, a different context there.

There is a "but". The "but" is that I agree with my Lord to this extent, which is that in our context there is at least a comity of nations flavour to it, but as a particular comity of nations flavour, it might be thought, one aspect of that is the point I was discussing with my Lord, Lord Justice Irwin, which is that, as part of a rational approach, you are entitled, depending upon your degree of access to the special information that you would need to make judgment about IHL breach or not, to make judgments, and it is perfectly proper to make judgments, about the extent to which and the manner in which you engage, for example, for the purpose of getting further information from that foreign sovereign state. That is one aspect of it.

The second aspect of it is one I keep coming back to, that this test, this approach, and its requirements, mandatory answer to the binary question or not, has to work for the United Kingdom and all other signatories to the Common Position. It would be very odd if the United Kingdom, through its own public law, particularly given the flexibility and the doctrine of rationality, insisted upon a process and a set of answers that foreign sovereign governments without the privileged access that we have will be simply incapable properly of answering. That cannot have been the intention of the framers of that part of the Common Position which became criterion 2(c).

A MEMBER OF THE BENCH: But how far does that problem not get solved by the foreign state that does not have access looking at publicly available material?

SIR JAMES EADIE: Well, my Lord, it might or it might not do. They would then have to make a judgment about the extent to which they thought that the sources and analysis in those NGO reports or UN reports, whatever they may be, did or did not bear with that.

A MEMBER OF THE BENCH: Of course. They would have to look and see whether the UN or MSF or all the other organisations were rigorous enough as a basis for action, but that would not make --

SIR JAMES EADIE: Or the judgment about choosing to engage with the foreign sovereign government even if they did not have the level of privileged access.

A MEMBER OF THE BENCH: Your point being that the hypothetical member state is not in the position that the UK was with Saudi -- does not have the access, does not have bridges that have been built -- and therefore if the legal point you are making is that the test or the approach must be, broadly speaking, operable in a comparable way, or to a comparable standard but with a comparable level of obligation on each member state, that must be subject to the factual position of the relationships of that state with the state to which arms are being supplied, but it does not abolish the obligation to consider the criteria.

SIR JAMES EADIE: Certainly not, my Lord. I think the point I am making is not quite so hard-edged as you put it to me. The point that I am making is that the Common Position and the existence of other states illustrates the likelihood of a whole variety of potential access that those states will have with the recipient states.

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A MEMBER OF THE BENCH: Why does it remove the obligation to reach at least some sort of provisional conclusion?

SIR JAMES EADIE: Because the likelihood is that there will be greater or lesser access to the information that would enable you to do that. That is the short answer to that.

A MEMBER OF THE BENCH: So you become reliant on the information you do (**Overspeaking**)?

SIR JAMES EADIE: Of course you do, and you have to make the judgment about prospective risk on the basis of what you have. No one is denying that. If all you have -- suppose you were a state which was considering exports, had signed up to the Common Position and you had absolutely no channels whatever into the Saudi military, let us assume, you then either say, "Well, we just simply take those UN reports as read," or you say, "Well, the foreign sovereign states can look at those reports and say they may have reached that conclusion," but in order, surely, to get to proportionality or get to a clear finding that there had been a breach of the principle of proportionality, you would need X, Y and Z, and they simply did not have that. It just depends. There is a whole variety of different possibilities. The fundamental point I make is that that breadth of access suggests flexibility rather than hard-edged testing of the kind that is being suggested.

My Lord, I have taken a bit of time on the first of the subpoints under 8, which is most serious constraints in relation to exporting states having to answer the binary question. The second point, which was a point that the Divisional Court was also very well alive to is that there is no requirement either expressly in, or even implicitly or suggested by, criterion 2(c) itself or the User's Guide to reach that sort of binary conclusion. On the contrary, those documents, and the provisions in criterion 2(c), are focused on attitudes and prospective judgment about clear risk, they focus on past and present record of respect for IHL but within --

A MEMBER OF THE BENCH: Forgive me. What does "past record" mean if it does not mean "has there been a violation?" "Are there concerns?", not, "Is there a possibility?" Is that not what the record is -- that something happened?

SIR JAMES EADIE: My Lord, yes, but it does not lead -- and there is no suggestion, either implicitly in the concept of a record or still less in the analysis they then

invite in 2.13, that you have to then ask the binary question. If that was a requirement it would have been the easiest thing in the world to have said so.

A MEMBER OF THE BENCH: What I am suggesting, at least for the sake of testing the argument, is that that is --

SIR JAMES EADIE: Where the record does so.

A MEMBER OF THE BENCH: Yes. The concept of record surely is exactly asking the question, was there a violation of IHL in the past?

SIR JAMES EADIE: My Lord, that, I respectfully submit, is not implicit in that concept properly set in its context.

A MEMBER OF THE BENCH: Thank you.

SIR JAMES EADIE: Not least because you have a whole series of indicative questions that you will recall from 2.13 and the other two factors which are designed to illustrate that.

The third subpoint in relation to this is that in order to conclude that rationality, presumably based on criterion 2(c) in the User's Guide and the general approach -- in order to arrive at a stage where you have a binary obligation of that kind, it is necessary to answer the question of which ones and to what extent. It is no answer to that to say, as my learned friend does, a sufficient number to displace the pattern, because that involves precisely the binary answer.

Just before coming directly to the way my learned friend put it yesterday on this aspect, can I just remind the court that this first general question was specifically and carefully addressed against the backdrop of all the other careful, legal and factual analysis that you have seen in the open judgment, but the particular paragraphs to which we make reference here, where the court specifically addresses these arguments, are 180 to 182 in the judgment, and we submit that that analysis is correct.

So, we do submit -- you become, as it were, "directly responsible", is the way my learned friend put it -- that past instances are a relevant matter but that proper consideration of them does not entail as a matter of rationality having to answer the binary yes/no or even likelihood question or any or all of them.

The fundamental flaw in my learned friend's submissions, we respectfully submit, is that he poses, as it were, a false choice. He says that if you do not answer those questions you, in effect, ignore them; you do not attempt the

exercise; you do not engage in the exercise but simply ignore the question of violation of IHL or not. But that is simply false. The fact that you do not address the yes/no question, the binary question, does not mean you ignore them at all. Indeed, the Divisional Court, as I have shown you, found precisely the opposite as a factor.

Nor does it mean you ignore the requirements of IHL; you consider them through the prism, as the Divisional Court put it, of IHL. There are incidents of concern precisely because they involve outcomes which raise IHL concerns and the seriousness my Lord Master of the Rolls was putting to me -- civilian deaths, for example, or a hospital being hit. The analysis is designed to enable consideration and analysis of the extent of those concerns. The state is perfectly entitled to consider them in that way in order to assess degrees of concern and the degrees of concern to which the incident gives rise, with a view to then engaging with the foreign government and targeting its focus on the incidents of most concern.

A MEMBER OF THE BENCH: How would the state ever get to the point, following that approach, of saying, "We must stop supplying"?

SIR JAMES EADIE: They could easily get to that place. Suppose they have a set of incidents which give rise to serious concern and they engage with the foreign state and the foreign state says, "We don't care," or, "We're not prepared to alter our systems; we're just simply not prepared to offer to improve our systems to avoid or to provide greater precautions." Its reaction to that engagement is likely to be absolutely critical to the judgment which is ultimately made as to whether or not their attitude is the one that is required by criterion 2(c).

A MEMBER OF THE BENCH: Would not the reaction to that engagement include, so far as the supplying state is concerned, an assessment of what happens thereafter on the ground?

SIR JAMES EADIE: My Lord, it would and could, and it would centrally be focused upon the reaction of the foreign state and the extent to which it was prepared to engage with those issues or not.

A MEMBER OF THE BENCH: The state may say all sorts of things, but what the state does must be set beside what it says.

SIR JAMES EADIE: I entirely agree.

A MEMBER OF THE BENCH: Therefore, there needs to be an assessment of what happens after a particular piece of engagement.

SIR JAMES EADIE: True.

A MEMBER OF THE BENCH: Why would that not involve thinking, "Well, we agreed that this would happen (**Overspeaking**) did not happen; it did, and it probably represents a breach of IHL"?

SIR JAMES EADIE: Sorry, what, the subsequent event?

A MEMBER OF THE BENCH: Yes, the subsequent event.

SIR JAMES EADIE: My Lord, you would have the same engagement, the same exercise, in relation to that subsequent event. You would have to try and understand it. You engage with them to understand what went wrong again. If it went wrong again then there is a --

A MEMBER OF THE BENCH: Going wrong again has to mean something. It means they did not do what they said they would do or we think they did not do what they said.

SIR JAMES EADIE: It does not necessarily mean that. It may mean that you need to take further precautionary steps. It may mean that the systems need to be tweaked again.

A MEMBER OF THE BENCH: How often does that get iterated?

SIR JAMES EADIE: That is a question of judgment.

A MEMBER OF THE BENCH: Question of fact.

SIR JAMES EADIE: But the question you posed to me was, is that sort of analysis potentially relevant on my approach. Answer, yes.

A MEMBER OF THE BENCH: A kind of --

SIR JAMES EADIE: Iterative, if you will.

A MEMBER OF THE BENCH: A horrible word; we lawyers use it and nobody else does.

SIR JAMES EADIE: That is what you had in mind. Yes.

A MEMBER OF THE BENCH: Yes. You look at the response following engagement?

SIR JAMES EADIE: My Lord, you do.

A MEMBER OF THE BENCH: And you have to assess what happens following the engagements -- assess the response?

SIR JAMES EADIE: You do.

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A MEMBER OF THE BENCH: If you have 2(c) in mind -- or 2(b), but certainly 2(c) -- do you not assess it against the criteria in 2(c)?

SIR JAMES EADIE: You do. You do all of those things. But none of that leads to --

A MEMBER OF THE BENCH: You do not have to come to a conclusion?

SIR JAMES EADIE: You do not have to come to that conclusion, if by "a conclusion" you mean binary yes or no after the engagement.

A MEMBER OF THE BENCH: Or even probably?

SIR JAMES EADIE: Well, you say "even probably" but "probably" is like likelihood. It is still asking the binary question but just fiddling about with the standard of proof.

A MEMBER OF THE BENCH: (**Overspeaking**) degree of certainty.

SIR JAMES EADIE: Yes, exactly. I was on the false choice, if I may be disrespectful enough to accuse my learned friend of that, namely the fact that you do not ask the binary question, non-sequitur that you just ignore it; you did not even attempt the exercise. That is simply false.

A MEMBER OF THE BENCH: Well, the way you put it to me, having regards to me, was the Secretary of State on this footing made the assumption that these events may have occurred.

SIR JAMES EADIE: They may have occurred and there are degrees of concern triggered by the degree to which are answers or are not answers to a particular question. It is about degrees of concern or degrees of "might". We respectfully submit, to come directly to the submission that my learned friend made, we fastened or sought to fasten, in the context of rationality, on a requirement to engage or grapple with -- you will recall that language -- but we respectfully submit that we are assisted by that sort of phraseology, even if one can, as it were, directly transpose it from the very different context in which that language was used. If anything, we are assisted by that because it effectively means, as it did in the very different context of the Syrian immigration case to which we took you yesterday, where we were dealing with the approach of a court, which is obviously fundamentally different -- but what it effectively meant even in that context was "do not ignore/do not treat as irrelevant". That was the concern in that Syrian case, if I recall it correctly, that they had reached a particular view on the state of affairs in a foreign country and an Amnesty report had come out saying that actually there

are greater concerns than that it had been effectively ignored. The fact of the matter is there is no question of that here for all the reasons I have explained, and, as you have seen, there is an express finding of the Divisional Court and that is precisely what the Government did not do. The concepts of engaging with and grappling with do not prescribe how, as a matter of rationality, you should engage or grapple.

I just want to give you one more reference on the same theme. When refusing permission, the Divisional Court, on this ground, said -- and the reference is core bundle tab 8, page 145 -- this:

> "This point [that is ground 1] fails on the facts. The open and closed evidence demonstrates that at all material times the Secretary of State operated a comprehensive and robust system of analysis of all reported incidents using the Tracker and sources of information not available to NGOs in order properly to inform its decisions about the risk."

We respectfully submit that is absolutely right.

Here you will recall that conclusion and, perhaps more relevantly, the long and detailed judgment and analysis of the Divisional Court, put them in a particularly good position to answer that question about the nature and extent of engagement with these sorts of issues by the Secretary of State before reaching that decision.

Can I just refer you to one other paragraph in that respect, which I am sure you will have highlighted already, which is paragraph 60 in the open judgment. That is the paragraph in which the Divisional Court summarise the approach that it took and emphasise the level of detail into which they descended and the way that they approached the (**Overspeaking**). So, paragraph 60 is an important paragraph about approach. To some extent it chimes with my Lord the Master of the Rolls' question to my learned friend yesterday about what is the basis on which this court is going to interfere, might interfere or could legitimately interfere, with the judgment of the Divisional Court and on the issues of fact which suffuse the analysis I have just been going through. Paragraph 60 is obviously important. There is no deficit in terms of the detail or level of their analysis and understanding of the facts.

We respectfully submit, therefore coming to the ninth submission, that we do not have to -- my Lord the Master of the Rolls explored it yesterday with my learned friend -- explain in relation to individual incidents why we cannot do it; we

are just simply not in that territory of having to chase down and then reach a point and saying, "Actually, we can't go any further." We just simply do not have to do that binary exercise incident by incident. It is simply not necessary for the prospective judgments based on attitudes that criterion 2(c) requires.

The ninth submission is essentially a catch-all for the approach in fact taken, and the submission is that there was nothing deficient or irrational about the processes in fact followed. They were not inconsistent with the User's Guide and they enabled a proper rational substantive judgment to be made on the criterion 2(c) test. I can take this very quickly, I think, by reference to the judgment itself, if you have that to hand -- the basic departmental structures and processes of all parts of the Government, as it were, feeding into the ultimate decision-making. Those are set out in the judgment between paragraphs 92 and 102.

The Divisional Court then went through six core strands feeding into the ultimate criterion 2(c) analysis. They do that in a long section of their judgment between 104 and 175. It is a long and important section. The basic submission in relation to that whole section is that that is, as it were, the practical underlining of the point that they made and the explanation they gave of their approach in paragraph 60, and they were, we submit, entitled to reach all of those judgments of fact. You have seen the structure of it, that they relied on and analysed the MOD part, including in particular the Tracker, between 104 and 120. You see in 104 the range of sources feeding into the allegations considered in the Tracker. You see its basic nature and the issues it focuses on in particular at 106 to 107, if you remind yourselves of those paragraphs. The consideration on the Tracker extends, those paragraphs indicate, to a range of allegations, a range of incidents being treated as being at least **prima facie** of concern, and they are then subject to further factual exploration and analysis to the extent possible thereafter.

They return to the Tracker, just to complete the exercise in relation to the Tracker, which is dealt with in factual terms at 104 to 120. They return to the criticisms of the Tracker for the purpose of --

A MEMBER OF THE BENCH: If we are going to take up 107 for a moment, one of the points I have put to you was about the need for evidence in relation to the (**Inaudible**) complexities of your point (**Inaudible**) that really made it, in practical terms, not feasible to reach any conclusion on the binary question. You said that

because we are dealing with the rationality of the process, that has not been necessary because you are telling us, as it were, submitting to us what the complexities were. But in 107 -- this is what I had in mind -- in the evidence, for example, of Mr Watkins, he explains why in some cases in relation to various incidents on the Tracker, it was not possible to reach any conclusion because of the absence of information. What I was really putting to you was that that is clear enough but we do not find anywhere in the evidence a statement that it was not possible in relation to any or at least a sufficient number of those on the Tracker to form a view about likelihood. We do not see that anywhere. At the end of the day, that is a factual matter, is it not?

SIR JAMES EADIE: Whether or not they did go through --

A MEMBER OF THE BENCH: Whether or not it is feasible because of complexities, or irrespective of all the specific points Mr Watkins is making, it simply is not feasible to reach a reasonably coherent and reliable conclusion on likelihood. That is a factual matter I was putting to you, and I was now drawing your attention to this particular aspect of the evidence where it is explained why in some cases it was not possible, but we do not see that reflected in a generic or general observation of the kind you were making to us.

SIR JAMES EADIE: My Lord, I do not think we find that cast in the evidence in terms of the impossibility of doing that in any individual case, if that is what my Lord is --

A MEMBER OF THE BENCH: Well, in a sufficient number to form a view. One might, in fact, expect (**Several inaudible words**) I am putting to you that it might be said that what one could have found in the evidence, if this had been the position, in fact, is that it simply is not possible, because of all the matters you have referred us to in your submissions, to reach a reasonably reliable evidence about likelihood of a sufficient number to form a view about pattern. That is the only point I was making.

SIR JAMES EADIE: Yes. My Lord, I do not think there was anything further --

A MEMBER OF THE BENCH: You cannot take it any further really.

SIR JAMES EADIE: I do not think I can. There is nothing in the evidence that goes that far. My submission, as you know, is that there are --

A MEMBER OF THE BENCH: It is not necessary.

SIR JAMES EADIE: It is not necessary as a matter of rationality, and it is still appropriate to draw attention under that to the sorts of analyses that were done. The positive aspects of this, if I can put it that way, is that the prism point: they were actually looking at incidents of concern to see how far they could go structurally. They are asking questions which are, as it were, directed to IHL-type issues, but they are doing so for the purpose of deciding when and how to engage and so on.

A MEMBER OF THE BENCH: I do see that.

SIR JAMES EADIE: But, my Lord, they are not saying impossibility. Indeed, it might be quite difficult for them to say impossible, because one simply would not know; it would just depend on what was there. The question is whether they are required, as it were, to chase it down and then explain, when you reach the end of the road, why you cannot go further.

A MEMBER OF THE BENCH: All right. I need to understand that. I thought you were saying it was not reasonably practical to do this in order to answer the binary question, and therefore what you were doing is, the Secretary of State in effect was saying, "These are important issues, they may have occurred on the range of probabilities or possibilities," or whatever, "and we'll engage with the Saudi counterparts to try to see whether they can give us assurances about future conduct so that there isn't a real risk." I thought you were saying that, but just now you seemed to say that there was no need for them even to confront the question of whether it was possible. They wanted you to form a view on the binary question. There is a difference between saying it is not going to be practical or possible to reach that view with all the complexities and saying, "Well, for all sorts of other reasons of comity and engagement and even the value of a close relationship, we don't choose to do that, but we'll engage in a different way." Now, I am not quite sure which of those two you are following. Perhaps both.

SIR JAMES EADIE: My Lord, I think both is the answer. The second one goes to a positive point, which is, as it were, to explode the false choice. The fact that they decided to approach it in this way without directly, in all cases or indeed in a sufficient number, whatever that means, to answer the binary question does not mean that they were not conducting IHL-type analysis to the extent that they

thought it was feasible to do so in a general sense. I am sorry it maybe led to confusion, but that is the question of degree.

Sorry, I was going to take you from the Tracker bit we have just been looking at to the punchline on the Tracker bit, which is between 183 and 185, where the court picks up -- makes some findings of fact, in particular at 183, it picks up and deals with the criticisms of the Tracker that were made by my learned friend below.

So, the Tracker is the first of the strands. Going back in the judgment, if I may, to the title above paragraph 121 to 125, "UK knowledge of KSA military processes and procedures", you see the structure of those paragraphs. The Divisional Court then highlights four particular areas which were then the subject of further consideration, and the (i), (ii), (iii) and (iv) in 121 are then picked up in 122 and following and explored further. Then you have "UK engagement with the KSA" between 126 and 127 -- political military engagement and so on, the highest level, directly focused on the issues around and improvement of the structures and processes precisely to seek to minimise the possibility of breaches of IHL.

Then "Saudi investigations into incidents" is at 128 and following, the key finding being in 128.

"Public statements" you see at 134 and following. In effect, the point being made there is clear public statements indicating a proper concern to try to conform to the standards of IHL.

Then in relation to the sixth strand, there is again a long section dealing with and analysing the key analytical tool, as it were, into which this all goes, which are the IHL updates.

Against that backdrop, in particular on core findings about the process actually followed by the Secretary of State and the findings of the Divisional Court, the key paragraphs perhaps are 120 and 201(i). Alongside that seriousness and rigour sits in particular the fact of privileged access. On that point, see especially, if you are still at 120, just above that on the page, at 116 to 117 the findings about the privileged access.

You can put alongside 117, if you would, the finding at 123. This is of particular importance because it relates to targeting and targeting processes, so 117, 123 and 125. All of that feeds into the conclusion that the court reaches at, for example, 201(ii) (**Several inaudible words**) the judgment. It is a group of

points. We have a serious and rigorous approach, we have privileged access on key conclusions still, and we then have considerable and constructive engagement with the kingdom of Saudi Arabia, which is itself evidently and properly concerned to seek to ensure that it complies with IHL and the findings on that of some importance are particularly at 130, when they set up the JIAT team in February 2016. They send a formal letter to the United Nations Security Council that this is not just any old public statement a state chooses to make; it was a formal communication between Saudi Arabia and the UN Security Council, at 130 and 133 in relation to JIAT. You have 135, leading in particular to the key finding of fact on this aspect at 136.

All of that leads to their overall conclusion about process and approach which is summarised in paragraph 209 and enables them to reach the conclusion and the substantive conclusion they do at 210.

The tenth and final submission focuses in particular on the reports from respective bodies such as the UN Panel of Experts. The submission is put in this way. If the obligation for which my learned friend contends -- in other words, the binary yes/no answer -- is not required by consolidated criterion 2(c), the User's Guide or rationality, does it become required when and if respective bodies produce reports of the kind that you have seen? We submit that the answer to that is no, and I make, if I may, four sub-points under that broader submission.

Firstly, the open source allegations and views and opinions, however eminent, are part of the overall picture and evaluation and are properly to be considered as such. Secondly, the weight to be afforded to them and the question of what to do about them is in principle a matter for the Secretary of State to decide. There is nothing in the rationality principle that leads to any form of presumption (**Several inaudible words**) loose based on the reports of NGOs or the UN Panel. The allegations made are just that and then they would be based on a variety of sources including press reporting or that reports may be based, to a greater or lesser extent, on press reporting. They may come from a more or less, as it were, respected source, but it is still for the Secretary of State to judge what to do about them in the light of the processes that he has in place, which, as we have seen, will be and are tailored to enable him effectively to engage with the criterion 2(c) process and

decision-making. There is nothing wrong with considering them as respective views even if there are concerns about some of the expressions of conclusion.

Just to pick up a point at that stage in my learned friend's submissions, he seeks to put a gloss on the concept of "engage or grapple with" at this point, because he says that it means, in the present context, that the only rational process was to, as he put it on a number of occasions, accept the findings or, if not, explain why. There is no basis, we submit, for that gloss, and it simply reintroduces the yes/no binary analysis by a different route.

As the Divisional Court pointed out, if you just go to paragraph 19 of the judgment, final sentence, the User's Guide itself at paragraph 2.6 makes it clear, as the Divisional Court put it, that, notwithstanding any analysis by competent bodies of the UN or the EU, the final assessment of whether or not a violation is considered to be serious must be done by the member state -- back to that point about overall judgment, and back to the false choice. It is perfectly proper to have genuine concern and genuine scrutiny of the kind the Divisional Court repeatedly identified without the need to answer the binary question.

The third sub-point is that there is nothing in the consolidated guidance generally or in criterion 2(c) or in the User's Guide which requires the exporting state to treat expressions of opinion by anybody as in effect creating a burden of rebuttable or a presumption of some kind, or a burden of public disagreement. Indeed, those documents are inconsistent with that straitjacketing approach, not least because the consolidated criteria makes clear that "all relevant evidence will be taken into account" and specifically gives, but only as an example of that, reports by international bodies. It thus sets up no such presumption or burden or approach, and that was the correct conclusion of the Divisional Court, if you go forward in the judgment to paragraph 207. They specifically addressed this argument, and they reject the submission, however it is dressed up -- and my learned friend denies a case based on legal presumption and then in effect asserts it under a different guise -- and however the point is ultimately put, it is rejected by the Divisional Court in the final sentence of para 207. The reason for that rejection is set out in some detail at paragraph 208. That is the consolidated guidance, therefore, and that is also consistent with the User's Guide. That also contains no indication of a requirement for some sort of approach requiring

rebuttal. It specifically highlights -- I am not going to go back to them -- indicative questions and it highlights repeatedly the need for states to make their own judgments in this area.

The fourth sub-submission, as it were, under this head, is that there is no good reason in principle for treating such report or creating any such mandatory presumption or burden, and indeed there are good reasons not to. Just to pick up on some of those reasons, the nature of the exercise and the broad canvass and the central focus on attitudes, all of which I have been through, are positively against such an approach. States are unlikely to have and here did not have the same privileged access as the Government did, the same NGOs or UN Panel of Experts. They did not have access to key strands of information. When I say "key strands of information" I mean key strands because they are likely to be critical to a proper assessment of the violation or not question. For example, knowledge of the systems actually used, the ability to engage at an operational level about that, the ability to engage at the political level about such issues, imagery and so on. That was a point which was correctly and repeatedly made by the Divisional Court. I think I have taken you to both of the subparagraphs already: 181(ii), particularly the sorts of questions at the end of 181(ii); and see also in this respect 201(ii), but again I have taken you to the qualitative difference in terms of the risk analysis. So, unlikely to have the same sort of privileged access to enable them to answer those questions.

That leads on to the next point, which is that there is a degree of real concern, perhaps, certainly proper reason to treat with real caution some of the reasoning, basis and conclusions in those reports, especially if and to the extent that they assert, as they do, to a high level of certainty, as it were, the fact of a violation. The issues that would need to be considered and would need to be clearly established, one might have thought, before such a finding should be made, are those that bear on the relevant principle of IHL, which the Divisional Court set out at 23 and 24 of the judgment. They involve particularly the distinction of proportionality when you are dealing with a conflict in which airstrikes are the principle concern, because they necessarily involve or need to involve an understanding about whether, for example, where civilian deaths or infrastructure have been hit, that was done deliberately -- that would go to the principle of

distinction -- or what the targeting processes actually were, what the intelligence actually was leading to the strike in question. They are the sorts of questions, in short, that the Divisional Court correctly identified at 181(ii).

It is clear that the fact of civilian death or injury or the fact that a bomb hits a civilian building of course raises concern because of the precise seriousness that my Lord the Master of the Rolls put to me. But it on no view comes close to establishing a breach of IHL of any kind. It simply does not lead to the inference of violation -- again, a point that the Divisional Court was properly and correctly very alive to (see, for that purpose, 182, and specifically 208(i)). That becomes all the more problematic if you do not have access to that information but you are then basing your views in particular on second-hand information, by which I mean information that does not bear on that at all, interviews with those who are affected on the ground -- highly unlikely, we respectfully submit, to be able to do much more than confirm physical evidence of the strike that would be evident anyway -- and again it was a point the Divisional Court was properly alive to in the paragraph I have already taken you to, being 201(ii).

There is perhaps a tendency, as it were, to take an assertion or a conclusion of violation by an NGO or even a respected body such as the UN Panel of Experts as having a full and proper basis, but we do respectfully urge considerable care with that sort of conclusion and approach. It is, for example, correct and unchallenged that some of the organisations, including in particular the UN Panel of Experts, were not on the ground in Yemen. It is certainly the fact that lots of those NGOs, or all of the NGOs, and indeed the UN Panel of Experts, simply did not have access to the sort of information that would be necessary properly to consider and make findings of serious violations of IHL based on, for example, a breach of the principle of proportionality in relation to a particular airstrike. I am sorry to jump around in the judgment, but the same point is touched on, as it were, in a variety of different places for good reasons. If you go back to paragraph 117 in the judgment, you will see the description of the sort of information that was available to the MOD which might well bear on those sorts of questions.

A MEMBER OF THE BENCH: Sir James, I do not want to take you out of order -- I really do mean that -- but does the Divisional Court at any stage address the Sa'ada incident that Mr Chamberlain told us about yesterday?

SIR JAMES EADIE: Yes, they do, and I am going to come to that.

A MEMBER OF THE BENCH: Please do, when you are ready.

SIR JAMES EADIE: They do, and I am going to come to that. So, a concern about the disparity in terms of the information and the relevance of the information to which they do not have access -- and there is at least some concern that some of these bodies are indeed drawing the inference of violation from the fact that civilians were killed. True it is, of course, that those are serious incidents and serious incidents of concern if there was any civilian casualty, but it simply does not lead to the finding or a conclusion of a violation. To take but one example, if one goes to the judgment at paragraph 65 you will see the European Parliament's resolution and the matters my learned friend refers to yesterday. They appear, at least, to be jumping from killed civilians to a violation -- at least that is a strong part of the inference, as it were.

I will come directly to the UN Panel of Experts, if I may, and obviously some of the incidents my learned friend went to yesterday will have been formed on the facts by the closed material, but so far as one can do it in open, let me do it in open. It may be worth reminding you, at the beginning of the UN Panel of Experts consideration, as you are aware from yesterday, the 2017 report was presented to the Security Council only on 11 January 2017 and was in the course of being looked at, as it were, when the timing guillotine that we discussed yesterday came down, which was the trial, effectively, which was in February 2017. I think the Divisional Court hearing started on the 7th. Everyone is looking, as it were, for reaction to the reaction to the report, the 2017 one, and needs very considerable caution. It is also worth bearing in mind the limited mandate and recommendations of the UN Panel of Experts for their practical function, as one saw from the Security Council resolution my learned friend took you to yesterday, was to monitor the implementation of sanctions measures for those who might threaten the peace, security and stability of Yemen.

A MEMBER OF THE BENCH: Do you say that affects the seriousness with which anyone should take the conclusions of the Panel reports?

SIR JAMES EADIE: My Lord, no, but it is at least a feature because it appears that there was at least some question in the minds of the Saudis about the extent of their remit and purview (**Inaudible**) Panel of Experts, but they are principally

focused on sanctions (**Inaudible**). Their recommendations in relation to the 2016 report in respect of IHL are highly limited. I will just give you a reference and summarise what it says. It is in the supplemental bundle, volume 3, tab 31, page C225. Their recommendations are simply that they, one, suggest that the Security Council should stress to member states conducting military ops in Yemen that they have a responsibility to respect and uphold IHL. You see then in (m), in effect, to indicate that further investigations of reports of violations of IHL are required, and they do not contain any indication that, for example, the export of arms to the coalition should cease. Indeed, the central focus of the UN Security Council's concern, as one sees from the preamble to the resolution that is in the bundle and the other resolutions that are referred to in it, is in relation to the Houthis on the ground creating all the difficulties that a civil war created, and to put on the sanctions list, as it were, named individuals and to ban people going through them to provide arms into the conflict. But the findings and recommendations are extremely limited in relation to the state actors. So, limited mandate and limited recommendations, or slightly differently focused, centrally focused, mandate, limited recommendations, limited methodology, as you see the methodology in particular at 206, if you go back to the beginning of the 2016 report.

A MEMBER OF THE BENCH: Sorry, could you give me the reference?

SIR JAMES EADIE: My Lord, yes, C206 and indeed 207. Look at paragraph 15. They are unable to travel to Yemen. Paragraphs 7 and 8, going back on page 206, they endeavour to comply with the standards recommended, and so on -- reliance on verified genuine documents, concrete evidence -- butter no parsnips, as it were. Physical inspections, observations and onsite interviews in Yemen were not possible throughout. They used satellite imagery procured by the UN from private providers. They used public statements by officials and they use social media and cross-platform instant messaging to monitor the situation and collect information that activists in Yemen wish to share.

No doubt -- we are not quibbling with any of this -- they have tried their best with the resources they had and the sources they were able to access, but they are some way off ideal if one is trying to make these sorts of judgments about the potential breaches of the principles of proportionality and distinction. They themselves, in fairness to them, were entirely alive to that, as one sees, for

example, from paragraph 122. That is what has been put into their methodology section at page C209.

A MEMBER OF THE BENCH: The Panel did write to coalition members, we see from paragraph 18 on C207 --

SIR JAMES EADIE: It did.

A MEMBER OF THE BENCH: -- and got replies from coalition member states, including Saudi Arabia. Do we have that? Did they publish the replies and, if so, do we have that in the report so we know what was said?

SIR JAMES EADIE: I do not think we have that specific document. You see what it says in footnote 1, or what they describe it as saying.

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: To some extent there is a separate issue. They assert their compliance with IHL, to which my Lord may think, "Well, they would, wouldn't they?" but --

A MEMBER OF THE BENCH: Well, one does not know what was said. That is the --

SIR JAMES EADIE: Right. I think the best we have is in footnote 1. I suspect it may not have gone much further than that, because the complaint that was then made in paragraph 18 is of the kind that you have seen.

A MEMBER OF THE BENCH: It is clear that the Panel went to talk to coalition member states, amongst many others, from paragraph 16, so my reading of this was that they formulated the information they could get, they then sought replies from the coalition that the states had got some, travelled to states including Saudi and talked to relevant officials.

SIR JAMES EADIE: Yes, I think that is fair. You see from paragraph 18 that there appears, at least, to have been some disagreement about the purview of the panel, as a disagreement of interpretation about the extent and reach of their remit, as it were, so there was obviously a bit of a bust-up about whether or not they were even entitled to be engaged in that exercise, which may in part have explained the attitude of the Saudi government to further provision of information. Again, it may be entirely understandable, if you having a dispute as a sovereign government, about the extent of the purview and jurisdiction of the body that is seeking to investigate these statements, you do not engage (**Inaudible**) but it is also perhaps understandable that there would be concerns in any event given the

sensitivity of some of this information, but the key things it might be thought this emphasises is the difference in terms of the information access that they did in fact have, which was a point that the Divisional Court, for whatever reason (**Inaudible**) due to make findings about the correctness or otherwise of the dispute about jurisdiction, but it does highlight that they did not actually have access to the sort of information that the United Kingdom Government did, as the Divisional Court has identified.

So, there is some concern, legitimately, I would respectfully submit, about the idea that one treats this as the springboard for a mandatory rationality approach that says burden to disagree, burden to explain why you differ, particularly given that all sorts of questions, including whether or not it was a coalition incident or strike or not -- those sorts of issues, and access to targeting information and all of that -- is simply not available to these bodies. I have given you the paragraphs which emphasise that, being 182 and 117 of the Divisional Court judgment.

Can I turn to some of the specific allegations in the 2016 report in particular. I start with the Sa'ada incident that my Lord, Lord Justice Singh invited me to deal with. That is dealt with in the judgment at paragraphs 138 to 146. There is a long section in the judgment which is focused on that, and in particular it is one of the public statements on which my learned friend relies, being a statement about Sa'ada and the key conclusions of the Divisional Court were at 140 and 141. We make, in short, two points about that (**Inaudible**).

Firstly, on the statement upon which reliance has been placed, which you see at 138 -- the Brigadier Asiri statement -- we respectfully submit the Divisional Court was entitled to reach the judgment it did at 140. The statement in any event is not a breach in itself. If there is a breach of IHL, it depends on what they in fact did. No doubt it would be a breach of the principle of proportionality if they declare a whole city a military target and then do indiscriminate bombing of the entire area as opposed to targeted attacks on enemy positions, but the statement itself is not a breach of IHL.

A MEMBER OF THE BENCH: Why is that? Mr Chamberlain, I think, says that if you make an announcement to the entire population of a city the size of Cambridge that, "The whole of your city is a legitimate target for our bombing," that is a violation of IHL.

SIR JAMES EADIE: My Lord, if you then do not do anything about it, there is no violation of IHL. It is not the statement itself that does that.

A MEMBER OF THE BENCH: Is that right?

SIR JAMES EADIE: It has to lead to --

A MEMBER OF THE BENCH: It is not treating that civilian population as the target which is --

SIR JAMES EADIE: And then carrying it out. You do not have --

A MEMBER OF THE BENCH: Making a threat is not?

SIR JAMES EADIE: Making a threat is not.

A MEMBER OF THE BENCH: What is the threat designed to do if it is not to terrorise the civilian population and perhaps make them leave their homes?

SIR JAMES EADIE: My Lord, in my respectful submission, the statement does and is intended to operate as a warning, because they no doubt formed the view that there were Houthis all over the city and, as a result of that, the operations will cover the whole area of the city, and there was a call then to stay away from those groups or to leave the areas where the enemy are. That is a different thing from saying, "We're going to indiscriminately bomb the whole of Cambridge," or equivalent. They are producing, by this public statement, a warning, and that is designed, as it were, to conform to the principle of proportionality and distinction. It is not just that the statement has to lead to action for the breach to occur, but it is on a proper interpretation or construction of it anyway -- one can debate these things -- it is plainly intended to operate as a warning, and it is not, "Leave the city," but, "Move away from the areas where the Houthis are."

A MEMBER OF THE BENCH: Is it? If you are serious in making that point then I have misunderstood what the warning said. Should we look at the actual warning?

SIR JAMES EADIE: It is 138 in the judgment.

A MEMBER OF THE BENCH: That is the statement (**Inaudible**).

A MEMBER OF THE BENCH: "The operations will cover the whole area of those two cities."

SIR JAMES EADIE: Yes. "There is the potential for a strike to occur there:

> "… and thus we repeat our call to the civilians to stay away from these groups, and leave the areas under Houthi control or where the Houthis are taking shelter."

You see the nature of the claim being made on the back of it from 140. The claim being made was that they were in fact employing targeting practices that were incompatible with international humanitarian law. That is why I say it depends upon more, as it were, than that. That is the claim that the Divisional Court were addressing. The Divisional Court's reasoning was that not merely to view the statement on its own, as it were, but then to view and put that statement in context, which they then do in the subsequent paragraphs.

A MEMBER OF THE BENCH: Do you say the Divisional Court were correct in saying this constituted adequate advanced warning?

SIR JAMES EADIE: My Lord, I do. I am fully aware that there is a debate about that, but they warned the civilian population -- we do not have the terms of it -- through social media, leaflet drops and, we now know, by radio as well, so they are taking active steps to try to warn the civilian population to the extent they can, and the giving of those warnings is proper practice. As I say, the third point illustrates to some extent the controversy and the difficulties of getting sucked into this, because ultimately one ends up with a question about the adequacy of the warning, what timings there were on it, when the social media warning was put out (**Overspeaking**) information, but you can chase down and chase down and chase down those things and you are still left with a controversial question as to whether or not adequate warning was given. I respectfully submit that both of the findings at 140 and 141 were properly open to the Divisional Court who were entitled to make those findings.

So far as hospitals are concerned, can I turn to those. The principal concern --

A MEMBER OF THE BENCH: So, to summarise your views of this particular incident, the Sa'ada one, as I understand it, you are saying that the declaration of Brigadier Asiri was a legitimate warning in accordance with IHL. I am not sure what the second point is but I think the second point may be it was not carried out. Is that the point?

SIR JAMES EADIE: Well, there will be a question as to whether or not --

A MEMBER OF THE BENCH: There is a question that will remain as to whether it was carried out, and carried out --

SIR JAMES EADIE: Yes -- because indiscriminate bombing of a whole civilian area I can quite see is a breach of the proportionality principle.

A MEMBER OF THE BENCH: Yes. We do not have the information on that.

SIR JAMES EADIE: It depends on how you treat "military target" in the context of this.

A MEMBER OF THE BENCH: I think your third point, which is a subsection of your second point, is that even if it was carried out -- is this right -- you would still need to know whether or not it did infringe, in fact, IHL, because of the breach of the principles at that point (**Overspeaking**)?

SIR JAMES EADIE: Yes, because of the adequacy of the warnings. There is a separate set of questions around that, and there is controversy around that. We do not have all the details or the facts in relation to that. We do not know, for example, when the social media warning was put out, how long before. We have seen what the UN Panel of Experts had to say about that.

A MEMBER OF THE BENCH: Yes. Thank you.

SIR JAMES EADIE: There is a question of controversy at the end of it all about the adequacy (**Inaudible**).

A MEMBER OF THE BENCH: Yes.

A MEMBER OF THE BENCH: Therefore, the conclusion in paragraph 141 is correct or sustained?

SIR JAMES EADIE: Yes. I was moving on to hospitals.

A MEMBER OF THE BENCH: Yes, thank you.

SIR JAMES EADIE: We have two particular hospitals just to touch on for present purposes and in open. The first is that the principal concern in the 2016 report, which is, as I say, the only one that had been really, as it were, in play for a decent period before the hearing before the Divisional Court, was a strike on a Médecins Sans Frontières hospital or medical facility in Haydan on which quite a lot of attention was directed below, and concerns were expressed in the 2016 report about that. My learned friend did not really focus on that, so I will pass on from it, as it were. His focus was on the Abs Hospital. That was, just to give you the basics on that, the subject of a JIAT report in December 2016, so a month or so before the trial in the Divisional Court. The UN's report of 2017 was only produced in January 2017, so an even shorter period before, and consideration of it was ongoing -- this is a factor of some importance -- at the time of the trial.

We respectfully submit that the Abs hospital incident, at least at one level, is illustrative of the sort of layers and complexity and difficulties that are involved in

reaching views about these sort of fraught issues for a yes or no answer, as it were. Here, at least at an initial stage, there was evidently a disagreement between JIAT and the United Nations about the legitimacy of the target. My Lord, you will recall that from the UN and their report. It is at C383 of the 2017 report, but they disagree that this was even a legitimate target. It may be worth turning it up briefly at C383. It is in bundle 3, tab 45. There is a disagreement, I say -- you see the JIAT statement, public statement recorded at paragraph 8 where they conclude it was a legitimate target based on intelligence information, it appears.

A MEMBER OF THE BENCH: Where is that?

SIR JAMES EADIE: Paragraph 8 on page C385.

A MEMBER OF THE BENCH: Thank you. Yes.

A MEMBER OF THE BENCH: Well, they say the vehicle is a legitimate target. Does it actually say that the hospital was?

SIR JAMES EADIE: My Lord, no. There is then a subsequent disagreement about whether or not it was proportionate anyway because the strike occurred in a hospital.

A MEMBER OF THE BENCH: The question is narrower. I looked at this and it seemed to me that JIAT was saying that the vehicle was a legitimate target but not claiming that the hospital (**Overspeaking**).

SIR JAMES EADIE: No, that is right.

A MEMBER OF THE BENCH: Yes, all right.

SIR JAMES EADIE: I am so sorry. The UN Panel then disagreed with even that limited finding of legitimacy, as you see from paragraph 14 over the page on 386.

A MEMBER OF THE BENCH: This is the **hors de combat**.

SIR JAMES EADIE: This is the **hors de combat** point, but they reached that conclusion -- not convinced, and so on, that it was a legitimate target, despite the fact that they highlight at paragraph 10 that they do not have access to the information which was at the disposal of the JIAT. You can say that they should have had access to all that information, but they plainly did not. They are making a finding about the legitimacy of the target without having had access to the underlying evidently intelligence material on which JIAT based its conclusion of legitimacy.

MR CHAMBERLAIN: While my Lords are on that, I wonder if you could also just read paragraph 15 of the report as well.

SIR JAMES EADIE: (**Pause**). Yes. That was the paragraph to which my learned friend drew attention.

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

SIR JAMES EADIE: Of course there is a debate about that, so there is a debate about legitimacy. There is then a debate about hospital and there is at least some issue in relation to that, because if you go back to paragraph 8 the JIAT are concluding there is a question about markings. That does not, of course, deal with geographical gridding and so on. I do not know what the answer is to that. But you have a question about markings. But, in any event, what the JIAT ultimately conclude -- and I think this was my Lord, Lord Justice Irwin's point -- is that there was a failure here.

A MEMBER OF THE BENCH: It was unintentional and they apologised. I think, on your submission, that may have some bearing on that question you have emphasised more than once about the attitude of the Secretary of State.

SIR JAMES EADIE: Yes. And it goes, as it were, to all sorts of things to do with the investigative processes that JIAT set up, why they set up JIAT, its operation and the attitude of the Saudis, as my Lord rightly points out. But in terms of engaging with those sorts of debates, they are illustrative, I respectfully submit, of precisely the difficulty. Now, you can get to a point where you say there are enough clear facts and you can make a judgment about those, but even those may be controversial -- what inferences one draws, the mixed questions of fact and law that might arise, and so on.

No military operation is without its difficulties, its accidents and things going wrong. It is almost inherent in the very nature of military operations at this time. What this demonstrates, we respectfully submit, is a proper reaction by the Saudi authorities, a proper reaction by an independent body and proper conclusions being reached. I emphasise that this is in the 2017 report, so if and to the extent one is trying to get a point out of this that says you have not properly addressed or answered the final debate or the final points that are made by the UN in response to JIAT, well, this was under the course of consideration. It also illustrates the point I was making about degrees and degrees of concern, so if one reads this and

takes it on its face, yes, it looks like a troubling incident. No one is seeking to deny that, and that was the conclusion that JIAT reached.

There are two other points to bear out in relation to the 2017 report. Simply trying to focus on the two most serious of the incidents that my learned friend made reference to, the two most serious in terms of civilian casualties appear to be the Haja marketplace strike and the Great Hall strike in particular -- the Great Hall being the funeral my Lords will recall.

The Great Hall strike, one can say in open, was investigated by JIAT, and one sees that from 341 to 342 within this same tab.

A MEMBER OF THE BENCH: (**Pause**). Yes.

SIR JAMES EADIE: Again, a bit like the (**Inaudible**) incident, there is acknowledgment of serious concern arising from this incident, and they explore and investigate -- that is JIAT -- why it is that this happens. So, the Great Hall strike is dealt with there, including a summary of the JIAT conclusions, and JIAT also investigated the Haja marketplace strike. That is at 373, and you see there, at 373 at the bottom, the JIAT public statement. So, in relation to this, their judgment is rather different. In relation to this one, they are effectively saying legitimate military target, and if there is controversy about this, it is as to whether or not the market was actually happening -- there is a debate about whether it was happening on the Thursday or the Tuesday and so on -- and who the people were: were they a large gathering of armed Houthi militia recruits or were they simply innocent civilians going about their lawful business in the market. Again, if you go to paragraph 9, against that backdrop, the UN Panel of Experts acknowledge in terms and highlight at the second sentence of paragraph 9 that they did not have access to the information which was at the disposal of JIAT.

A MEMBER OF THE BENCH: It is the same formulation as before, is it not?

SIR JAMES EADIE: It is.

A MEMBER OF THE BENCH: It requested the information and JIAT would not give it to them.

SIR JAMES EADIE: Yes. But it is what then happens. They then go on, despite not having had access to that information, which one might have thought was tolerably critical, as it were, clear and final view about violation. It may be that that explains the limited terms in which they express the view on this incident, as one

sees from paragraph 12, finds that it is possible that the airstrike target (**Several inaudible words**) principles of proportionality and so on.

A MEMBER OF THE BENCH: Could we pursue this example in this sense. So, the UN ask for the information and JIAT give them their conclusions, they do not give them the information on which those conclusions are based. are we able to say, at least in open, what access the UK might have had or did have?

SIR JAMES EADIE: I do not think we can extend in open into that debate, I am afraid. But the critical point that can be made in open is that for whatever reason -- and one can be more or less critical of their non-cooperation (and we have seen some of the potential reasons for that) with this UN body -- they do not actually have access to it, and when one examines what the nature of the dispute ultimately turns out to be -- by that, I mean a dispute between JIAT and the UN Panel of Experts -- it is in relation to things like whether the market was ongoing on that day of the week and who were the people who were there. What was the nature, therefore, of the intel which presumably led to inform the strike on the market at that time? It is evident, at least, that JIAT had formed the view that it was a legitimate military strike against a large gathering of armed Houthi recruits.

So, the key conclusions we make -- and this is the final point I am going to make on ground 1, and I can take grounds 2 and 4 much more quickly -- or the core conclusions, therefore, that we respectfully invite the court to draw from this: first, the UN reports of course fell to be considered and are part of the consideration given, but they were only part of that picture. That is the point that the open judgment made below. They said that in terms at paragraph 86. There was a broader focus on attitude, structures, reaction to compliance issues of the kind referred to in the User's Guide by the Government, and we had access to a range of information beyond open source reporting which were of some significance to at least a large number of the sorts of issues that were being considered by these sorts of bodies. They are part of the picture, is the first point, but part of the picture only.

Secondly, we did have, as the Divisional Court has frequently pointed out -- I have taken you through all the references -- privileged access. Of course, there are still limits on that. But it might be thought that in relation to those live issues, in relation to (**Inaudible**) those issues of controversy, we were better placed and

were sometimes considerably better placed to make any form of criterion 2(c) judgment based on those sorts of incidents.

Thirdly, there was nothing inappropriate, we respectfully submit, about the reaction of the Government to those UN reports. Of course, the 2017 one is different because it was a recent arrival on the desk and was still under consideration. In relation to the 2016 one in particular, we treated it with proper seriousness and reacted to it.

Can I just take you, in that respect, as a final point, to one further paragraph which I do not think we have looked at before but which is relevant to this context, which is 208(6) of the judgment. There is a reaction to these reports. There is a feeding-in of the allegations into the basic analysis that the Government is conducting anyway. These are one source -- an important source but only one source -- that feeds into that process. There is an attempt to progress, at least, further with some of those allegations and it appears from the final sentence at 208(6) that the interruption to information flow is not necessarily all one way. All it serves to illustrate is the difficulty of trying, as it were, to impose a mandatory yes/no or even likelihood standard in relation to any of these incidents.

A MEMBER OF THE BENCH: Your three grounds I think were that these reports, the UN report in particular, are all part of the general party picture; the second point was --

SIR JAMES EADIE: Privileged access.

A MEMBER OF THE BENCH: -- privileged access; the third point was nothing inappropriate?

SIR JAMES EADIE: Nothing inappropriate about the manner in which we reacted as part of our rational process to the receipt of these sorts of reports. Everyone has been sucked into the deprecation noun, and I do not want to be sucked into that, but I simply have highlighted, I hope respectfully and properly, concerns about the solidity or the ability to make solid findings even by a body as respected as the UN Panel of Experts, particularly when one considers the nature of the issue. My Lord, I am sorry.

A MEMBER OF THE BENCH: No. I am sorry to interrupt you, Sir James. I think you also make the point, do you, that the final sentence of 208(6) tends to illustrate the submission you have been making to us about the fluid situation, because, as at the

time the Divisional Court was writing this, in what is inevitably, you submit, a dynamic situation, there was still a request for further information for the Panel which --

SIR JAMES EADIE: May or may not have been reacted to and provided later on. In fairness, I made the rather snider point as well, which was about the information flow being interrupted. We have had quite a lot of implicit criticism or express criticism of the Saudis for not providing information, but for whatever reason this is not all one way in that respect.

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: My Lord, can I turn then to the questions in the User's Guide, which is ground 2?

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: That was dealt with in the judgment at paragraphs 11 to 15, summarising the factual backdrop, and setting out the relevant passages and nature and effect of the User's Guide, what it did and did not do, and to some extent I touched on a lot of this already in terms of its basic nature. We have explored whether or not it was a matter of international law which had any impact on domestic law at all, and I was, as it were, prepared to acknowledge the possibility that it came with the international parts of that. But 11 to 15 on the User's Guide and then the reasoning of the Divisional Court at 177 to 179. It is 179 that I effectively described as an impeccable and accurate summary of how the User's Guide and criterion 2 works, which provides the answer to precisely the case that my learned friend has rerun in this court about the matters that are referred to that you see at 178, which he says were not specifically addressed.

Just to pick up some of those points, it is non-binding guidance, not replacing the Common Position -- it is agreed guidance for interpretation and implementation intended primarily for the use of officials (see judgment paragraph 11 and 179(ii)) and one can add the highlighted bit in judgment paragraph 11 and the quoted bit in judgment paragraph 11 for good measure. Three areas of enquiry we have already dealt with under 213. Those are picked up in 179(iii), and then 179(v) the questions are simply indicative of the sorts of questions …

(Fire announcement made)

A MEMBER OF THE BENCH: We are not the main building but it will be repeated so we ought to rise now.

SIR JAMES EADIE: My Lord, I have about 20 minutes, if I can say that over the beeping.

A MEMBER OF THE BENCH: You have about 20 minutes?

SIR JAMES EADIE: I have about 20 minutes.

A MEMBER OF THE BENCH: 2 o'clock.

(12.59 pm)

(The luncheon adjournment)

(1.59 pm)

SIR JAMES EADIE: My Lord, we were on ground 2.

A MEMBER OF THE BENCH: Yes.

SIR JAMES EADIE: I had made some introductory submissions and I directed my Lords to the relevant paragraphs where this is dealt with in the Divisional Court judgment. The key, and we submit dispositive, finding is the one at 179(6), properly approaching the User's Guide. It is not, as it were, a mandatory and prescriptive document; it is intended to be guidance with a series of -- and you remember they went to two-and-a-half pages or thereabouts -- indicative questions that the decision-maker might consider in order to assist him or her in addressing the three key matters at 2.13, is how the Divisional Court approached it. We respectfully submit that, as a matter of structure and principle, that is plainly correct.

The question therefore is whether a rational decision-maker, looking at the matter more generally, could have addressed the criterion 2(c) question without asking each of those questions **seriatim** or focusing on the three that my learned friend has now chosen to focus on. We respectfully submit that the answer to that starts with the nature of the questions within the structure of the User's Guide and the nature of the question which is to be posed. The Divisional Court made findings both in relation to that structure and in relation to the nature of the analysis that was in fact followed, enabling them to answer the 2(c) question. Those are the two structural thoughts in relation to that submission in relation to that.

My learned friend then made a more targeted submission orally, which is that you need to look at questions like whether there is, and if so what, legislative structure in the recipient state governing these matters and whether or not disciplinary processes were on the cards or not on the cards, effectively. And our answer to that, at least in terms of the legislative regime is concerned, is it might be thought -- and we submit it is -- some considerable way from the heart of the truly relevant analysis for the purpose of the 2(c) question in the context of the campaign of airstrikes which everyone was considering.

We are not here dealing with, in relation to the open materials, any situation or any incident where it is suggested, for example, that there had been a war crime on the ground -- someone had shot a civilian wholly unnecessarily in the back or whatever it may be -- and the recipient stated they had not reacted properly because the structures of legislation were not in place. There is no indication at all that we are dealing with a case or cases in which questions as to the adequacy of the legislative regime in play or, for example, the independence of the judiciary and all the breadth that point might entail if correct, are actually live. What we are dealing with is a situation in which there is an ongoing armed conflict and we are fundamentally focused on airstrikes by a sovereign state, and the question is whether there was proper respect and there are proper structures in place to enable respect to be given in particular to the IHL principles of distinction and proportionality.

The answer to that question -- that question, in other words, did the Kingdom of Saudi Arabia properly respect the principles of distinction and proportionality -- is highly unlikely to turn on or be informed by the ultimate question about the nature of legislative structures in place. Indeed, if one does the exercise I suggested earlier on and one flips it round and says, "Well, what about the United Kingdom?" and one asks that question, and we were involved in an armed conflict involving airstrikes, you might search in vain for a legislative structure governing that. Indeed, one might search in vain for even the residual form of public law controls over that exercise because traditionally that has been treated as, as my Lords will be aware, the exercise of royal prerogative and territory where, at the very least, the domestic courts, even in public law, would be, again to put it at its

lowest and take words out of Lord Bingham's mouth, extremely reluctant to enter, even if not forbidden territory.

A MEMBER OF THE BENCH: We have incorporated some of the international obligations, for example, through criminal law.

SIR JAMES EADIE: We have.

A MEMBER OF THE BENCH: But the point you are making is, in a sense, this is the flipside of the submission about ground 4. The whole point Mr Chamberlain submits on ground 4 is that there is an important distinction between individual criminal responsibility and serious violations of IHL, which are two different things he submits. You are going to address us on that in a moment, I know, but you might be entitled to say that assuming that is right for the purpose of ground 2 --

SIR JAMES EADIE: (**Several inaudible words**).

A MEMBER OF THE BENCH: -- yes, you will not find in English law, for example, any statute which prohibits serious violations of IHL by the state.

SIR JAMES EADIE: But it brings absolutely sharply into focus the key structural finding of principle which the Divisional Court made in 179(vi), because if you treat this as a formulaic exercise requiring all questions to be addressed and answered from the User's Guide, even though that plainly is not their nature, you end up focusing on a bunch of things which really are not relevant to the central questions that you should be focusing your mind on.

The central things that you should be focusing your mind on here are essentially -- which is why the Divisional Court particularly highlighted those and why the User's Guide particularly highlighted those -- the principles of distinction and proportionality, and that is a sovereign state matter. As I say, there is no indication that the absence of any legislative structures created any difficulties (**Inaudible**) sense whatever.

If and to the extent it is said the fact that those questions were not answered raises an accountability question in a broader sense -- which I understand is part of the nature of the submission that was being made in this respect -- our short answer to that is that it is entirely evident from the findings of the Divisional Court -- and you have already seen many of them -- that the Saudi Arabian authorities were well alive of the need to ensure that there was proper, effective and

independent investigation of incidents of particular concern. That was the very reason for their setting up the JIAT. So, one has, as it were, built into the system structural accountability to that extent, but these sorts of questions about the precise nature of the legislative regimes and the precise nature of the disciplinary processes and all of that, are all designed, as it were, as examples of things which might shed light on issues of accountability and capacity to react appropriately to respect the relevant principles. That rather depends on what the relevant principles are. For present purposes, they are distinction and proportionality. So, whilst we do not for a moment deny that in some cases, if it was evident, for example, that there were strong indications that there had been the commission by individuals of war crimes and a state was not prosecuting and it became evident it was not prosecuting because it did not have any relevant legislation of the kind that my Lord, Lord Justice Singh just referred to that exists in England, that might be different. That is our short answer to ground 2.

A MEMBER OF THE BENCH: Thank you.

SIR JAMES EADIE: So far as serious violation of international humanitarian law is concerned, which is ground 4, the Divisional Court's approach can be seen from paragraphs 15 to 24 of the judgment, in particular paragraph 16. It is perhaps worth noting, given that my learned friend, I think, made a point about recklessness in relation to one of the other paragraphs of the --

A MEMBER OF THE BENCH: Paragraph 18.

SIR JAMES EADIE: Paragraph 18. It is at least worth noting the refusal of permission decision, which is in the core bundle for the appeal at tab 8, page 145, paragraph 7. It was then ground 3, I think. So, the Divisional Court then went on on that basis, that there was not that sort of stricture. They went on, just focusing on what they did for a moment, conducted the intensive evidential review you have seen in the judgment, concluded that the Secretary of State substantively was rationally entitled to reach the view he did about clear risk and did not identify anything which suggested that they were approaching -- that is the Divisional Court -- that through these strictured lenses, as it were. They were plainly addressing serious violation on the basis that it is included but was not limited to the concept of grave breaches.

My learned friend then says that the Secretary of State evidently, he says, applied a narrow approach and made an error of law --

A MEMBER OF THE BENCH: Sir James, forgive me.

SIR JAMES EADIE: My Lord, I am so sorry.

A MEMBER OF THE BENCH: Before you leave the judgment and the Divisional Court's understanding, what is your submission about paragraph 18? Why did the court refer to recklessness there? Mr Chamberlain submits that that suggests they fell into the error of thinking that some mental element or **mens rea** is required.

SIR JAMES EADIE: My Lord, I respectfully submit that is not a proper or fair reading of that paragraph in the context of the judgment as a whole. If it was, you would expect to find, as it were, repeated reversion in the analysis that followed to the requirement for a mental element, instead of which, they are not doing that; they are simply reviewing the various incidents and seeing whether they occurred and whether there was a legitimate target and so on.

A MEMBER OF THE BENCH: I wondered if it might also be relevant that that paragraph in terms --

SIR JAMES EADIE: Indeed.

A MEMBER OF THE BENCH: Well, no, it is about the Rome Statute.

SIR JAMES EADIE: Yes, it is.

A MEMBER OF THE BENCH: Simply about Article 8.

SIR JAMES EADIE: It is.

A MEMBER OF THE BENCH: They say it requires a mental element and they then say the mental element does not have to be deliberate or intentional but can include recklessness. Might that be a fair reading of that paragraph?

SIR JAMES EADIE: I think it is a fair reading of it, but I think my broader submission would be that you have to read it in the context of what they actually then do in terms of their analysis.

A MEMBER OF THE BENCH: I understand.

SIR JAMES EADIE: They plainly are not, as it were, perpetually coming back and saying, "Well, this can't be serious unless it's reckless and there's no indication of recklessness." They actually went through the incident. Precisely that answer is the answer to the case that the Secretary of State committed an error of law. There is nothing in the evidence to indicate any such error or that he was, as it were,

setting as a precondition to a finding of serious violation or to consideration of serious violation, some form of higher threshold based on mental element.

Give me one moment and I will check the reference. (**Pause**). Yes. In our skeleton argument, for the purpose of the hearing, on page 479, if you slot it in the back of the core bundle, paragraph 40, we respectfully submit that is a fair summary of what the Secretary of State actually did. It is evident from the judgment of the Divisional Court that they agreed. The Secretary of State was not looking in some way for individual responsibility, war crimes incidents. There was a much broader focus to the consideration of the IHL position. One cannot reason, from references to things like "deliberate" in some of the IHL updates -- and I will come to the specific ones upon which my learned friend relied -- and one cannot reason, from references to "deliberacy" in the context of those documents, to a broader proposition that says that therefore the Secretary of State applied an unduly restrictive approach. There is nothing on those documents, on their face, in terms or at all, to indicate that he was treating something deliberate or reckless or intentional as being a precondition restricting the nature of the IHL analysis or a precondition to something being a serious violation and therefore, as it were, excluding relevant matters from the analysis.

The learned judges below gave a specific answer to the point that my learned friend has simply repeated in this court, based on the October 2015 IHL update, which referred in part to deliberate incidents. The Divisional Court provide both the answer to the submission and a fair summary of that document at 153, if you could go to that part of their judgment. Look in particular at the sentence beginning half-way through 153, "The update notes," to the end of that paragraph, if you would.

A MEMBER OF THE BENCH: When the judgment says, "Those making the assessment," is that principally Mr Crompton?

SIR JAMES EADIE: Well, it is all of the Government departments that they referred to earlier which feed into the IHL updates.

A MEMBER OF THE BENCH: There is a lot of input to it, then?

SIR JAMES EADIE: There is. There is MOD, who do that, and then there is a Foreign Office which I think has principal carriage of the IHL updates. Mr Crompton is the Foreign Office witness and Mr Watkins, I think, is the principal MOD witness.

You see the answer that is given at 153 at the end, and you get the same point in relation to the November 2015 update at paragraph 156, if you just cast an eye down the page. Again, just to jump around, those are the two direct points, but you see, if you cast your eye back up to 153 and look at the first half of it, that it is evident that the analysis that is being conducted in those updates includes consideration of "worrying levels of civilian casualties in some reports" and that "high levels of civilian casualties can raise concerns particularly around the proportionality criteria". There is no suggestion that you need some form of mental element; it is just that concern is raised as a matter of proportionality if you have a disproportionate number of civilians being killed or civilians being killed in a certain situation.

It is important, perhaps, also to note that this is not either the taking into account of an irrelevant consideration in public law terms, because whether something is done with intent or is deliberate may well be critical or thoroughly important for the purpose of the IHL analysis. One thinks, for example, of the principle of distinction, which prohibits the targeting of civilians **inter alia**, so you are looking to see whether or not there has been some conscious decision, some intentional or deliberate targeting of civilians or whether it is an accident, in which case you are thrown more obviously into the principle of proportionality. Deliberate or not is a relevant question. The only question for our purposes under this ground of challenge is whether there is any indication that the Secretary of State treated it as being a **sine qua non** to a serious violation of IHL, and it is perfectly plain that he did not.

A MEMBER OF THE BENCH: So, relevant but not an erroneously applied threshold?

SIR JAMES EADIE: Exactly so. Perhaps for the clearest indication of that latter point, ie a relevant but not an erroneously applied threshold, look, if you would, at the final sentence of 208(i).

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

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

REPLY BY MR CHAMBERLAIN

MR CHAMBERLAIN: My Lords, can I deal in reply with the grounds in the same order as my learned friend did?

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: Before I get on to ground 1, though, there are just a couple of factual points that arose during the hearing. One was that that yesterday Lord Justice Irwin asked the question of whether we could produce a schedule of the dates of the incidents against the dates on which training and various statements were made. We have been doing that over the course of the day and we have produced that. It is not an agreed document, it is our document, so I anticipate that the defendant may want to say something about it, but can I hand this up.

A MEMBER OF THE BENCH: Yes. Thank you. That will be very helpful.

(**Handed**).

MR CHAMBERLAIN: It is simply a table with references both to the bundle and to the judgment.

A MEMBER OF THE BENCH: That is very helpful.

MR CHAMBERLAIN: I am going to make one or two points about it through the course of my submissions.

The second factual point that arose during the hearing was that Lord Justice Irwin also asked the question of how it was known, or whether it was known, that a particular strike was undertaken by Saudi Arabia rather than by one of the other coalition partners. I made the point in the course of my submissions that was one of the things looked at by the Tracker, but we can add to that the Government's own assessment, which you have in supplemental bundle 1, tab 6, NC6, page 241. It is right at the bottom of the page, in the redacted paragraph. There is one little bit at the end of that redacted paragraph which is unredacted, "The Saudis are responsible for the majority of coalition airstrikes."

Can I deal now with ground 1, my Lords. I want to try and respond to Sir James's ten points briefly, if I may. The first three were that the exercise involved in assessing compliance with criterion 2(c) is a prospective one that focuses on attitude and this has involved consideration of three key factors: record, commitment and capacity. We agree. The overall assessment is indeed prospective and the attitude of the receiving state is indeed a consideration, but, in forming a view about the risk in the future, one key consideration is the state's past and present record. You cannot form a rational view about the weight to give to evidence or indicia of the state's attitude and capacity without considering its past

and present record. In short, our submission is simply that record is, on any view, one key consideration. We do not need to put it any higher than that.

That is so not only because the User's Guide says so and the Government has directed itself, as my Lord, Lord Justice Irwin pointed out in argument, in accordance with the User's Guide, so whether or not the User's Guide has a special status on its own, the Government has directed itself in accordance with that. And also because, as a matter of rationality, no reasonable decision-maker could reach a view about clear risk without looking at the past and present record. That is no doubt why Sir James accepted in answer to a question from my Lord, Lord Justice Singh, that if the Secretary of State had simply decided not to consider past and present record, he would act irrationally.

Sir James's fourth point was that it was for each exporting state to make its own judgment about how to go about assessing compliance with IHL. Again, we agree, subject to this caveat. Each state's decision-making process will be subject to the constraints of its own domestic law. In the UK those constraints are imposed by the public law principles governing rational decision-making. Those principles in general allow decision-makers a discretion as to the mode of enquiry they will undertake in the exercise of a public law power. But the discretion is not unlimited. It does not extend to leaving out of account or failing to address centrally relevant matters. One such matter in this case was the body of open source material from NGOs and international organisations and, critically, the conclusions described in argument by my Lord, Lord Justice Singh as mixed conclusions of fact and law, as to whether IHL violations had taken place in particular cases. The conclusions had to be considered and engaged with and addressed, and they were not.

The fifth point was that at the substantive stage, where the Secretary of State is assessing the prospective question of whether there is a clear risk in the future, the judgment is also for the Secretary of State subject only to the constraints of rationality. Again, in principle we agree, and the consequence is that in general it will be difficult to persuade a court to interfere with a decision where the decision-maker has: first, followed a legally permissible process; second, taken into account all matters which he is required to take into account; and third, given sufficient reasons to demonstrate that the conclusion is rational. We say that none of these

conditions are met here because, first, the process did not grapple with the reasoning or conclusions that violations had occurred in particular cases; therefore, second, those findings were left out of account in the materials before ministers and replaced with a bland conclusion that we have not established any violation of IHL; and third, in any event, there were no sufficient reasons either in open or, as we understand the position, in closed for the latter conclusion.

We do not, and we do not need to, go further and say that the Secretary of State was obliged to reach a concluded view as to whether IHL was violated in each case. He might look at a particular case and decide, having examined the conclusions reached by others, that there is, for example, powerful evidence of a violation but there remains some uncertainty, or even, having looked at all the material, one simply cannot reach any conclusion at all, but there would have to be a process by which such a view could be reached, and there was not.

The sixth point is that the incidents must be (and, Sir James says, were) considered through the prism of IHL. However, and tellingly, he accepted that this did not involve any of the following processes. It did not involve reaching a conclusion about whether IHL was or was not violated in any individual case. It did not involve reaching a conclusion as to the probability or degree of probability that IHL was violated in any individual case. It did not involve reaching a provisional conclusion -- the formulation suggested by my Lord, Lord Justice Irwin -- on the information available, as to the likelihood of IHL having been violated in any individual case. It did not involve reaching a view as to whether it was possible upon the information available to reach such a conclusion in any individual case. The only conclusions that you will find on the documents before ministers are conclusions to the effect that there had been some incidents of concern. The fundamental problem with this is that if your process focuses, as Sir James tells us the Government's process does, on the reaction of the Saudis to concerns raised by the UK Government, you cannot gauge what weight to attach to that reaction unless you also undertake some assessment of what happened on the ground afterwards.

To illustrate that, I would ask your Lordships just to look at the chronology that we have handed up in response to my Lord, Lord Justice Irwin's suggestion. What we have done in this chronology does not by any means include every single strike

that is referred to in the evidence. There is a very long and detailed table of the earlier strikes which you will find in the core bundle tab 14 between pages 314 and 359, so this is just a selection of strikes. It does include all the dates on which training was given, as referred to in the judgment, and such references as you were able to put in of statements that were made by the king of Saudi Arabia and also referred to in the judgment.

If one looks at the statements at the third column in the table, you can see, as long ago as January 2015, there is an intention to form an independent high-level team to assess and verify incidents of concern. Then training takes place between July and August 2015, which you can see in the third column on the third page. There is further training in October 2015 and again in November 2015. Then there is some further training again in May 2016. The final training session that is referred to is July/August 2016. You see that in the middle -- unhelpfully, we have not put page numbers on this -- of the third page from the end. Then, after that, you can see a succession of incidents. They are all set out there.

I mentioned the point without the document in front of me in submissions, but when one is assessing, "What weight do I attach,, in answering the clear risk question, to the fact that the Saudis have accepted training from the UK?" you cannot answer that question rationally without forming at least a view about the incidents -- or at least attempting to form a view about the incidents that occurred after the last of those training sessions. Why? Because if you accept, or indeed consider it reasonably likely, or consider it quite likely, that there have been a succession of violations of IHL after the last of the training sessions, that tells you something about the weight that you can attribute to the training. I am not going to go through it all, but the same is true about the various statements that have been made. You will see the chronology there.

The seventh point was that there is nothing irrational about considering allegations in the manner the Secretary of State did, focusing, Sir James said, on patterns of concern. We agree that there is nothing irrational about focusing on patterns of concern if your process enables you to discern such patterns. But, before you reach a judgment of whether there is or is not a pattern of concern, you have to have at least some idea how likely it is that the incidents which make up the pattern did in fact constitute a violation of IHL.

The eighth point concentrated on what Sir James described as the complexity of judgments or assessments as to whether IHL has been breached in any given case. It is said that it is a multifactorial assessment and it is a complex one. The short answer to that is that judgments about whether IHL has been breached in any individual case may be more or less complex. They may be more or less factually disputed. But they also may be more or less straightforward. It depends. The difficulty for Sir James is that the Secretary of State's process does not even involve an attempt to make these judgments.

The reason why it is important to at least attempt to make the judgments is, as my Lord, Lord Justice Singh put it I argument, because the risk of a future violation may be qualitatively different if you can establish in at least some cases that actual violations probably have occurred in the past. Test it this way what the Secretary of State was actually told, as you can see from the documents before him, was, "We have not been able to establish a violation." That is what he was told. Right at the start, we had understood the position was, "We have concluded that there hasn't been a violation," but we know that was not correct. What the Secretary of State was actually told was, "We have not been able to establish a violation." Now, if instead he had been told, "We have concluded that it's probable that there have been some violations but in other cases we have been unable to reach a conclusion," can one be sure that the answer he gave would have been the same? The answer, in our respectful submission, is plainly not; this was, as is admitted, a finely balanced decision.

As to why it was decided not even to attempt to make these judgments, it was pointed out by my Lord, Lord Justice Irwin that the passage in Mr Watkins's evidence set out by -- or it may have been, my Lord the Master of the Rolls; I cannot remember who it was, but whoever pointed it out, it was a good point.

A MEMBER OF THE BENCH: In that case I will claim it!

MR CHAMBERLAIN: It was pointed out that, as to why it was decided not to attempt these judgments, the passage quoted from Mr Watkins's evidence at paragraph 107 notes that some cases are too difficult to make a judgment in. Well, yes, but that, we would respectfully agree, begs the question that surely some cases are not too difficult, and there is, as Sir James fairly accepted, no evidence at all to show why the decision was made not even to attempt to reach a view, even in the cases where

such a view could be reached. On that, it was my Lord the Master of the Rolls who asked whether the degree of seriousness, the gravity of the consequences of the decision, was a factor that had to be borne in mind when considering what the demands of rationality were. To that, we would respectfully answer that, yes, indeed it does have to be factored in. This was a point which in fact the Divisional Court itself acknowledged at paragraph 25 of its judgment. I will ask your Lordships just to look at that. It is the now well-known passage from Lord Mance's judgment in *Kennedy v Charity Commission* [2015] AC 455, quoting Lord Bridge in *Bugdaycay*, which is another well-known case in the immigration field:

> "The nature of judicial review in every case depends on the context [and then from *Bugdaycay:*]
>
> 'the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines.'"

This was an issue which, as I think everybody accepts, was one of exceptional gravity.

A MEMBER OF THE BENCH: Mr Chamberlain, I am sorry, I do not want to interrupt you at all, but if you were just pausing there; can I just ask you, on that last submission of yours, is this a matter, on your submission, which requires evidence by the Government or is it something we can deal with on the basis of submissions? On one view rationality is, like other areas of public law, a question of law, a question for the court to decide. If that is right, it might be said we can deal with it on submissions. But I think it is implicit, or possibly explicit on your submission, that in fact this is something that required evidence of the type that Mr Watkins did give about another matter, and he did not give any evidence about this.

MR CHAMBERLAIN: Yes, that is my submission. If Sir James is going to stand up and make the submission that actually a decision was taken to approach the matter in a particular way and the reasons were 1, 2 and 3, and there is nothing irrational about those reasons, I would be in a different position. There simply is no evidence explaining why the Secretary of State took the decision not even to attempt to reach a view in any individual case.

Now, it was suggested -- and, again, this flows from the last point I was just making -- in oral argument by Sir James, possibly in response to an invitation or a question (I think in response to a question) from my Lord, Lord Justice Singh, in fact, that maybe the reason might have been something to do with the comity of nations. Well, there are a couple of points to make in response to that. Again, there is not a shred of evidence that that was the reason for adopting this particular process. If that had been the reason, there would have had to be evidence from the Secretary of State saying it was the reason.

But if it had been the reason, it would, with respect, have been a very bad reason, for this reason, because Saudi Arabia knows there is a process underway to assess compliance with criterion 2(c). It is a public process and there has been litigation about it, and of course its conclusion was reported to Parliament. But if it be correct that rationality requires the Secretary of State to form, or at least attempt to form, a conclusion or a provisional conclusion about the likelihood that individual incidents have constituted breaches of IHL, it is no part of our case that those conclusions have to be given in public.

This is a closed appeal in part. Sometimes claimants in cases like this are very unhappy with the concept of a closed procedure, but one of the reasons that the appellant did not oppose the section 6 Justice and Security Act declaration in this case is because it recognised that some of the judgments underlying the criterion 2(c) assessment were bound to be judgments which the Secretary of State would state could not be given in open. So, we have had a closed material procedure and we understand from the special advocates -- and your Lordships will look at the closed material in due course -- that even in closed there is no attempt to reach a judgment on these points. The existence of closed material, as my Lord, Lord Justice Irwin, will know from his experience in SIAC, I am sure, and my Lord, Lord Justice Singh as well, from his experience of closed material procedures, means it is not at all unusual, especially in SIAC, to see judgments of one kind or another, including about factual matters, in closed. Why are they in closed? Because the Government asserts that it would be contrary to the international relations of the United Kingdom, or contrary to national security, for those judgments to be given in open. That is why we have a closed material procedure, to enable those judgments to be given in closed and to be scrutinised.

A MEMBER OF THE BENCH: One needs to be a little careful. As I have banged on about before, the regime in SIAC permits material which cannot be aired in public by reference to the international relations of the United Kingdom to be introduced but not in these proceedings.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: In these proceedings the threshold is national security only.

MR CHAMBERLAIN: Of course that is right, but we have a large quantity of closed material in these proceedings, which has been -- and it has no doubt been considered whether that material can properly be held in closed -- and the answer has been yes on national security grounds. That is because, when you are dealing with a state like Saudi Arabia, there is of course an overlap between national security on the one hand and international relations on the other. Why? Because no doubt the intelligence cooperation and so forth has an impact on national security. So, there is a closed part to these proceedings where judgments could be given, and if it were not possible to make those judgments then one would expect to see a PII certificate in respect of those judgments. But, in fact, we have none of that. Why is that? That is because the judgments have not been made. So that is our comity point.

A MEMBER OF THE BENCH: Mr Chamberlain, I am afraid I have a couple of questions for you arising out of that submission. The first is that I well understand your submission that once we reach the stage of litigation and this court has procedures legislated for by Parliament now about closed hearings, but public law is not primarily about litigation. Public law is first and foremost about government bodies getting the law right and acting lawfully.

MR CHAMBERLAIN: Yes.

A MEMBER OF THE BENCH: So, when we give judgments, for example, what we are doing is announcing the law in the hope that the Government will actually, most of the time, as I am sure they do, get the law right and there is never any need for litigation then. So, how is your procedure supposed to work in practice if an NGO says to the Secretary of State, "You're licensing these arms exports unlawfully," and the Secretary of State says, "No, I'm not, but I can't tell you why"?

MR CHAMBERLAIN: The same way as any closed material procedure would work, my Lord. If, for example, somebody applies for a passport and the Secretary of State says, "Not going to give you one --"

A MEMBER OF THE BENCH: So there would have to be litigation?

MR CHAMBERLAIN: "-- for reasons which I cannot disclose to you and do not wish to disclose to you," that happens all the time, and --

A MEMBER OF THE BENCH: I know. Are you saying there would have to be litigation then?

MR CHAMBERLAIN: There may have to be, to test the reasons.

A MEMBER OF THE BENCH: I see. All right.

MR CHAMBERLAIN: But that is not an unusual position in cases where, for example, the Justice and Security Act applies.

A MEMBER OF THE BENCH: I understand.

MR CHAMBERLAIN: Obviously, the Government has to decide what it can disclose in open and what it needs to keep in closed. The fact that a judgment needs to be reached, which judgment has to be kept in closed for proper reasons of public interest, is not a reason to suppose that rationality cannot require the judgment to be made in the first place, if I can put it that way.

A MEMBER OF THE BENCH: I understand. That is very helpful.

MR CHAMBERLAIN: It is not, also, a reason to suppose that the court does not have the ability to scrutinise the legality of that judgment and to come to a view about it in due course.

A MEMBER OF THE BENCH: Thank you. The second question, which is unrelated to that but arises from what you have submitted about the comity of nations point -- I fear that I may have misled you and perhaps did not explain myself fully earlier when I was asking for help from Sir James. The point that I would like help with is simply this: as I understand it, the consequence of your submission about rationality of process will be, if we accept it, certainly on one view of your submission, that the court would be saying there is no latitude given to the Secretary of State by public law as to how he goes about the process of answering the question which arises under criterion 2(c) because there is a minimum question that the Secretary of State must address, which is whether there has been violation of -- or at least he must attempt to answer that question. What that may raise --

and I do not know; I would like your help on this -- is that therefore the courts of this country would be requiring the Government of this country to form an assessment about whether another sovereign state has violated international law. Now, it may be a bad point, but it might be said that that is not the state of our law and that is going too far because traditionally we tend to take the view that, well, there is a certain degree of latitude given to the Government particularly in such sensitive areas.

MR CHAMBERLAIN: But I think this, my Lord, is the *CND* point, or it is allied, at any rate, to the *CND* point. We say that, with the greatest respect, the point simply does not arise in these cases. It is not being suggested by Sir James at any stage of this litigation that any of the questions involved in this process would trespass on the sovereign equality of any state including Saudi Arabia. Why is that not suggested? Well, in the *CND* case, the reason why the court was unable to determine the question which the claimant had put before the court was because it was a question which did not have, in the words of the Divisional Court, a domestic foothold. There was no domestic law hook on which one could put the issues relevant that question. Here, of course, there is a domestic law hook, and that is because the Government has itself decided to adhere to the policy contained in the consolidated guidance and public law then comes in to check that, in taking its decision under consolidated guidance, it has adhered to its policy.

To the question of whether I am saying that there is no leeway at all, of course my submission has been throughout -- my submission is absolutely not that there is a one-size-fits-all approach to every single exercise of discretion under criterion 2(c). It all depends on the facts. My case proceeds on these facts because there is, as I have said, an overwhelming body of open source material reaching conclusions that IHL has been violated. That is the factual basis for the submission that I make about what rationality requires here. In another case there may not be that factual substrate or factual basis, and therefore a different approach may be appropriate.

My learned friend says, "Well, that's all very vague and we don't know what we have to do," but it is not, with respect, very surprising to be told that you cannot say in advance what the demands of rationality are going to be, any more than you could say what the demands of rationality are if you are hearing an appeal on a

point of law from a first instance decision-maker. It depends what the evidence is in front of that decision-maker. We looked at the *IA (Syria)* case, and it was said against me that that is all very different because it is all to do with a judge. In fact, the *IA (Syria)* case does give a good template as to what the demands of rationality are. In that case it was not that the judge had failed to refer to the Amnesty letter; it was that he had referred to it but he had not engaged with it, and that is precisely what has happened here. The circumstances in which the Court of Appeal, in an appeal on a point of law, can interfere with a decision of a first instance decision-maker are precisely the same as the circumstances in which the High Court can interfere with a public law decision, namely if it is irrational.

A MEMBER OF THE BENCH: Just cutting through all this, is the short answer you are giving to my Lord that the issue does not actually arise here to decide what are the boundaries between making a decision of this kind with or without reference to international relations because there is no explanation in the evidence that it was ever featured in the decision-making process.

MR CHAMBERLAIN: That certainly is my first answer.

A MEMBER OF THE BENCH: That clearly lies at the heart of the precise (**Inaudible**) in that whether it could in certain circumstances does not arise here, does not need to be addressed here.

MR CHAMBERLAIN: My Lord, I should have put it like that. I think I did put it like that --

A MEMBER OF THE BENCH: You did.

MR CHAMBERLAIN: -- but then I went on to make a much more complicated point which, in the light of my Lord's point just now, is probably strictly unnecessary.

So, the ninth point made by Sir James is that there was nothing deficient or irrational about the process followed. We say there was no evidence that the Secretary of State decided for good reason to proceed in this way, and actually the evidence as to what happened to the Tracker is to the contrary, because when it is explained -- and the Divisional Court explains this as well -- the Tracker originally had that column you will remember, "IHL breach?", and the column was taken away. Absolutely no evidence to indicate that there was a positive decision for good reason to proceed in a particular way. On the contrary, the evidence is that

the Secretary of State was in fact planning to take a decision and then decided simply to remove the column and not to ask the question.

As to the IHL update, we encourage you to look at those in closed and to ask whether they told the decision-maker everything that it was legally necessary for him to know. The gist that we have been given in open of the IHL updates suggests that all that was said in them was, "We haven't been able to reach a finding that IHL has been violated but, nonetheless, there are some areas of concern," and we say that, on the facts here, is not enough.

Can I make some very brief, if I may, points about the individual cases. As to Sa'ada, without going back to the documents, the first point made against me by Sir James was that, well, the Divisional Court was entitled to conclude that the declaration was itself a warning. I have already made the point that the UN Expert Panel deals in detail with the adequacy of the warning given, and no reasons are given by the Divisional Court for concluding that the warning was adequate. You will recall, one to two hours before leaflets were dropped, I think four or five hours previously to that, a radio broadcast, in circumstances where the population was largely illiterate and where there were fuel shortages which meant that they could not get out of town in any event.

I am not going to go back to it, but I do invite the court to look again at the terms of the declaration, and we do say it could not be clearer from those terms that the declaration itself was, as my Lord, Lord Justice Singh put it in argument, a threat to the civilian population which can only have been designed to make that civilian population fear what was going to happen.

Last of all, my learned friend says that a warning for a declaration is one thing, but what actually happened. Well, look at paragraph 140 of the UN Expert Panel report. The answer is that the city was systematically targeted and devastated. Now, again, my Lords, I emphasised at the outset and I emphasise again that I am not inviting your Lordships to make a finding that there was a breach of IHL in that case. But I do say when one is assessing Sir James's submission that these judgments are very complex, one has to look at some illustrative facts and say, on complexity, that judgments of this kind may be more or less complex, and in that case the judgment, in our respectful submission, is not so complex.

The second example was the Abs hospital example. I do just want to show you the evidence on this, because the submission made here was, in my respectful submission, really quite an extraordinary one. It was, "Well, look at the JIAT report and you can see that they've acknowledged it was a mistake and certain of the facts are disputed so that also shows you the difficulty of reaching a conclusion." But if one just looks at those facts for a moment, it is in the third bundle, tab 45, C385. The striking thing about this incident is here JIAT have actually told us what their explanation is, that the vehicle was targeted and they say it was a legitimate military target. Leave aside the dispute about whether it was a legitimate military target. It was still targeted within the curtilage of a hospital which is protected building for the purposes of IHL, in circumstances where Médecins Sans Frontières had given the coordinates of that hospital repeatedly, the last occasion being five days before the attack. There are no disputed facts here. All you need to do is look at what JIAT said. The conclusion flows from what JIAT said, that there was a breach of IHL here, and that is what the Panel says. At paragraph 18 on page 387:

> "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."

At 19:

> "The JIAT media statement demonstrates that the Saudi Arabia-led coalition did not comply with the strict IHL obligation to issue a warning prior to the attack."

It tells you, in case there is any doubt, in the footnote at 286, where that obligation comes from. It comes from Article 11(2) of Additional Protocol 2.

This is not a case which turns on any disputed facts. It is a case where the UN Expert Panel was able to reach a conclusion to a standard of almost certainty, applying a thoroughly rigorous and documented methodology. The Secretary of State's response to this and all the other allegations is, "Not able to reach a view that IHL has been breached."

Similar points can be made in relation to the Great Hall incident, but I am not going to trouble you with further details of examples because this case is not going to turn on examples, it is going to turn on the approach to the general principles.

Just a couple of sentences about each of grounds 2 and 4, if I may. On ground 2, the point I think that was put to my learned friend by my Lord, Lord Justice

Singh, in argument was that, well, we are not really dealing with war crimes here, we're dealing, as my ground 4 suggests, with serious violations of international law which do not necessarily amount to war crimes. But that does not, in our respectful submission, absolve the Secretary of State from asking the question of whether there is legislation that entails or enables individual criminal prosecution. In fact, the UN expert report in its second report in 2017 did say that some of the incidents it looked at may amount to war crimes. It said that in supplemental bundle 3 at page C342 to 343, paragraphs 127 to 128.

But the main point is a general one, and that is that if you are a member of the armed forces and the country that you are fighting for does not have legislation prohibiting individual breaches of international humanitarian law and it does not have a system of accountability for holding those responsible for those individual breaches to account and it does not have an independent and functioning judiciary, those facts are going to be highly relevant to the question of the state's capacity to ensure that IHL is complied with.

As to the point that the United Kingdom does not have legislation either, the United Kingdom does, with respect, have legislation in, for example, the International Criminal Court Act, which incorporates the relevant provisions of international humanitarian law and makes it an offence to commit violations of international law which entail individual criminal responsibility. Obviously, you cannot impose criminal liability for breaches of IHL which do not entail criminal responsibility, but the United Kingdom does have that, and that system of law, and the fact that individual members of the UK armed forces know that they may be subject not just to discipline but to prosecution in court before an independent judge if they commit a breach of international humanitarian law that entails their individual responsibility. It is part of the reason why the United Kingdom might be thought less likely than many other states to commit such violations as a state.

Just finally, literally one or two sentences, if I may, on the question of ground 4. The one thing that your Lordships did not hear from Sir James at any point in his submission was any submission as to what "serious violation of IHL" actually means in his submission. We have set out what we say it means. We set it out in our reply submission before the Divisional Court and in oral argument before the Divisional Court. The Divisional Court did not rule on that question. Sir James

has been very careful to say nothing about whether the Secretary of State agrees with the way we put how you interpret "serious violation of international humanitarian law".

If we are right -- and he has said nothing to suggest that we are not right -- then even a single, isolated, non-deliberate breach of IHL could count as a serious violation. If that is right then all the documents, and in particular the witness statement I showed you in opening, indicate that that was not the approach the Secretary of State was taking. The Secretary of State was looking for breaches that were either deliberate -- that is the word used in the summary section of Mr Crompton's witness statement -- or, at best so far as the Secretary of State is concerned, a series of non-deliberate breaches which have not been addressed. If we are right -- the Secretary of State does not argue we are not -- then that was, in our respectful submission, a misdirection. Could it have made a difference? Yes, it could, to this finely balanced decision.

I will just take one example, the Abs hospital -- breach of the principle requiring all feasible precautions to be taken. That principle was breached in relation to the Abs hospital, in our respectful submission, even if, as JIAT found, what happened was a mistake. Why was it breached? Because they knew the coordinates and, knowing the coordinates, they should have taken all feasible precautions. That would not amount to a war crime because breach of the duty to take all feasible precautions does not amount to a war crime. It would not entail individual criminal responsibility; it would not be a grave breach. Even if it happened once, it was a serious violation. If the Secretary of State excluded violations of that kind in asking himself the question of whether a clear risk was established, he misdirected himself and he must be required to take the decision again on a proper legal basis.

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

A MEMBER OF THE BENCH: Thank you very much. So, at this point we move into closed. Could I raise two things with Sir James before we do, just very briefly. One, I repeat my request, if you would not mind, for the propositions you have developed orally -- at some point to have a note of those.

SIR JAMES EADIE: Yes. Can we forward those in Word?

A MEMBER OF THE BENCH: Of course. Secondly, I wonder whether you wanted to respond to the chronology.

SIR JAMES EADIE: I cannot. I have just been given it five minutes ago, as it were.

A MEMBER OF THE BENCH: Of course. But by the time we finish.

A MEMBER OF THE BENCH: I do not mean now.

A MEMBER OF THE BENCH: Exactly. You will have an opportunity to look at it in the next day or so.

SIR JAMES EADIE: I will have a look overnight.

A MEMBER OF THE BENCH: Yes.

MR CHAMBERLAIN: My Lords, can I just ask a question. We received an email before the start of this hearing asking us to be ready to return on Thursday afternoon if the court considered that were necessary. I do not know whether the court has formed any provisional views as to whether that may be necessary and, if not --

A MEMBER OF THE BENCH: No, we have not. It depends on what happens hereafter.

MR CHAMBERLAIN: I see. If we could be informed whenever the court has reached a view on that, that would be appreciated.

A MEMBER OF THE BENCH: Obviously, we will give you as much notice as we possibly.

MR CHAMBERLAIN: Thank you.

A MEMBER OF THE BENCH: We will rise now so that the court (**Overspeaking**).

(3.11 pm)

(Court continued in closed session)

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